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COURT OF APPEALS  
DIVISION II

2019 MAR 14 PM 3:58

STATE OF WASHINGTON

BY \_\_\_\_\_  
CLERK

COA No. 52025-7-II

COURT OF APPEALS, DIVISION TWO  
OF THE STATE OF WASHINGTON

RICHARD SORRELS, RCJS PROPERTIES, Appellant

vs.

PIERCE COUNTY, Respondent

APPELLANT'S OPENING BRIEF

Richard Sorrels  
Appellant, Pro Se  
9013 Key Pen Hwy N, Suite E-110  
Lakebay, WA 98349  
253-884-4649

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## INTRODUCTION

This is an appellate court review of a LUPA (Land Use Petition Act) Hearing Examiner decision, consistent with the general practice in administrative law. The appellate court stand in the same position as the superior court when reviewing a local land use decision, and it applies the appropriate standard of review directly to the administrative record (*Girton v. City of Seattle*, 97 Wn App 360, 363, 983 P2d 1135 (1999)). In its review of a LUPA case the appellate court “stands in the shoes of the superior court and reviews the hearing examiner’s action de nova on the basis of the administrative record, (review denied), 140 Wn2d 1007 (2000); *Faben Point Neighbors v. City of Mercer Island*, 102 Wn App 775, 778, 11 P3d 322 (2000).

General Order 2010-1 applies to COA Division Two.

## ASSIGNMENT OF ERROR

1. The hearing examiner erred in denying the appeal of a Notice of Violation and Abatement (NOVA).

### ISSUES PERTAINING TO ASSIGNMENT OF ERROR

- a. The administrative record is incomplete. Hearing examiner failed to provide a complete recording of the proceedings as required by Pierce County Office of the Hearing Examiner, Rules of Procedure for Hearings, para 1.13(A).
- b. The hearing examiner found (#11) and concluded (#2) that the County failed to prove violation of PCC Section 8.08.050(I). This Finding and Conclusion was **not** included in the Decision.
- c. The NOVA, PCC 8.08 (Public Nuisance), and the notice of appeal all identified “public nuisance” as the alleged violation, but all of the elements of Public Nuisance were never identified nor found.

- d. The exact same issue regarding storage had already been adjudicated in District Court with the same allegation, pleadings, evidence, argument, etc. The case at bar is barred due to Res Judicata, Collateral Estoppel, and splits a cause of action.
- e. Hearing examiner makes Findings of fact that are unsupported by the evidence presented including (1) that Sorrels is involved in a partnership called Sand and Sorrels, (2) that vehicles are offered for sale on the property, (3) that vehicles are being "stored" on the property, (4) that a public nuisance exists, (5) that there is conflict with ARL zoning.

#### STATEMENT OF THE CASE

Pierce County issued Notice of Violation and Abatement (NOVA). Prehearing determine that hearing examiner did not have authority to rule on certain issues, including Constitutional issues which would need to wait for Superior Court. Hearing held. Decision filed. Hearing Examiner Finds and Concludes no violation of Junk Vehicles, but does not include this in decision. Assistant to hearing examiner discovers that third tape is blank (AR 764-765), with 25 minutes not recorded. No action taken to create complete record. Appeal filed to Superior Court. Appeal filed to Court of Appeals.

#### ARGUMENT

A. Hearing examiner failed to provide complete record of the proceedings as required by Pierce County Office of Hearing Examiner, Rules of Proceedings, para 1.13(A).

The administrative record for this matter contains copy of an email from the legal assistant to the hearing examiner which documents that "the third tape did not work at the hearing" and that this includes "25 minutes on it all closing arguments". (AR 764-765) (Exhibit A, hereto).

The hearing examiner's Rules of Practice requires "All proceedings before the examiner SHALL be electronically recorded and such recordings SHALL become part of the record." (para 1.13) (Exhibit B, hereto).

Note that the use of the word "shall" constitutes a mandatory act, with no discretion.

No action was taken by the hearing examiner to create a summary, nor narrative report, nor any agreed report as a substitute. The only recognized action under the mandatory rule would have been a supplemental hearing, which never occurred.

The missing electronic record is critical, because the missing 25 minutes included not only closing arguments, but also findings and conclusions which counterdicts those now found in the hearing examiner' Report and Decision.

Failure to provide a complete electronic record is a violation of Para 1.13(A) of Rules and Procedures for Pierce County Hearing Examiner. This is a mandatory requirement and is NOT harmless. It prevents the reviewing court from determining whether or not the Hearing Examiner' Report and Decision complies with the Findings and Conclusions determined by the Examiner.

One of the standards for relief in reviewing land Use decisions is RCW 36.70C.130(1)(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 is harmless."

This appeal should be remanded back to hearing examiner to provide a complete record, and if the record cannot be corrected, then reverse the decision and grant the appeal, thereby finding in favor of appellant Sorrels and RCJS Properties

B. In both his Findings (#11) and his Conclusions (#2), the hearing examiner found and concluded that the County failed to prove violation of Section RCW 8.08.050(I). This Finding and Conclusion was NOT included in the decision.

A County employee initiated this matter with a NOVA citing two "public nuisances": (1) Junk vehicles, and (2) operating a storage business. (Admin Record # \_\_\_\_\_).

The notice of appeal for the NOVA to the hearing examiner (form created by Pierce County appealed the finding of "Public Nuisance". (AR \_\_\_\_\_).

The Hearing Examiner's Report and Decision found that there was NO violation concerning junk vehicles (AR \_\_\_\_\_), and also concluded that there were no junk vehicles. (AR \_\_\_\_\_).

The hearing examiner found and concluded that vehicles were being "stored" in violation.

The Decision, however, fails to recognize the Finding and Conclusion that there were NO junk vehicles, which would require granting the appeal for that issue. The Decision only recognizes the Finding and Conclusion re storage which denies the appeal.

The court fails to grant

Appeal for the junk vehicle issue, when both findings and conclusions acknowledges that no violation exists.

This is obvious error. The land use decision is clearly erroneous application of the law to the facts (RCW 36.70C.130(I)). The decision should be either remanded back to the hearing examiner to correct, or else be reversed with decision finding no violation of the junk vehicle allegation.

C. The only violation found by the hearing examiner had to do with vehicle storage. The NOVA identified the violation of storage as a public nuisance (AR \_\_\_\_\_). The Pierce County Code citation identified the violation of storage as a public nuisance (AR \_\_\_\_\_). The notice of appeal to hearing examiner identified the violation as a public nuisance (AR \_\_\_\_\_).

Our Legislature has defined "nuisance" expansively: Nuisance consists in unlawfully doing an act, or omitting to perform a duty, which act or omission either annoys, injures or endangers the comfort, repose, health or safety of others, offends decency, or unlawfully interferes with, obstructs or tends to obstruct, or render dangerous for passage, any lake or navigable river, stream, canal or basin, or any public park, square, street or highway; or in any way renders other persons insecure in life, or in the use of property. (RCW 7.47.120)

"RCW 7.48.120. Despite this expansive definition, generally, an activity is a nuisance **ONLY** when it 'interferes unreasonably **with other person's** use and enjoyment of their **property**'".

(Moore v. Steve's Outboard Service, 182 Wn2d 151, 339 P3d 169 (2014); Tieg v. Watts, 135 Wn2d 1, 13, 954 P2d 877 (1998); Joesv. Rumford, 64 Wn2d 559, 392 P2d 808 (1964)).

A municipal ordinance may not make a thing a nuisance, unless it is in fact a nuisance.

(Greenwood v. The Olympic Inc, 51 Wn2d 18, 21, 315 P2d 295 (1957): 37 Am Jur 808).

According to Washington Supreme Court, the critical element of any nuisance is damage to another' property, which would require identification of the other person's property and actual damages.

In Moore, neighbors alleged damages due to noise, smoke, fumes, and business related traffic (Moore, at 152). The court found that "the business did NOT injure the plaintiff's property, unreasonably detract from the plaintiff's enjoyment of their property, or cause cognizable damages, and dismissed the case." (Moore, at 152).

In the case at bar, there was no allegation of any damages to other's property and no other property, damages, or property owners were identified in the NOVA, pleadings, evidence, or by any other means.

The land use decision is not supported by evidence that is substantial when viewed in the light of the whole record before the court (RCW 36.70C.130 (1)(c)), and the land use decision is a clearly erroneous application of the law to the acts (RCW 36.70C.130(1)(D)).

D. The exact same issue regarding storage had already been adjudicated in District Court with the exact same allegation, pleadings, evidence, argument, etc. The case at bar is barred due to res judicata, collateral estoppel, and split a cause of action.

The exact same allegation of a violation concerning vehicle storage, which us a business activity according to Pierce County Code, had already been tried as an infraction and dismissed by Pierce County District Court.

The exact same arguments, pleading, testimony, evidence, etc was all used in both that case and this case. The entire file from the infraction case has been used as evidence in this case (AR \_\_\_\_\_). Both cases ARE the same case, even bearing the same internal file number.

Appellant includes herein by this reference thereto "Opening LUPA Brief of Appellant Sorrels and RCJS Properties LLC" and "Appellant Richard Sorrels and RCJS Properties LLC's Reply Brief as Exhibits C and D hereto. These briefs were prepared by Appellant's attorney earlier in this matter. Appellant's attorney is a professional and far more competent to do such Brief here.

This is a Due Process Constitutional issue (5<sup>th</sup> Amendment). The hearing examiner was not able to her Constitutional issues, including the res judicata and equitable estoppel issues (see RP 8/17/2016, pre-hearing transcript) wherein the hearing examiner determined that he had no authority to hear these issues, and that they must wait for Superior Court on appeal.

These issues are now before the Court of Appeals on a hearing de nova. The issue is argued herein and in Exhibit C and in Exhibit D hereto.

This matter is barred from being heard by hearing examiner because of res judicata and/or equitable estoppel.

The land use decision violates the Constitutional rights of the party seeking relief (RCW 3670C.130(1)(f)). This is a standard of relief for land use decisions. The Court should reverse and remand this case accordingly.

#### CONCLUSION

RCW 36.70C.130 sets the standards for granting relief from hearing examiner land use decisions. Facts, argument, and authority above establishes that these standards have been met, and the decision of the hearing examiner should be reversed accordingly, as requested in Appellant's Land Use Petition pursuant to the Land Use Petition Act.

Dated this 14<sup>th</sup> day of March 2019.



Richard Sorrels  
Appellant  
9013 Key Pen Hwy N, Suite E-110  
Lakebay, WA 98349  
253-884-4649

PROOF OF SERVICE

Richard Sorrels certifies that on 3/14/2019 he served the above on Pierce County Prosecutor by delivering same to receptionist at office on 9<sup>th</sup> floor of 930 Tacoma Avenue S, Tacoma WA.  
Dated 9/14/2019.



Richard Sorrels

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2019 MAR 14 PM 3:58  
STATE OF WASHINGTON  
BY \_\_\_\_\_

## Jenny Pelesky

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.om: Jonathan Baner [jonathan@banerbaner.com]  
Sent: Thursday, November 17, 2016 4:02 PM  
To: Cort O'Connor  
Cc: j.pelesky@mchlawoffices.com; web1@banerbaner.com; Vicki Eastburn  
Subject: Re: Tape

Yes, his recollection, but if questions arise I think Mr. McCarthy should be able to inquire since he doesn't have the benefit of the tape.

On Thu, Nov 17, 2016 at 3:33 PM, Cort O'Connor <coconno@co.pierce.wa.us> wrote:

> I vote for having the examiner use his recollection of the closing  
> argument and notes.

>  
>  
>

> Cort O'Connor

>

> Deputy Prosecuting Attorney

>

> Pierce County Prosecutor's Office

>

> 955 Tacoma Ave S, Suite 301

>

> Tacoma WA 98402-2160

>

> (253) 798-6201

>

> coconno@co.pierce.wa.us

>

>

>

>

>

>

>

> From: J. Pelesky [mailto:j.pelesky@mchlawoffices.com]

> Sent: Thursday, November 17, 2016 3:25 PM

> To: Cort O'Connor <coconno@co.pierce.wa.us>; web1@banerbaner.com

> Cc: Vicki Eastburn <veastbu@co.pierce.wa.us>

> Subject: Tape

>

>

>

> Dear Mr. O'Connor and Mr. Baner:

>

>

>

> Vicki from PALS just notified me that the third tape did not work at  
> the hearing this morning.

>

> There was 25 minutes on it all closing arguments from both of you.

>

> We see three alternatives:

>

> 1. Reconvene the hearing to present oral arguments only,

>

> 2. Submit in writing closing arguments, or

>

> 3. Have Mr. McCarthy consider from his notes.

> Let us know how you wish to proceed.

Thanks!

>

>

>

> Jenny J. Pelesky

>

> Legal Assistant to Stephen K. Causseaux, Jr.

>

> Hearing Examiner

>

> 902 South 10th Street

>

> Tacoma, Washington 98405

>

> (253) 272-2206

>

> [j.pelesky@mchlawoffices.com](mailto:j.pelesky@mchlawoffices.com)

>

>

>

>

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724 S. Yakima Ave.  
Tacoma, WA 98405

Ph. (253) 212-0353  
[www.BanerBaner.com](http://www.BanerBaner.com)

In extraordinary cases the Examiner may request County staff or others to accompany him or her on the site inspection for the purpose of assisting the Examiner in gaining access to and/or finding portions of the site or area in dispute or which were the subject of substantial testimony and/or evidence.

#### 1.13 RECORDING

- A. All proceedings before the Examiner shall be electronically recorded and such recordings shall become part of the record. Copies of the recordings may be obtained from Planning and Land Services upon request and upon payment of the cost of reproduction of the tape(s). The preparation and cost of a written transcript is the responsibility of the person desiring the transcript.
- B. The Examiner's Report and Decision will include a summary of the testimony of each person testifying at the hearing. The summary of testimony is an abbreviated recitation of the testimony presented.

#### 1.14 FAILURE TO APPEAR

- A. If an applicant/appellant fails to appear at a regularly scheduled hearing, an order shall be entered dismissing the application/appeal for default. The applicant/appellant may file a timely request for reconsideration setting forth good cause to vacate the Order of Default.
- B. If an applicant/appellant telephones or otherwise notifies Pierce County Planning and Land Services of an emergency or other good reason why attendance at the hearing was not possible prior to the close of business on the hearing day, the Examiner will not enter a default, but will reschedule the hearing subject to the applicant/appellant providing new notice at its sole expense.
- C. During periods of inclement weather or severe traffic congestion, i.e., closure of Narrows Bridge, following consultation with County staff the Examiner may either delay or cancel the hearing or cancel the entire agenda, depending upon the situation.

#### 1.15 FORMAT OF HEARING

Quasi-judicial hearings are informal in nature, but are organized so that testimony and other evidence can be presented efficiently. Cross-examination of expert witnesses and staff may be deferred to an appropriate time during the

E-FILED  
THURSTON COUNTY, WA  
SUPERIOR COURT  
November 7, 2017  
Linda Myhre Enlow  
Thurston County Clerk

Hearing is set:  
Date: December 22, 2017  
Time: 1:30 p.m.  
Judge: Hon. James Dixon

SUPERIOR COURT OF WASHINGTON FOR THURSTON COUNTY

RICHARD SORRELS, RCJS PROPERTIES,  
LLC

Petitioners,

v.

PIERCE COUNTY,

Respondent.

NO. 17-2-00016-34

OPENING LUPA BRIEF OF  
APPELLANT SORRELS AND RCJS  
PROPERTIES, LLC

Pursuant to RCW 36.70C Richard Sorrels and RCJS Properties, LLC through their attorney of record, Richard B. Sanders of the Goodstein Law Group, files this opening brief in this Land Use Petition Act (LUPA) appeal from a decision of the Pierce County Hearing Examiner:

**I. INTRODUCTION**

This matter comes for hearing as a result of Pierce County refusing to accept a decision by the Pierce County District Court dismissing the matter based on the exact same factual allegations – that Sorrels was utilizing his property for the “storage” of vehicles in violation of zoning. Pierce County chose not to appeal the decision of the district court, and instead issued a

OPENING LUPA BRIEF OF APPELLANT  
SORRELS AND RCJS PROPERTIES, LLC - 1

171107.pldg.Sorrels Opening Brief.docx

GOODSTEIN LAW GROUP PLLC  
501 S. G Street  
Tacoma, WA 98405  
253.779.4000  
Fax 253.779.4411

1 new citation alleging that Sorrels'<sup>1</sup> property at 3917 Key Peninsula Highway South in  
2 Longbranch, WA ("Subject Property") is utilizing his land for storage in violation of zoning  
3 and is a per se public nuisance. In fact Sorrels is utilizing the property for personal purposes  
4 and is not in violation of any, vaguely, alleged code.

5 **II. PROCEDURAL SUMMARY**

6 **A. Prior litigation in Pierce County District Court**

7 On or about August 17, 2015 Officer Luppino issued a "Notice and Order to Correct."  
8 ("NOC") (Exhibit 1). It alleged violations of 18.140.030, 18A.36.070 .1-2, 18A.36.070 (K)(1-  
9 2), 18A.26.020, 18A.33.280 (J), 8.08.010-090. (Exhibit 1). The description indicates the  
10 violation is for "operating a business" in violation of cottage industry permitting, and also for  
11 "outside storage of business equipment and materials," for "vehicle storage" which is "is not an  
12 allowed use on your parcel of land located in an Agricultural Resource Lands (ARL<sup>2</sup>) zone in  
13 the Key Peninsula Community Plan area" and for a "public nuisance." The NOC indicated that  
14 Sorrels must comply with the NOC by August 31, 2015 or "[f]ailure to comply with this notice  
15 may result in a civil infraction with a \$1,230.00 fine."  
16

17 Upon Sorrels alleged failure to comply with the NOC he was issued a civil infraction  
18 alleging a penalty of \$1,230.00. The notice of infraction (No. I025052<sup>3</sup>) alleging violations of  
19  
20  
21

22 \_\_\_\_\_  
23 <sup>1</sup> The current owner, specifically, is RCJS Properties LLC.

24 <sup>2</sup> This classification may be the subject of modification during the pendency of this appeal, and additional briefing  
25 may be needed if the modification does occur.

<sup>3</sup> In accord with practice this infraction was assigned Pierce County District Court Case No. 5P0025052

OPENING LUPA BRIEF OF APPELLANT  
SORRELS AND RCJS PROPERTIES, LLC - 2

GOODSTEIN LAW GROUP PLLC  
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1 "PCC 18.140.050A.4<sup>4</sup> and failure to comply with PCC 18A.36.070(K)(1-2)." PCC 18A.36.070  
2 was subsequently repealed, but 18A.36.070(K)(1-2) previously provided:

3 *The following structures and uses may be allowed accessory to a residence: . . .*  
4 *K. Home Occupation and Cottage Industry provided the following standards are met.*  
5 *1. General Standards . . . not create noticeable glare, noise, . . . b. Activities shall*  
6 *be performed completely inside . . . The activity shall be clearly incidental and*  
7 *secondary to the residential use of the property and shall not change the residential*  
8 *character of the dwelling or neighborhood . . . parking required for the single-family*  
9 *residence according to PCC 18A.35.040, Off-Street Parking; and i. Use of hazardous*  
10 *materials or equipment must comply with the requirements of the Uniform Building*  
11 *Code and the Uniform Fire Code. 2. Home Occupations may be allowed in urban and*  
12 *rural zones with issuance of a Home Occupation Permit and when in compliance with*  
13 *the following . . . : a. . . be limited to an area not more than 500 square feet or a size*  
14 *equivalent to 50 percent of total floor area of the living space within the residence,*  
15 *whichever is less . . . One vehicle up to 18,000 pounds gross vehicle weight is allowed;*  
16 *and d. There shall be no located outside display or storage of materials, merchandise,*  
17 *or equipment.*

18 On or about March 8, 2016, Pierce County was present for a contested court hearing  
19 regarding that notice of infraction. See County Exhibit 1 page 13. Sorrels was represented by  
20 attorney Robert Freeby. Sorrels, through counsel, had motioned the Court to dismiss the Pierce  
21 County District Court case on the grounds that there is insufficient evidence in the undisputed  
22 facts of the case to support a "prima facie case of guilt." County Exhibit 4A<sup>5</sup> at 1. A substantial  
23 portion of the argument before the district court focused on whether or not Sorrels was engaged  
24 in any sort of commercial activity on the Subject Property. Sorrels also argued that the PCC  
25 (PCC 18A.040-1) "sets no maximum number of parking spaces that may be occupied by  
vehicles parked on private property not being used as a business."

22 <sup>4</sup> Interestingly, the County appears to indicate that alleged violation relating to temporary housing of recreational  
23 vehicles or camping was "error" and the County apparently made no attempt to amend or correct the infraction  
before the district court to correct this error. See County Exhibit 1 at 13.

24 <sup>5</sup> It is unclear why certain portions of the provided exhibit contain highlighting. there is highlighting on the  
Exhibit provided by the County.

1 Unquestionably, the district court case concerned zoning violations, vehicle storage,  
2 and the alleged nuisance it creates. The infraction was issued as a result of the failure to  
3 remedy the alleged defect (note the penalty threatened on the NOC matches the penalty on the  
4 notice of infraction). The County elected its forum, procedure, and legal theories to correct  
5 what it believed to be a violation of nuisance and zoning ordinances. The District Court  
6 disagreed, and dismissed the matter in its entirety on March 8, 2016 (County Exhibit 1 at 13).

7 **B. Current proceeding**

8 The instant matter stems from the County's disapproval of that District Court decision  
9 resulting in CEO Luppino issuing a Notice of Violation and Abatement (NOVA) on March 29,  
10 2016 (weeks after the district court dismissed the infraction) and a NOVA dated July 19,  
11 2016.<sup>6</sup> In it the County alleges violations of PCC 8.08.010-090 (exactly as it did in the NOC)  
12 and specifically 8.08.050 (G), (I), and (M). It describes the violations as "utilizing a parcel of  
13 land for vehicle, recreational vehicle, and boat storage located in an Agricultural Resource  
14 Lands (ARL) zone" and said use is "not customarily incidental and subordinate to the  
15 principal building or use of your lot." And "utilizing property for the purpose of storing  
16 vehicles, recreational vehicles and boats without a permit." County Exhibit 3QQ (emphasis  
17 added).  
18  
19  
20

21 <sup>6</sup> Strictly, the NOVA under direct appeal is a re-issuance (following re-inspection) of the March 29, 2016 NOVA  
22 to avoid a challenge regarding timeliness. See County Exhibit 1 at 18. It appears the error resulted from CEO  
23 Luppino dating the March 29, 2016 NOVA with that date, mailing it on March 31, 2016, and the subsequently  
24 informing Pierce County Public Works Code Enforcement to deem Sorrels April 14, 2016 appeal late, which is  
25 incorrect. See County Exhibit 1 at 15-16. Although Sorrels notes that the timeliness error was the result of the  
County's actions, the County did rescind and re-issue to resolve that issue, which was not before the Hearing  
Examiner.

### III. FACTUAL SUMMARY

1  
2 Pierce County ("the County") has presented hundreds of pages of exhibits including  
3 pictures, a narrative, public records, e-mails, letters, statements, and, for no obvious reason,  
4 sections of the Pierce County Code ("PCC"). Despite the voluminous submissions, the County  
5 has not demonstrated any violation nor presented a coherent legal theory upon which some  
6 violation could be based.

7 The County made no effort to demonstrate that any particular vehicle has been sold. It  
8 made no effort to look to some particular vehicle and find it to violate some ordinance. Instead,  
9 the County seems to prefer a wide brush. The County describes the use as "illegal vehicle . . .  
10 storage." County Exhibit 1 at 19. The County describes, without elaboration or purpose, that  
11 numerous vehicles are "junk vehicles" in "land use violation case p#50735." County 3 Exhibit  
12 TT. Appellant is thus left confused as to the purpose of these repeated allegations as no detail is  
13 provided as to how the unidentified officer<sup>7</sup> writing the narrative came to the conclusion or  
14 why the statement is made or offered.

15 Sorrels does not dispute that he parks a number of his vehicles on his property.  
16 However the vehicles are not junk vehicles, offered for sale, or a part of any commercial or  
17 industrial enterprise. The County has offered nothing to demonstrate that any commercial  
18 activity is occurring. The County has offered excessive evidence that various vehicles have  
19 been purchased by Sorrels (typically by the trust or other legal entity). And the County  
20 presented evidence based upon DOL records utilizing license plates.  
21  
22

23  
24 <sup>7</sup> The County's staff report indicates County Exhibit 3TT is "Photos with vehicle registration information  
regarding the inventory by CEOs."

The various vehicles parked on Sorrels' property take up a small portion of his almost 6 acres of land and are part of his collection of personal vehicles. He has never sold, salvaged, or stored vehicles for a fee on the Subject Property.

**IV. RELIEF REQUESTED**

This appeal should be granted and the entirety of the NOVA should be reversed and dismissed. The County should be further restricted from alleging additional violations based on alternative legal theories for the same conduct.

**V. ARGUMENT**

**A. Standard of Review**

RCW 36.70C.130 sets forth multiple grounds for granting relief from a land use decision including an erroneous interpretation of the law, one which is not supported by the evidence, one which is clearly erroneous application of the law to the facts or "the land use decision violated the constitutional rights of the party seeking relief." (1)(f) The gravamen of this land use appeal pertains to proper interpretation of the Pierce County Code (PCC). "The basic rule in land use law is still that, absent more, an individual should be able to utilize his own land as he sees fit." *Norco Const. v. King County*, 97 Wn.2d 680, 684, 649 P.2d 103 (1982). Land use ordinances must be strictly construed against the government. <sup>8</sup>

<sup>8</sup> "It must also be remembered that zoning ordinances are in derogation of the common-law right of an owner to use private property so as to realize its highest utility. Such ordinances must be strictly construed in favor of property owners and should not be extended by implication to cases not clearly within their scope and purpose." *Sleasman v. Lacey*, 159 Wn.2d 639, 643 n.4, 151 P.3d 990 (2007), quoting *Morin v. Johnson*, 49 Wn.2d 275, 279, 300 P.2d 569 (1956)

**B. The NOVA is defective<sup>9</sup>**

A Notice of Violation and Abatement must contain six statements under PCC 8.08.080(A). Relevant here is PCC 8.08.080(A)(3) that requires a "reference to the Title, Chapter, and Section of the Pierce County Code or Tacoma-Pierce County Health Department regulation or written order which has been violated, if applicable." The import of this requirement is that a recipient of a NOVA can understand and appreciate the legal code which is alleged to have been violated.

Here, as referenced, the County alleged that PCC 8.08.010-090 was violated (exactly as it did in the NOC) and specifically references PCC 8.08.050 (G), (I), and (M). The reference to "PCC 8.08.010-090" is not a reference to "the Title, Chapter, and Section of the Pierce County Code" as PCC 8.08.080(A)(3) requires. The NOVA actually alleges a violation of the *entirety* of Chapter 8.08 (almost 5,000 words) and the mere listing of the various sections contained in Chapter 8.08 does not change that. Similarly, it is unfairly confusing and vague to allege a violation of an entire chapter of the code especially as many such provisions invoke and draw from other portions of the code.

PCC 8.08.050(M) declares a nuisance to be any violation of Title 18, Title 18A-18J. Each such title contains thousands of restrictions. If the County cannot be bothered to determine a legal basis for an alleged violation before issuing a NOVA, then the appellant cannot be expected to discern that basis for the County. This is especially true when the conduct at issue has already been brought before the district court.

<sup>9</sup> Much of the credit for what follows must be given to attorney Jonathan Baner's excellent trial brief.

1           **C.     The County's claim is barred by res judicata, collateral estoppel, and splits**  
 2           **a cause of action**

3           Although the County's identical claim that Sorrels had violated the Pierce County Code  
 4 by storing vehicles on his property was dismissed with prejudice by the Pierce County District  
 5 Court, and not appealed, the County simply started a new action based on the same facts after  
 6 the court's dismissal of its prior claim. However the Hearing Examiner rejected the res  
 7 judicata/ collateral estoppel defense in Finding 15 essentially opining preclusion didn't apply  
 8 because the prior claim cited Sorrels for violating home occupation regulations of the PCC  
 9 rather than public nuisance regulations. This finding is in reality a legal conclusion and should  
 10 be reviewed as such, de novo.<sup>10</sup>

11           While it is certainly true the former litigation between the same parties alleged a PCC  
 12 violation based on difference provisions of the code, the legal issue is whether the County may  
 13 undertake multiple litigations against the same individual based on the same facts but avoid  
 14 preclusion by switching legal theories. As a practical matter that places an impossible legal  
 15 burden on the private litigant who must rely on his own resources to defend against multiple  
 16 publicly funded legal assaults based on the same facts. This, the applicable doctrine was  
 17 designed to avoid.<sup>11</sup>

18           It is often stated res judicata bars a subsequent action where there is identity of (1)  
 19 subject matter; (2) cause of action; (3) persons and parties; and (4) the quality of the parties for  
 20

21 \_\_\_\_\_  
 22 <sup>10</sup> *Ullery v. Fulleton*, 162 Wn. App. 596, 603, 256 P.3d 406 (2011)

23 <sup>11</sup> The policies behind the doctrine are summarized in *Hilltop Terrace Assoc. v. Island County*, 126 Wn.2d 22, 30-  
 24 1, 891 P.2d 29 (1995) These include avoiding disrespect for the judiciary if the matter was twice litigated with  
 inconsistent results; protecting courts against repetitious litigation; protecting a victorious party against oppression  
 by a wealthy adversary; finally ending private disputes, and provide certainty, as "Repose is the most important  
 product of res judicata."

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1 or against whom the claim is made. *Rains v. State*, 100 Wn.2d 660, 663, 674 P.2d 165 (1983)

2 Here at issue is whether the cause of action is the same.

3 *Rains* explains that the identity of the cause of action “cannot be determined precisely  
4 by mechanistic application of a simple test.” *Id.* at 664 Rather the court must consider (1)  
5 whether the rights established in the prior judgment would be impaired by the second; (2)  
6 whether substantially the same evidence is presented; (3) whether the two suits involve  
7 infringement of the same right; and (4) “whether the two suits arise out of the same  
8 transactional nucleus of facts.” *Id.*

9 Under this test simply citing different code provisions to address the same factual  
10 problem is barred. Moreover the doctrine expressly bars a plaintiff “from litigating claims that  
11 either were, or should have been, litigated in a former action.” [citing cases] *Kuhlman v.*  
12 *Thomas*, 78 Wn. App. 115, 120, 897 P.2d 365 (1995), See also *Irondale Cmty. Action v.*  
13 *Hearing Bd.*, 163 Wn. App. 513, 262 P.3d 81 (2011) (“The doctrine of res judicata bars parties  
14 from relitigating claims that that were raised or *could have been raised* in an earlier action.”)

15  
16 When res judicata is used to mean claim preclusion, it encompasses the idea that when  
17 the parties to two successive proceedings are the same, and the prior proceeding  
18 culminated in a final judgment, a matter may not be relitigated, or even litigated for the  
19 first time, if it could have been raised, and in the exercise of reasonable diligence  
20 should have been raised, in the prior proceeding. As already noted, the Supreme Court  
21 has said that ‘res judicata acts to prevent relitigation of claims that were or *should have*  
22 *been* decided among the parties in an earlier proceeding.’ The Court has also said, on  
23 numerous occasions, that res judicata  
24 applies, except in special cases, not only to points upon which the court was  
25 actually required by the parties to form an opinion and pronounce a judgment,  
26 but to every point which properly belonged to the subject of litigation, and  
27 which the parties, *exercising reasonable diligence*, might have brought forward  
28 at that time.

29 And the court has further said:

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This court from early years has dismissed a subsequent action on the basis that the relief sought *could have and should have been* determined in a prior action. The theory on which dismissal is granted is variously referred to as *res judicata* or *splitting causes of action*.

*Kelly-Hansen v. Kelly-Hansen*, 87 Wn. App. 320, 329-30, 941 P.2d 1108 (1997) (italics in original) Reasonable diligence required the County to claim nuisance in the prior proceeding: it is barred from doing it now. The alternative is what we have here, multiple piece meal litigations which undercut judicial economy and make the litigation unnecessarily burdensome.

“When a subsequent action is on a different claim, yet depends on issues which were determined in a prior action, the relitigation of those issues is barred by collateral estoppel.”

*Irondale Cmty. Action*, 163 Wn. App. at 524

Collateral estoppel differs from *res judicata* by not preventing a second assertion of the same claim but by preventing a second litigation of the issues between the parties, even though a different claim or cause of action is asserted. *Rains*, 100 Wn.2d at 665 Here, for example, the first litigation determined there was no commercial aspect to parking the cars—this is binding. Moreover the first litigation determined that Sorrels had not violated the Code—that is binding as well.

**D. No violation of PCC 8.08.050(M)**

Alleging a violation PCC 8.08.050 (M) is unduly vague. PCC 8.08.050(M) creates a per se nuisance for:

*Any violation of any of the following in the Pierce County Code: Title 18, Development Regulations – General Provisions; Title 18A, Development Regulations – Zoning; Title 18B, Development Regulations – Signs; Title 18D, Development Regulations – Environmental; Title 18E, Development Regulations – Critical Areas; Title 18F, Development Regulations – Land Divisions and Boundary Changes; Title 18H, Development Regulations – Forest Practices and Tree Conservation; Title 18I,*

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*Development Regulations – Natural Resources Lands; Title 18J, Development Regulations – Design Standards and Guidelines.*

The NOVA attempts to clarify somewhat in its description by stating that the allegation is for the use of Agricultural Resource Lands (ARL) “for vehicle, recreational vehicle, and boat storage.” County Exhibit 2A at 5. The NOVA provides another description for the supposed violation and describes the violation as being for “[u]tilizing property for the purpose of storing vehicles . . . without a permit . . . from Pierce County” and referencing PCC 8.08.050(G) “and/or” (I). Because the NOVA specifically cites subsections G and I in its second description, the NOVA allegation concerning subsection M only applies to the first description of utilizing ARL “for vehicle, recreational vehicle, and boat storage.”

Assuming, without conceding, that Sorrels property is properly zoned as Agricultural Resource Lands, PCC 18.A.26.020 provides the use chart that is as close to applicable as possible. Under that use chart there are three relevant use categories: “residential,” “commercial,” and “industrial.” They are defined in PCC 18A.33.210, -.270, -.280 respectively. In addition to the definitions it is worth noting initially that the “description of the use types and associated levels . . . contain examples of usual and customary uses . . . intended to be typical and are not intended to represent all possible uses.” PCC 18A.05.050(1)(a). In the use table a “blank cell . . . indicates that the use type is prohibited in the zone.” Further that the use allowance “principal use means the primary or predominant use of any lot or parcel. Principal or main building means a building devoted to the principal use of the lot on which it is situated. The use of a property is defined by the activity for which the building or lot is intended, designed, arranged, occupied, or maintained” with multiple uses permissible.

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1 The "residential use" category is, obviously, for "living accommodations for  
2 individuals," including the subcategory of "single family detached housing." PCC 18A.33.210.

3 The commercial use category "include the provision of services and the sale,  
4 distribution, or rental of goods that benefit the daily needs of the general public which are not  
5 otherwise classified as civic, office, or industrial activities." PCC 18A.33.270. It has fourteen  
6 subcategories, all of which involve some sort of, appropriately, *commercial* aspect. Nothing  
7 Sorrels does on his property provides *anything* for the "daily needs of the general public." Mr.  
8 Sorrels doesn't give rides in his vehicle collection, doesn't sell them, doesn't provide storage  
9 for a fee, etc. PCC 18A.33.270(M) "Storage and Moving" specifically "refers to *businesses*"  
10 that store. Sorrels is not operating a business as the County is well aware (having been already  
11 decided by the district court). Therefore, the commercial use category does not apply.  
12

13 PCC 18A.33.280 describes the "industrial use category" which "include[s] the on-site  
14 production, processing, storage, movement, servicing, or repair of goods and materials . . . The  
15 Industrial Use Categories typically have one or more of the following characteristics: relatively  
16 large acreage requirements, create substantial odor or noise, create heavy traffic passenger  
17 vehicle and/or truck volumes, employ relatively large numbers of people, and/or create visual  
18 impacts incompatible with residential development." There is no allegation or evidence that  
19 Sorrels has maintained the subject property to have a large acreage requirement, create any  
20 odor or noise, heavy traffic, or employ anyone. Whatever visual impacts "incompatible with  
21 residential development" might mean doesn't seem to apply as the vehicles are stored away  
22 from full view and in a relatively undeveloped area.  
23

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1 Of the various subcategories of the Industrial use category only the “salvage  
 2 yards/vehicle storage” has enough relevance to be addressed. As there isn’t any evidence  
 3 submitted thus far or allegations of salvage<sup>12</sup> only the Level 3 and Level 4 could apply. See  
 4 PCC 18A.33.280(H). Both level 3 and 4 reference “parking tow-aways, impound yards, and  
 5 storage lots” for vehicles. *Id.* Although there is some evidence that Sorrels *purchased* some  
 6 vehicles that had been previously towed and then subsequently brought the vehicle to the  
 7 Subject Property that cannot be what is meant by the terms “impound yards” or “parking tow-  
 8 aways” without those terms becoming meaningless.<sup>13</sup> The term “storage lot” does not appear  
 9 anywhere else in the Pierce County Code. To interpret the term harmoniously with the  
 10 description in PCC 18A.33.280 and similar to other subcategories would imply the meaning of  
 11 the Level 3 and 4 is referencing a large scale industrial storage of vehicles revolving around  
 12 generating profit for the landowner. That is not the case here.

14 Here, because there are no sales, salvaging, or any profit motivated behavior of Sorrels  
 15 occurring on the Subject Property, the intended use of having a single family residence is best  
 16 categorized as a residential use. The accessory use of parking Sorrels’ personal vehicle  
 17 collection on the property does not change the use category. Because the residential use  
 18 category must apply, and because the residential use category contains no description of  
 19 whether or not personal vehicle parking of a vehicle collection is prohibited there is no zoning  
 20  
 21  
 22

23 <sup>12</sup> Indeed the vehicles demonstrated by the County show vehicles that are whole. Some may appear older, but none  
 appear as crushed or substantially disassembled for salvaging purposes.

24 <sup>13</sup> An extreme example proves the point: if a person parks in a tow away zone, then pulls the vehicle from  
 impound, and drives it to his home his home cannot thereafter be deemed a tow-away lot or impound yard.

1 violation. Put another way, there is no appropriate use type restriction in the use table that  
2 prohibits parking.

3 **E. No violation of PCC 8.08.050(I)**

4 PCC 8.08.050(I) contains two requirements for a nuisance to exist: "Property where  
5 derelict vessels, junk vehicles, or vehicle or vessel parts are stored **and** pose a threat to human  
6 health or safety or to the environment." (emphasis added).

7 The County has not presented any evidence how any threat to human health, safety, or  
8 to the environment exist. There is no reference to anyone ever being hurt,<sup>14</sup> children being  
9 attracted to the property, or the like. Sorrels has a personal vehicle collection on his  
10 residential<sup>15</sup> property.

11 Subsection (I) applies to "derelict vessels, junk vehicles," which as previously  
12 discussed, there is no evidence of because Sorrels vehicles and vessels do not meet the  
13 requirements of the code. Junk vehicles under 8.08.030(F) require three of the following four  
14 to be demonstrated: three of more years older, is "extensively damaged", "is apparently  
15 inoperable", and has an "approximate fair market value equal to only the approximate value of  
16 the scrap in it". "Apparently inoperable" means that a vehicle does not appear to comply with  
17 requirements for vehicles used on public streets with regard to brakes, lights, tires, safety glass,  
18 or other safety equipment. PCC 8.10.020(A). Further, "extensively damaged" means "visible  
19 damage to, or is missing, a minimum of three of the following parts: "frame; axle; surface  
20 panels; doors; fender; window or windshield; headlight or front signal light; taillight, brake  
21  
22

23 <sup>14</sup> Not that an actual injury would be required under the code.

24 <sup>15</sup> It is not the intent to imply that Sorrels is presently living at the Subject Property.

1 light, or rear signal light; engine; transmission; wheels or tires; steering wheel; radiator;  
 2 battery; any other major mechanical or electrical equipment; or visible damage or a lack of any  
 3 other similar component identified by a public official when observing the vehicle." PCC  
 4 8:10.020(B).

5 The County has produced no evidence or witnesses to detail the fair market value of  
 6 any vehicle. The pictures provided show vehicles that are not extensively damaged or  
 7 apparently inoperable.

8 As neither prong of PCC 8.08.050(I) is met, no nuisance can be found under the code.

9 **F. No Violation of PCC 8.08.050 (G), which applies to commercial use.**

10 The County alleges a violation of PCC 8.08.050(G). That code provision provides for a  
 11 per se nuisance of a "Property used or maintained *for the purpose of* dismantling, salvaging,  
 12 storing, or repairing of machinery, metals, or vehicles except where the landowner has obtained  
 13 all licenses, permits, and approvals necessary to conduct such activity on the property."  
 14 (emphasis added).  
 15

16 The County has already alleged the commercial use of the Subject Property in district  
 17 court. The district court already determined that no commercial activity was occurring. No new  
 18 evidence has been introduced to challenge the district court decision.

19 Even if subsection G is not limited to commercial purposes the code, at a minimum,  
 20 requires that the alleged property be "used or maintained for the purpose of . . . storing." The  
 21 purpose of the Subject Property is not storage, but is the single family residence located there.

22 See PCC 18A.05.070(A) "The use of a property is defined by the activity for which the  
 23 building or lot is intended, designed, arranged, occupied, or maintained."  
 24

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**G. PCC 8.08 does not apply as Chapter PCC 8.10 is specifically applicable**

In *Seven Sales, LLC v. Otterbein*, 189 Wn. App. 204, 212, 356 P.3d 248 (2015) the court of appeals summarized a method of statutory construction:

*"When considering two statutes that address the same subject, one method of interpretation is to determine whether one statute is "general" and the other is "specific." "It is a fundamental rule that where the general statute, if standing alone, would include the same matter as the special act and thus conflict with it, the special act will be considered as an exception to, or qualification of, the general statute." Wark v. Wash. Nat'l Guard, 87 Wn.2d 864, 867, 557 P.2d 844 (1976). Although we must try to consider statutes "related to the same subject together" where possible, if statutes conflict "irreconcilably," the more specific statute prevails.*

*Hallauer v. Spectrum Props., Inc.*, 143 Wn.2d 126, 146-47, 18 P.3d 540 (2001).

Here, the County has invoked PCC 8.08.050 (G), (I), and (M) and issued the NOVA. However, PCC 8.10.050 indicates that where an official believes more than 20 public nuisance vehicles<sup>16</sup> exist, the official "shall issue the notice authorized by PCC 8.10.070 and/or . . . PCC 8.10.170<sup>17</sup>." Unlike the NOVA issued pursuant to PCC 8.08 a PCC 8.10 NOVA must specify each vehicle alleged to be a public nuisance and how to remedy that vehicle. See PCC 8.10.070(D)(3). Thus a different process (PCC 8.10) is required when it is the vehicles themselves that are considered the problem.

**H. There is no maximum parking allotment for Sorrels' vehicle collection on the Subject Property**

Sorrels is merely parking his vehicles. PCC 18A.35 governs parking of vehicles. The purpose of 18A.35.040 is to "regulate off-street and on-street parking areas to . . . create

<sup>16</sup> Sorrels, of course, does not concede that any vehicle is a public nuisance.

<sup>17</sup> This code is for dealing with vehicles unfit for use due to contamination from methamphetamine or other substances which are harmful to human health."

1 uniform standards . . . for parking . . . motor, transit, and nonnotarized vehicles.” The County,  
2 bound by the judicial determination that Sorrels is not operating any commercial entity at the  
3 Subject Property, ignores Chapter 18A.35 for no apparent reason. PCC 18A.35.040-1 provides  
4 that a single family residence have a minimum parking required for two, but provodes no  
5 maximum. Clearly, Sorrels has sufficient parking to meet the minimum and has not exceeded  
6 any alleged maximum.

7 The guidelines in PCC 18A.35.040 are, in parts, comprehensive. Importantly, the  
8 guidelines *do* include maximum parking restrictions for 23 of the 29 use categories. PCC  
9 18A.35.040-1. There is also a provision to allow approval to exceed the maximum PCC  
10 18A.35.040(E)(4).

11  
12 Pierce County has not elected, outside of any municipalities at least, to create specific  
13 parking restrictions applicable to the Subject Property. Pierce County could enact, as Auburn  
14 has done for example, a comprehensive plan for parking at residential use properties by  
15 restricting parking areas to improved surfaces, capped percentages of property allocated to  
16 parking, etc. See Generally Auburn Municipal Code Chapter 18.52.<sup>18</sup> Instead, the Pierce  
17 County Council has chosen to apply less regulation. It is not the duty of code enforcement  
18 officers to create regulation where none exists, nor is it permissible for a court of law to do so.  
19 The County’s remedy in this matter is legislative (at best).

20  
21 Without conceding the appropriateness of the Agricultural Resource Lands designation,  
22 new section 18A.36.070 specifically notes that “accessory uses and activities, including . . .  
23

24 <sup>18</sup> Available online at <<http://www.codepublishing.com/WA/Auburn/html/Auburn18/Auburn1852.html>>

1 parking . . . shall not be located outside of the general area already developed for buildings and  
2 residential uses.<sup>19</sup> As the Code, here and in PCC 18A.35 uses the term "parking" rather than  
3 "storage" the distinction should be read as an intentional one. Further, PCC 18.25.030<sup>20</sup> draws  
4 several definitions for "parking aisle", "parking area,<sup>21</sup> "parking garage," "Parking lot,<sup>22</sup>"  
5 "Private parking area,<sup>23</sup>" As this accessory use of parking is permitted under 18A.36.070 as  
6 "parking" the code is making an intentional reference to PCC 18A.35.

7  
8 **VI. CONCLUSION**

9 Because Sorrels is merely parking his personal vehicle collection on a residential  
10 property there is no provision of Pierce County zoning that prevents him from doing such. This  
11 appeal should be granted and the administrative decision vacated. Further, the County is bound  
12 by the preclusive effect of the district court decision. The Hearing Examiner should be  
13 reversed, the Notice of Violation dismissed, and appellants should recover their costs.

14 DATED this 7<sup>th</sup> day of November, 2017.

15 GOODSTEIN LAW GROUP PLLC

16  
17 By: s/Richard B. Sanders  
18 Richard B. Sanders, WSBA No. 2813  
19 Attorney for Petitioners  
20

21 <sup>19</sup> The code also limits the conversion of agricultural land to the accessory use of parking to less than an acre,  
22 however, at the Subject Property there is little agricultural use to be converted.

<sup>20</sup> The code does not individually assign subsections to each defined term.

23 <sup>21</sup> "an area accessible to vehicles, which area is provided, improved, maintained, and used for the sole purpose of  
24 accommodating a motor vehicle."

<sup>22</sup> "the open air, common area devoted to the standing . . . of motor vehicles, not including off-street parking  
25 spaces or areas for single family . . . dwellings."

<sup>23</sup> "open area . . . limited to the parking of automobiles of occupants"

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Hearing is set:  
Date: December 22, 2017  
Time: 1:30 p.m.  
Judge: Hon. James Dixon

SUPERIOR COURT OF WASHINGTON FOR THURSTON COUNTY

RICHARD SORRELS, RCJS PROPERTIES,  
LLC

Petitioners,

v.

PIERCE COUNTY,

Respondent.

NO. 17-2-00016-34

APPELLANT RICHARD SORRELS  
AND RCJS PROPERTIES, LLC'S  
REPLY BRIEF

Richard Sorrels and RCJS Properties, LLC herewith reply to the Pierce County  
Response Brief previously filed in this matter.

**I. INTRODUCTION**

The facts are simple and basically uncontested; however the issue is a rather straight  
forward issue of law: does the Pierce County Code (PCC) limit the number of vehicles a  
homeowner may park on his residential property? The answer is a straight forward NO. In the  
final analysis nothing else really matters. For example, it doesn't matter to whom the vehicles  
are registered or who owns them.

Rather the Hearing Examiner legally concluded the presence of these vehicles violated  
Pierce County's nuisance ordinance which defines same as:

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1 Property used or maintained for the purpose of dismantling, salvaging, storing or  
2 preparing of machinery, metals, or vehicles except where the landowner has  
obtained all licenses, permits, and approvals necessary to conduct such activity on  
the property.

3 PCC 8.08.050 (G) Giving all the words in this sentence meaning, it is apparent that this  
4 provision exists to penalize individuals for engaging in the specified activity without first  
5 obtaining a necessary license. For example, a license would be required to “store” vehicles in  
6 an industrial or commercial zone however, there is no such licensing requirement for a  
7 residential zone such as this, i.e. one may park vehicles on their residential property without  
8 any maximum limit set by the code which only specifies a *minimum* limit of two parking  
9 spaces with no maximum. PCC 18A.35.040 (E) (7), AR 592

11 Moreover “storing” is a term of art in the Pierce County Code: “Storage and Moving  
12 Use Type refers to *businesses* engaged in the storage of items for personal and business use...”  
13 PCC 18A.33.270(M) (“Storage and Moving”) A property owner who parks or allows someone  
14 to park on his property for no remuneration is not operating a business. The purpose of  
15 business is to make money. But here vehicles are parked without any remuneration. Mr.  
16 Sorrels simply likes to collect vehicles and has no business purpose whatsoever. “Vehicle  
17 Storage...does not include parking lots...” PCC 18A.33.280 H

19 A secondary issue is whether on site residential parking is an “accessory use” which is  
20 “customarily incidental and subordinate to the principal building or use of the lot upon which it  
21 is located.” PCC 18A.37.020(D) The Hearing Examiner legally concluded “The storage of  
22 large numbers of vehicles, vessels, and trailers is not customarily incidental and subordinate to  
23 a single-family residence.” Hearing Examiner Decision paragraph 14 However, as previously

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1 noted, on site residential parking is not only accessory to a single family residence but is  
2 required by the code which sets no maximum. The examiner's conclusion that the code  
3 prohibits a "large" number of vehicles is without citation to the code and without foundation in  
4 the code. If the code actually prohibited a "large" number of vehicles it would be  
5 unconstitutionally vague and subject to an equal protection challenge as well as it invites  
6 inconsistent enforcement and does not provide fair notice to the property owner. Moreover as  
7 noted in the Opening Brief, land use ordinances are strictly construed against the government  
8 and the property owner is entitled to use his land as he sees fit absent specific prohibition.  
9 Residential property owners commonly park cars, trucks, RV's, trailers and boats on their  
10 property. There is nothing in the code to preclude that. The Hearing examiner made a  
11 reversible error of law when he applied *his* rule without legal foundation and erroneously  
12 concluded same as well. Conclusion 4

## 14 II. TESTIMONY AT HEARING

15 The principal witness for the County at the administrative hearing was Code  
16 Enforcement Officer Mark Luppino. He testified at the time he issued the Notice of Violation  
17 and Abatement (NOVA) the principal use of the parcel was a single family residence. RP 8 He  
18 testified he observed a number of vehicles "parked" on the property and parking vehicles on  
19 residential property is "customarily incidental and subordinate to the principal building or use  
20 of the lot." RP 10 He testified there is "no set limit currently" as to how many vehicles can be  
21 "stored" at the property. RP 24 When he visited the property he didn't see anything which  
22 was a danger to anyone's health. RP 26 He testified he issued the prior District Court citation  
23 in 2015 because he thought Sorrels was operating a business; however the District Court

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1 dismissed the case because he didn't present enough evidence to prove it. He continued that he  
2 had "no idea" what other new evidence would prove that. RP 43 He had never seen any  
3 advertising for storage on the lot. RP 44 And he found no threat to the environment on the  
4 property. RP 44 He stated parking is normally a customary accessory use for a single family  
5 residence. RP 49-50 He testified vehicle storage is allowed in an industrial zone and is an  
6 industrial use. RP 51 Industrial uses "tend to be business." RP 51 He could not think of any  
7 industrial uses which are not for profit. RP 52

8 Then the County called Mr. Sorrels as its next witness. He testified RCJS Properties  
9 LLC took title to the property because the lender would not loan to the prior entity which was a  
10 family trust. RP 56, 60, 62 The function of the trust was to hold title to property to benefit the  
11 beneficiaries, himself and his children. RP 60 He testified Key Center Enterprises merely  
12 holds title to vehicles but is inert and does no business. RP 62 He testified firmly that the cars  
13 were parked, not stored, on the property. RP 75 He testified the legal entities which hold title  
14 to the vehicles exist just to do that and do no business and generate no revenue. RP 76 There  
15 was absolute no evidence to the contrary.  
16

17 The County then called Erica Swanson. She works for the Health Department and did a  
18 site visit to look for solid waste violations. She saw none. RP 78

19 Although the Hearing examiner made a finding regarding C & L Auto Sales (Finding 9)  
20 your undersigned has been unable to locate any testimony to support it.  
21  
22  
23

24 APPELLANT RICHARD SORRELS AND RCJS  
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1 “storing” vehicles it is using a term of art referencing a commercial storage facility, which this  
2 is not.

3 Finding 11 repeats the same erroneous legal conclusion as does 12. The later *concludes*  
4 RCJS “is acting as a storage facility...” No, just because RCJS owns property where cars are  
5 parked doesn’t meaning it is in the business of operating a “storage facility.” Where is the  
6 evidence anyone is paying RCJS to store vehicles? There isn’t any.

7 Finding 14 pertaining to accessory uses is all legal conclusion, discussed in the  
8 introduction.

9 Finding 15 is also a legal conclusion regarding collateral estoppel, erroneous for the  
10 reasons set forth in the Opening Brief.

11 At the end of the day we have a residential property with some vehicles parked on it,  
12 nothing more. This simply is not prohibited by the code notwithstanding the view of code  
13 enforcement and the Hearing Examiner that it should be. There are no shortcuts around  
14 amending the ordinance to prohibit this—but that could be a political problem which could  
15 adversely affect council members who would restrict the right of homeowners to park a variety  
16 of vehicles on their property.  
17

18 **IV. IV RES JUDICATA, COLLATERAL ESTOPPEL, AND**  
19 **SPLITTING CAUSES OF ACTION**

20 Respondent doggedly asserts prior litigation on the same subject which the County lost  
21 has no preclusive effect. In other words the county contends nothing precludes the County  
22  
23

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1 from litigating the same facts again and again by slightly changing its legal theory until it either  
2 finds a judge who agrees with the County's position or Mr. Sorrels is financially exhausted.<sup>1</sup>

3 As clearly set for in Mr. Sorrels' Opening Brief, that is simply not the law.

4 The prior litigation was litigated to final judgment of dismissal on the merits before  
5 Judge James Heller of Pierce County District Court Number One on March 3, 2016 and the file  
6 from that litigation is reproduced in this record. AR 539-606, 692-710 That litigation  
7 pertained to the same cars parked on the same property. Mr. Sorrels was represented by  
8 attorney Robert Freeby who filed a comprehensive brief supporting his motion to dismiss  
9 based on the facts construed most favorably to the non-moving party, Pierce County. AR 541-  
10 606 He attached as exhibits much of the same factual record as the Hearing Examiner  
11 considered in the current proceeding including the Deed of Trust with the Declaration of  
12 Business Purpose clause, AR 556, the criminal complaint with the attached "Officer's  
13 Report", AR 567-570, registration certificates for vehicles located on the property, AR 571-  
14 582, and Department of Revenue business licenses and tax reports for the same entities  
15 addressed in the current proceeding. AR 583-87 He attached copies of the Pierce County  
16 Code pertaining to parking, AR 590-95, PCC 8.10.020 defining terms, AR 597-8, as well as  
17 photographs taken of the property by the County to support its case, AR 600-05, and a  
18  
19  
20

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21 <sup>1</sup> Calculated to overwhelm Mr. Sorrels with the cost of litigation Pierce County made application to the Pierce  
22 County Superior on November 7, 2017 to hold Mr. Sorrels in contempt for alleged violation of a 15 year old 2002  
23 judgment which expired by operation of law after 10 years in November 2012 without statutory renewal. The  
24 county set the hearing to obtain an order to show cause on December 15 to coincide with the hearing set for this  
25 LUPA appeal the following week. The timing was not by coincidence since there has been no activity to enforce  
the 2002 judgment for 15 years.

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A-2B

1 handwritten statement by Richard Sorrels taken by the Pierce county sheriff's office, AR 606.

2 In short the motion to dismiss included the same facts as the present proceeding.

3 The civil infraction action was premised on Sorrels' alleged violation of a Notice and  
4 Order to Correct issued on August 17, 2015. AR 692-93 That Notice alleged several code  
5 violations including operating a business without a license, outside storage of business  
6 equipment and or materials without living on the site, and

7 Vehicle storage is not an allowed use on your parcel of land located on an  
8 Agricultural Resource Lands (ALR) zone in the Key Peninsula Community plan  
area.

9 Any land use violation constitutes a public nuisance

10 AR 692 Here we go again.

11 The County claims "collateral estoppel does not apply in this case because the issues  
12 involved in the Pierce County District civil infraction case are not identical to the issues  
13 involved in this LUPA appeal and because application of the doctrine would work an injustice  
14 against the citizens of Pierce County." Res. Br. 16

15 The County however fails to distinguish between res judicata and collateral estoppel.  
16 Collateral estoppel does not require *all* the issues be the same, or even the claim be the same, to  
17 bar relitigation of those issues that *were* the same. *Rains v. State, 100 Wn.2d 660,665, 674 P.2d*  
18 *165 (1983), Irondale Cmty. Action v. Hearing Board, 163 W. App. 513, 524, 262 P.3d 81*  
19 *(2011)* Both litigations involved the same issue, whether Sorrels was operating a business.

20 The County's primary witness, Code Enforcement Officer Mark Luppino, testified he brought  
21 the first action because he believed Sorrels was operating a business and he lost it because he  
22

23  
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1 couldn't prove it, and the evidence is now what it was then. RP 43 The first litigation decided  
2 the business issue against the county. It is preclusive.

3 Suppose the County *had prevailed* in the first litigation, is there any doubt it would now  
4 claim Sorrels is precluded from claiming he is *not* running a business? But the rule works both  
5 ways.

6 As to the second aspect of the County's defense to claim preclusion (preclusion would  
7 work an injustice), the test for an injustice is whether the party against whom preclusion is  
8 asserted "had an unencumbered, full and fair opportunity to litigate [its] claim in a neutral  
9 forum..." *Rains*, 100 Wn.2d at 666 There is no claim that the county didn't have a full  
10 opportunity to present its case in the first proceeding, in fact it selected the forum and  
11 commenced the proceeding. Collateral estoppel applies and the examiner must be reversed.  
12 Shifting a litigant's theory in a second litigation involving one or more of the same issues is no  
13 defense to claim preclusion.  
14

15 The County claims res judicata doesn't apply because the prior proceeding was a civil  
16 infraction whereas maintaining a nuisance is a misdemeanor which could not have been plead  
17 in the context of a civil infraction. Res. Br. 18 However the instant action purports to pursue  
18 a civil action to establish a nuisance and does not allege a crime. Moreover, the 2015 Notice  
19 and Order to Correct alleged a nuisance but the County was unable to establish violation of the  
20 Notice when it brought it to District Court. If the county didn't pursue nuisance at the time, it  
21 could have and should have. Therefore it is precluded by res judicata from doing it now.  
22

23 The Hearing examiner must be reversed.

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V. CONCLUSION

The County brings this proceeding on the heels of losing an enforcement proceeding against the same party for doing the same thing: parking vehicles on his property. As a matter of law the Hearing Examiner erred when he refused to apply res judicata and/or collateral estoppel to the same issues.

The facts are relatively simple: Sorrels is parking more cars on his property than the County or the Hearing Examiner wants. However, no code provision precludes a home owner from doing just that. If the County doesn't like it, it can amend the code.

Finally, essential to the county's case, and the Hearing Examiner decision, is proof that Mr. Sorrels is engaged in the business of storing vehicles. The judge in the first litigation dismissed the case because the County couldn't prove it. And there is no proof here. There is no evidence that anyone or anything paid anybody to store vehicles on this property.

The examiner must be reversed and this case dismissed.

DATED this 7<sup>th</sup> day of December, 2017.

GOODSTEIN LAW GROUP PLLC

By: s/Richard B. Sanders

Richard B. Sanders, WSBA No. 2813  
Attorney for Petitioners

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