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State of Washington  
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NO. 53516-5-II

COURT OF APPEALS DIVISION II  
OF THE STATE OF WASHINGTON

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JASON GERARD,

Appellant,

vs.

PIERCE COUNTY,

Respondent.

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OPENING BRIEF OF APPELLANT JASON GERARD

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APPELLANT’S STATEMENT OF ISSUES &  
ASSIGNMENTS OF ERROR

A. Did the County meet its burden to establish that the violations cited in the Notice of Violation to Appellant actually occurred? **NO.**  
RCW 36.70C.130(1)(a) (c), (d).

1. Is the land use decision supported by admissible evidence that is substantial when viewed in light of the whole record before the court? **NO.**
2. Is the land use decision an erroneous interpretation of the law? **YES.**
3. Is the land use decision is a clearly erroneous application of the law to the facts? **YES.**
4. Did the Hearing Examiner that made the land use decision engaged in unlawful procedure or failed to follow a prescribed process, and that error was not harmless? **YES.**

B. Did the Deputy Examiner Err by Admitting Staff Report Over Objection & Without Allowing Argument? **YES.** (RCW 36.70C.130(1)(a) (b) and (d)).

1. Must County Code Provisions Comply with Due Process? **YES.**
2. Does County Code Provision Which Allows Submission of Unauthenticated and Hearsay Materials with No Process for Consideration of Objections Violate Constitutional Due Process? **YES.**
3. Is the land use decision is a clearly erroneous application of the law to the facts? **YES.**
4. Did the Hearing Examiner that made the land use decision engaged in unlawful procedure or failed to follow a prescribed process, and that error was not harmless? **YES.**

C. Once the Staff Report is properly excluded, does the County have sufficient “evidence” to support its case? **NO.** RCW 36.70C.130(1)(a),(b), (c), and (d).

1. Did the County Prove Its Case by Required Preponderance of Evidence? **NO.**
2. Is the land use decision supported by admissible evidence that is substantial when viewed in light of the whole record before the court? **NO.**
3. Is the land use decision an erroneous interpretation of the law? **YES.**
4. Is the land use decision is a clearly erroneous application of the law to the facts? **YES.**
5. Did the Hearing Examiner that made the land use decision engaged in unlawful procedure or failed to follow a prescribed process, and that error was not harmless? **YES.**

D. Should this Enforcement Action be overturned where County lacks legally admissible evidence? **YES.** (RCW 36.70C.130(1)(a)-(f)).<sup>1</sup>

1. Did the Examiner’s decision violate the constitutional rights of Appellant? **YES.**
2. Should this Enforcement Action be overturned where County site visits upon which notice apparently is based were not constitutionally permissible? **YES.**
2. Should this Enforcement Action be overturned where

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<sup>1</sup> RCW 36.70C.130(1)(a)-(f): (a) The body or officer that made the land use decision engaged in unlawful procedure or failed to follow a prescribed process, unless the error was harmless;  
(b) The land use decision is an erroneous interpretation of the law, after allowing such deference as is due the construction of the law by a local jurisdiction with expertise;  
(c) The land use decision is not supported by evidence that is substantial when viewed in light of the whole record before the court;  
(d) The land use decision is a clearly erroneous application of the law to the facts;  
(e) The land use decision is outside the authority or jurisdiction of the body or officer making the decision; or  
(f) The land use decision violates the constitutional right of the party seeking relief.

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

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

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

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

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

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

8. Should Exclusionary Rule be applied as a remedy for warrantless searches? **YES.**

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

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

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

## **I. INTRODUCTION & SUMMARY OF APPEAL.**

Appellant Jason Gerard, by and through his attorney, Carolyn A. Lake of the Goodstein Law Group PLLC, and pursuant to RCW 36.70C.005 *et seq*, files this appeal from the Thurston County Superior Court's Ruling which affirmed the Pierce County Deputy Hearing Examiner's Findings, Conclusions and Decision, Pierce County Administrative Appeal No. 877600 for Jason Gerard, Tax Parcel Number 0217263016 dated June 18, 2018 ("Land Use Decision"). That Land Use Decision denied Appellant's appeal of enforcement action related to 6522-366<sup>th</sup> Street South, Roy, WA 98580, within Pierce County. Appellant also appeals the Deputy Hearing Examiner's ("Examiner") rulings which admitted the County's voluminous "staff report" over Appellant's objection and without allowing consideration of or argument on the objection.

The County lacks admissible evidence to carry their burden on appeal to establish the validity of their enforcement action against the Appellant. The Deputy Examiner summarily admitted the County's voluminous Staff Report, which includes 122 pages of 28 exhibits, all of which lacked foundation and/or authentication over objection of the Appellant. The Deputy Examiner believed that the County was entitled to submit a Staff Report and the Staff Report

would be admitted in total, over any objections. When Appellant's Counsel objected, the Deputy Examiner stated he would address those objections in his Decision, but the Decision is completely silent on those objections. The Deputy Hearing Examiner erred in admitting the Staff Report without foundation and without considering Appellant's objections. The County also claims that permission was granted by a neighboring property owner for the County enforcement team to enter onto property adjacent to Appellant and gather evidence against him, however, testimony at hearing established that no such permission was granted by the property owner because the owner of the property had died. The County pursues enforcement of very specific Pierce County Code provisions, however, the County's admissible evidence about what staff claimed to observe on Appellant's property omits essential elements of the offense necessary to find a violation. Pierce County failed to meet its burden on appeal to prove any of the charges by a preponderance of evidence. The Deputy Hearing Examiner erred in denying Appellant's appeal.

**II. CONCISE STATEMENT OF ERRORS COMMITTED.**

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

evidence that is substantial when reviewed in light of the whole record and is a clearly erroneous application of the law to the facts. In addition, the Decision deprives Appellant of his constitutionally protected rights.

2. The Examiner's decision is based on constitutionally inadmissible evidence.
3. The Land Use Decision is an erroneous interpretation of the law. In this regard, the Examiner's interpretation of local ordinances is not entitled to any deference, as those ordinances are clear and unambiguous. The Examiner's interpretation of the law is contrary to law, and no deference is warranted.
4. The Land Use Decision violates the constitutional rights of the Appellant. The Examiner's Decision erroneously extinguishes an ongoing legal use of the property without compensation and in violation of the Appellant's constitutional rights. The Examiner erred to the extent that he failed to recognize and protect such rights, or alternatively, the Examiner erred to the extent that he purported to rule on constitutional issues without the authority to do so. *Yakima Clean Air v. Glascam Builders*, 85 Wn. 2d 255 (1975), and *Bare v. Gorton*, 84 Wn.2d 380 (1974).
5. The Land Use Decision is an erroneous interpretation of the law, and or of the facts.
6. The Hearing Examiner's Land Use Decision is clearly erroneous application of the law to the facts.

7. The Hearing Examiner's Land Use Decision is not supported by substantial evidence in the record.
8. Appellant specifically appeals the following:
  - All minutes of the hearing which appear in the Deputy Examiner's Decision which may be contrary to the transcript of the recorded proceedings.
  - All evidentiary rulings made by the Deputy Hearings Examiner which denied proposed evidence by Appellant and which granted the County's admission of evidence after objection by Appellant.
  - All pre-trial motions offered by Appellant which the Deputy Examiner denied.
  - Findings of Fact 1—12.
  - Conclusion of Law 1-2, and
  - Decision.
9. Appellant also appeals the Deputy Hearing Examiner's ruling (a) in admitting over un-addressed objection and relying on the County's Staff Report which lacked foundation and authentication, and (b) by admitting "evidence" obtained from unconstitutional, warrantless and non-consensual searches.

### **III. BURDEN OF PROOF**

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

- (a) The body or officer that made the land use decision

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

RCW 36.70C.130(1)(a)-(f).

Standards (a), (b), (e) and (f) present questions of law for which the accepted standard of review is de novo. 7 *Wash. State Bar Ass'n, Real Property Deskbook* § 111.49, at 111-25. Standard (c) is reviewed under the "substantial evidence" standard of review, which is defined as "a sufficient quantity of evidence to persuade a fair-minded person of the truth or correctness of the order." *City of Redmond v. Central Puget Sound Growth Management Hearings Bd.*, 136 Wn.2d 38, 959 P.2d 1091 (1998), (quoting *Callecod v. Washington State Patrol*, 84 Wn. App. 663, 673, 929 P.2d 510, rev. denied, 132 Wn.2d 1004, 939 P.2d 215 (1997)). The clearly erroneous test for (d) is whether the court is "left with a definite and firm conviction that a mistake has been committed." *Anderson v. Pierce County*, 86 Wn. App. 290, 302, 936 P.2d 432 (1987). If

Appellant shows that Pierce County's actions fall within any of the articulated standards, this Court is required to grant relief.

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

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

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

The County had the burden to establish that the violations cited in the Notice of Violation to Appellant actually occurred, which it failed to do.

#### **IV. FACTS<sup>2</sup>.**

Appellant Mr. Jason Gerard was charged with running a contractor's yard in a Rural 10 (R10) zone without an approved Conditional Use Permit (CUP) from Pierce County Planning and Public Works. Per Pierce County Code (PCC), contractor yards are

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<sup>2</sup> AR denotes reference to the Administrative Record, on file with the Court. TR denotes reference to the transcript of Examiner's hearing, also on file.

not allowed in R 10 zones without a CUP. Mr. Gerard was also accused of storing vehicles on his property that are not permitted in an R 10 zone, as well as improperly storing and accumulating solid waste as prohibited under PCC.8.08.

PCC 18A.33.280(B) describes two levels of contractor yard activity: "A. Contractor Yards. Contractor Yards Use Type refers to and area for construction or contracting business offices, interior or outdoor storage, repair or maintenance of heavy equipment, vehicles, or construction supplies and materials." Level 1 contractor yards include an outdoor storage area of less than or equal to two acres; and Level 2, contractor yards with outdoor storage area greater than two acres in size.<sup>3</sup> The County witness failed to describe the size of the property, so did not specify whether the County was pursuing a Level 1 or Level 2 alleged violation.

The Pierce County Code<sup>4</sup> expressly defines "Junk Vehicle" means a motor vehicle meeting at least three of the following requirements:

1. Is three years old or older;
2. Is extensively damaged;
3. Is apparently inoperable; or
4. Has an approximate fair market value equal only to the approximate value of the scrap in it.

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<sup>3</sup> TR 13:13-23.

<sup>4</sup> PCC 8.08.030 Definitions

The Pierce County Code expressly defines "Extensively Damaged" to mean any vehicle that has visible damage to, or is missing, a minimum of three of the following parts or components<sup>5</sup>:

1. Frame;
2. Axle;
3. Surface panels;
4. Doors;
5. Fender;
6. Window or windshield;
7. Headlight or front signal light;
8. Taillight, brake light, or rear signal light;
9. Engine;
10. Transmission;
11. Wheels or tires;
12. Steering wheel;
13. Radiator;
14. Battery;
15. Any other major mechanical or electrical equipment; or
16. Visible damage or a lack of any other similar component identified by a public official when observing the vehicle.

The Pierce County Code expressly defines "Solid Waste" as having the same meaning as in RCW 70.95.030(22) including but not limited to the following items: bagged or loose household garbage, containers of household liquids or hazardous wastes, old or unused furniture, furniture parts, machinery or appliances, household fixtures, tires, batteries, mattresses, construction debris, rotting or scrap lumber, paper and/or cardboard, rubber debris, scrap metal, vehicle parts, hardware, yard debris as defined in RCW

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<sup>5</sup> PCC 8.08.030 Definitions

70.95.030(28), cut brush or wood, dead or decaying plant materials, animal carcasses or animal waste, junk vehicles, or derelict vessels. "Solid Waste" also includes: any material or item kept, placed, stored, stockpiled or managed in a manner that does not preserve its value; any material or item for which a landowner would need to pay for its removal, recycling or disposal; and any material or item stockpiled for recycling but the market for the material or item is unavailable or insufficient. The County did not present evidence on these specific elements.

At hearing the County presented one Staff member witness, Inspector Mr Howe. Mr Howe describes four site visits, only the last three did he testify as to observations against Appellant: on March 2, 2017<sup>6</sup>, March 7,<sup>7</sup> April 21<sup>8</sup>, and November 17<sup>9</sup>. On each visit, Mr Howe described he never actually went on the Appellant's property. On the first site visit, he testified viewed the property from the roadway.<sup>10</sup> On the second visit, Inspector Howe observed from complainant's church's property.<sup>11</sup> The last two visits, Mr Howe described he viewed the property from another, second, private

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<sup>6</sup> TR 9:21-22.

<sup>7</sup> TR 11:10-13

<sup>8</sup> TR 19:7-9

<sup>9</sup> TR 23:12-16.

<sup>10</sup> TR 10:1-3

<sup>11</sup> TR 11:10-13

property<sup>12</sup> (“Second Private Property”), and Inspector Howe claimed he had permission to enter that property via a written letter.<sup>13</sup> However, the Complainant, who also testified at hearing,<sup>14</sup> explained that the actual owner of the Second Private Property was 94 years old, lived away, had died and the permission letter was actually written by the deceased’s son.<sup>15</sup> An Exhibit admitted at hearing<sup>16</sup> confirmed that Inspector Howe was aware that the owner of the Second Private Property did not grant permission to enter that private property from which Mr Howe viewed Appellant’s property for the last two out of three site visits.

Mr Howe testified that on the first two visits, he observed structures either recently constructed, or in the midst of being constructed.<sup>17</sup> Mr Howe described the construction as “recent construction,”<sup>18</sup> as a two story, very large house that was being constructed<sup>19</sup>, and “It appeared that there was new construction on an existing house on the second floor”.<sup>20</sup>

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<sup>12</sup> TR 19:12-18 and TR 23: 12-19

<sup>13</sup> TR Id

<sup>14</sup> TR 43:6-20

<sup>15</sup> TR 45:11-19

<sup>16</sup> AR 142; the transcript at TR 32:21 it refers to the document bates stamped 651 as Exhibit 7 – it is actually admitted Exhibit 6.

<sup>17</sup> TR 12:13-15

<sup>18</sup> March 7; id

<sup>19</sup> April 21: TR 29: 21-23.

<sup>20</sup> TR 39:18-32

Evidence admitted at hearing also demonstrated that another Pierce County staff member Development Engineer Jeff Sharpe had actually walked the property with Appellant in April 2017<sup>21</sup> and that County staff member also described a house under construction.<sup>22</sup> As a result of that Development Engineer’s site visit, Mr Sharpe had dismissed out a grade and fill violation alleged against the property with the notation, “no problem”.<sup>23</sup>

Inspector Howe testified that in addition to the construction, on March 7, he observed “construction debris,”<sup>24</sup> although it was “very hard to determine”, as well as a semi-truck trailer, steel frames, piping and some other vehicles that were in that area.<sup>25</sup>

On his April 21, 2017 site visit, in addition to the on-going construction, Inspector Howe testified he saw a “recently excavated area” with no vegetation, and “there was *what we call solid waste* that was improperly stored. It was laying on the ground instead of being up off the ground and protected out of view”.<sup>26</sup> Mr Howe testified the objects he saw were, “vehicles, tires, scrap wood, demolition waste”. He testified that although the complainant had

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<sup>21</sup> TR 36:20-24

<sup>22</sup> TR 37:3-5

<sup>23</sup> TR 37:1-2 and TR 37:10-18.

<sup>24</sup> TR 14:3-6

<sup>25</sup> TR 14:3-7.

<sup>26</sup> TR 19: 19-25

described a whole bunch of demolition debris and a pit had been there, ... “there was nothing there. It was just flat ground. There was still a lot of vegetation, but you could see that there was some stuff laying on the ground, some semitrailers loaded with some- appeared to be logs and some miscellaneous material and junk and with the vegetation.”<sup>27</sup> Mr Howe testified that he “classified this” as “improperly stored solid waste”.<sup>28</sup> He also testified that the evidence he saw that day of a contractor’s yard was “the excavator and the semi-truck and the materials lying around, yes.”<sup>29</sup>

On the third and last visit on November 17, 2017<sup>30</sup> Inspector Howe again viewed the site from the Second Private Property. He testified that this time, there was a large vegetation berm “so you couldn’t see into the property”<sup>31</sup> with a RV on top of it.

Mr Howe testified on direct examination that Appellant admitted to running a contractor yard in a phone conversation,<sup>32</sup> however on Cross examination, Inspector Howe admitted that his notes from a from a phone log reflected that Appellant stated he

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<sup>27</sup> TR 20:13-20.

<sup>28</sup> TR 2021-24.

<sup>29</sup> TR 2120:24- 21:3.

<sup>30</sup> TR 23:3-5

<sup>31</sup> TR 23:16- 20

<sup>32</sup> TR 15:9-10

was “**not** running a contractor yard”.<sup>33</sup> Mr Howe also testified that Appellant had a house and shop with permits.<sup>34</sup>

The only other witness who testified was the adjacent property occupant complainant, who was a member of a church, which church (and not the complainant) owned the adjacent property.<sup>35</sup> There was no testimony or evidence that the “church member” complainant owned the property or had authority to authorize the County’s entry onto private property from which the County viewed Appellant’s property. That witness confirmed that the actual owner of the Second Private Property had passed away and died about a year ago. He lived in Colorado so, “of course no one would see him”<sup>36</sup> and that his son had written the “permission letter upon which the County relied.”<sup>37</sup> There was no testimony or evidence that the referenced “son” owned the property or had authority to authorize the County’s entry onto private property from which the County viewed Appellant’s property.

The church member witness testified that his complaints were prompted by burning on the property<sup>38</sup>, and vegetation removal on

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<sup>33</sup> TR 33: 18-24

<sup>34</sup> TR 15:10=11.

<sup>35</sup> TR 43:10-14

<sup>36</sup> TR 45:13-20.

<sup>37</sup> TR 45:14-16.

<sup>38</sup> TR 43:16-18

the perimeter of the site.<sup>39</sup> The church member witness's only observations "as far as business activity" were limited and consistent with the new structure construction that both County inspectors observed:

And as far as business activity, you know we live there. We—there's large—there were- I have to say, everything has stopped after about the first of January, but up until that point, large vehicles coming and going and large construction equipment, a big excavator driving around<sup>40</sup>.

No more witnesses testified. At the conclusion of the County's case, Appellant's Counsel noted that the majority of written materials which were bundled into a County "Staff Report" had not been introduced through the testimony of any witness<sup>41</sup> and objected to the admission of those exhibits and the County's Staff Report.<sup>42</sup> The Deputy Examiner claimed the Staff Report "was already part of the record"<sup>43</sup> and allowed no argument on the issue.

**Ms Lake:** Yeah. I'm -- I know that the Examiner marked the staff report, but there's been no request for admission or support for admitting Exhibit 3-A, Exhibit 3-B, Exhibit 3-C, Exhibit 3-D, Exhibit 3-E, Exhibit 3-G, Exhibit 3-K, Exhibit 3-M, Exhibit 3-N, Exhibit 3-Q, Exhibit 3-R, Exhibit 3-T, Exhibit 3-V, Exhibit 3-W, Exhibit 3-X. So we would move to strike those as --

**MR. OWEN:** I believe that's already --

**HEARING EXAMINER:** It's already part of the record.

**MS. LAKE:** Yeah. This city -- I mean, is it -- is it the contention the County can just file a staff report and everything's admitted?

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<sup>39</sup> TR 45:21-25.

<sup>40</sup> TR 46:8-14.

<sup>41</sup> TR 48:17-23

<sup>42</sup> TR 48:17-25.

<sup>43</sup> TR 21: 8-10 and TR 21:24-22:3.

**HEARING EXAMINER:** Yeah. Basically, the staff report will be admitted. I'll note your objections, and I can address them in my decision.

**MS. LAKE:** Thank you.<sup>44</sup>

The Deputy Examiner stated he would address Appellant's objections in his written decision, but he failed to do so<sup>45</sup>. The Examiner issued his opinion on June 18, 2018.<sup>46</sup> Appellant timely appealed.

## **V. ANALYSIS IN SUPPORT OF APPEAL**

By not suppress all evidence and testimony obtained as a result of the County's illegal searches, including all such references in the County's offered Staff Report, testimony and exhibits, and by admitting the voluminous Staff Report over objection, the Deputy Hearing Examiner erred by making (1) a clearly erroneous application of the law to the facts, (2) erroneous interpretation of the law (3) engaged in unlawful procedure or failed to follow a prescribed process, where the error is not harmless, and (4) violated Appellant's constitutional rights.

### **A. DEPUTY EXAMINER ERRED BY ADMITTING STAFF REPORT OVER OBJECTION & WITHOUT ALLOWING ARGUMENT**

Appellant objected to the admission of the County's staff

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<sup>44</sup> TR 48:25-49:11.

<sup>45</sup> AR 6-11

<sup>46</sup> AR6-11.

report.<sup>47</sup> The Examiner claimed the Staff Report “was already part of the record”<sup>48</sup> and allowed no argument on the issue. By admitting the Staff Report over objection, the Examiner erred by making (1) a clearly erroneous application of the law to the facts, (2) erroneous interpretation of the law and (3) engaged in unlawful procedure or failed to follow a prescribed process, where the error is not harmless.

**1. Deputy Examiner Failed to Consider Objections**

The Pierce County Code (“PCC”) at 1.22.030 “Definitions” states that the “Official record” means “the written and oral information, exhibits, reports, testimony and other evidence submitted in a timely manner and *accepted* by the Examiner.” There is nothing that states that the County’s staff Report is “automatically” a part of the record. The Examiner erred by so concluding. The Examiner erred also by not allowing argument on the issue of admissibility. Accordingly, this Court should exclude the improperly relied on the Staff Report.

**2. Once the Staff Report is properly excluded, the County lacks “evidence” to support its case.**

Once the Staff Report materials are properly excluded, the County lacks sufficient evidence to support its case. This appeal should be

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<sup>47</sup> TR 12:23-25 and TR 21:8-15

<sup>48</sup> TR 21: 8-10 and TR 21:24-22:3.

granted in full. The Staff Report consists of 122 pages and includes all of the County's "evidence", including County's narrative response to the appeal, all of the photographs, Notice of Violation, Inspector Field Investigation Report, Assessor property information, Aerial photos, floor plans, etc.<sup>49</sup> None of the County's Exhibits were individually offered for admission, and only a handful were identified by the one County witness during testimony as a pre-condition of this automatic "admission".<sup>50</sup> As such, the "admission" of the Staff Report as "automatic" was not harmless. The Staff Report was the means used to "introduce" allegations that the County's Inspector did not testify in support of.

Essentially, the Deputy Hearing Examiner accepted carte blanche the County "Staff Report" and its many exhibits, without any testimony, foundation, authenticity, or even motion for admission. Per this Deputy Examiner, the County's complete "case" is packaged up and "automatically" a part of the record. This is error. The following items relied on by the County, all of which were part of the Staff Report<sup>51</sup>, and none of which were not properly before the Examiner:

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<sup>49</sup> AR 16-138

<sup>50</sup> 3F at TR 10"7-8, 3H at TR 31:18, 3I, at TR 13:25, 3J at TR 17:4, 3S at TR 13:1, 3T at 20:8, 3U at TR 23:3.

<sup>51</sup> AR 22

**List of Materials Included in the Pierce County Staff Report<sup>52</sup>:**

- 1 - STAFF REPORT
2. APPLICATION:
  - A. Appeal Application (#877600) and Attachment, dated December 26, 2017
3. STAFF DECISION AND DOCUMENTS:
  - A. Letter from Complainant dated January 5, 2017
  - B. Email from Dan Watts with TPCHD, dated January 23, 2017
  - C. Online citizen complaint, submitted to Pierce County Responds on February 13, 2017
  - D. Complaint/Intake Form, assigned to CEO Jim Howe, dated February 27, 2017
  - E. Public Service Request inquiry sent to Jason Gerard, dated February 27, 2017, including Assessor-Treasurer (A/T) electronic Property Information Profile
  - F. CEO Jim Howe Single Activity Report, dated March 2, 2017, including photos
  - G. Public Service Request Inquiry to Jason Gerard, dated February 27, 2017 and copy of undeliverable returned mail envelope
  - H. CEO Jim Howe Activity Report and email to Mary Van Haren and Jeff Sharp both dated March 7 2017
  - J. CEO Jim Howe Activity Report and Site Inspection Photos
  - J. Department of Labor and Industries, Department of Revenue, and Secretary of State inquiries for Penetration Dirtworks LLC
  - K. Pierce County Code PCC Chapter 18A Use Table, and PCC 18A.33.280 Industrial Use Category - Description of Use Categories, B. Contractor Yards
  - L. CEO Jim Howe Activity Report dated March 14, 2017, letter from Richard Daskam, dated March 13, 2017, and mail receipt
  - M. Complaint/Intake Form, assigned to Building Inspector Lou Nozsar on March 16, 2017 CEO Howe Activity Report, dated March 17, 2017
  - o. CEO Howe Activity Report dated April 20, 2017
  - P. CEO Howe Activity Report and site photos taken April 21, 2017, and email to Mary Van Haren on April 4, 2017
  - Q. CEO Howe Activity Report, dated June 1, 2017, with Aff electronic Property Information Profile
  - R. CEO Howe Activity Report, dated June 1, 2017, including state and A/T agency records
  - S. Violation Notice, dated June 6, 2017, sent to Penetration

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<sup>52</sup> AR 26

- Dirtworks LLC. and a copy of undeliverable returned mail envelope.
  - T. CEO Howe Activity Report, dated November 15 2017
  - U. CEO Howe Activity Report and site photos, taken November 17, 2017
  - V. State agency records regarding Penetration Dirtworks LLC
  - W. Final Notice and Order to Correct and Notice of Violation and Abatement sent to Jason Gerard via Certified Mail, dated December 13, 2017, along with certified mail delivery receipt dated December 13, 2017
  - X. Activity Reports, dated December 13, 2017 and December 20, 2017
4. NOTICE AND ROUTING DOCUMENTS:
- A. Letter to Jason Gerard regarding hearing date and time dated January 11, 20J 8
  - B. Agenda email list and legal notice of the February 21, 2017 Examiner 's Hearing

The Pierce County Code (“PCC”) at 1.22.030 “Definitions” states that the "Official record" means “the written and oral information, exhibits, reports, testimony and other evidence submitted in a timely manner and **accepted** by the Examiner.” There is nothing that states that the County’s staff Report is “automatically” a part of the record. The Examiner erred by so concluding.

### **3. Hearing Examiner’s Carte Blanc Acceptance of County Staff Report Violates Due Process**

Both as applied, or as written, the local County code PCC 1.22.030 cannot permissibly short-cut the due process protections afforded by federal and Washington state constitutions. “The fourteenth amendment to the federal constitution provides that no state shall ‘deprive any person of life, liberty, or property, without due process of law.’ Article 1, section 3 of the Washington State

Constitution similarly provides that “[n]o person shall be deprived of life, liberty, or property, without due process of law.”<sup>53</sup>

Article XI, section 11 of the Washington Constitution includes a specific exception to its simple statement of the general police powers of local governments: “Any county, city, town or township may make and enforce within its limits all such local police, sanitary and other regulations *as are not in conflict with general laws.*” (Emphasis added).

Any grant of police power to local government is subject to constitutional limitation, which is judicially enforced. “Our cases uniformly state that exercises of the police power are subject to judicial review.” *Petstel, Inc. v. County of King*, 77 Wn.2d 144, 154, 459 P.2d 937 (1969); *see also State ex rel. Brislawn v. Meath*, 84 Wash. 302, 313, 147 P. 11 (1915) (observing that if a police power regulation “has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the constitution” (quoting *Mugler v. Kansas*, 123 U.S. 623, 661, 8 S. Ct. 273, 31 L. Ed. 205 (1887))), as quoted in *Biggers v. City of Bainbridge Island*, 162 Wash.2d 683, 169 P.3d 14, 17–19 (2007).

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

Although ‘the boundaries of the concept of due process are not capable of precise formulation,’ at a minimum it requires “the opportunity to be heard,” and ‘notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and **afford them an opportunity to present their objections**, Thus, due process requires “notice and opportunity for hearing appropriate to the nature of the case” before a state deprives a person of “life, liberty or property.” Furthermore, the opportunity “must be granted at a meaningful time and in a meaningful manner”.<sup>54</sup> Pierce County’s apparent code that allows the County Examiner to automatically and in unfettered manner stuff the “official record” without any opportunity for the accused property owner to object violates Appellant’s due process. Our state and federal case law holds that the fundamental requirement of procedural due process “is the opportunity to be heard at a meaningful time and in a meaningful manner.” *Post v. City of Tacoma*, 167 Wash. 2d 300, 313, 217 P.3d 1179 (2009), 167 Wash.2d at 313, 217 P.3d 1179 (citing *Mathews v. Eldridge*, 424 U.S. 319, 333, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976)).

Pierce County commits the precise error that Washington’s

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<sup>54</sup> *Hasit*, internal citations omitted.

Supreme Court rejected in *Post v. City of Tacoma*, 167 Wash. 2d 300, 313, 217 P.3d 1179 (2009). *Post* explains:

Though the procedures may vary according to the interest at stake, the fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner. *Mathews v. Eldridge*, 424 U.S. 319, 333, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976).

To determine whether existing procedures are adequate to protect the interest at stake, a court must consider the following three factors:

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

*Post*, 167 Wash.2d at 313, 217 P.3d 1179 (quoting *Mathews*, 424 U.S. at 335, 96 S.Ct. 893); see also *Tellevik v. Real Prop.*, 120 Wash.2d 68, 78, 838 P.2d 111 (1992) (adopting and applying the *Mathews* test). This due process analysis balances the property owner's interest, the risk of an erroneous decision, and the relative interest held by the claimant and government. *Id.*

In present setting, the Appellant property owner has significant interest in defending against land use enforcement actions (including penalties up to and including criminal misdemeanor charges **AR 96**), there is a relatively high risk of an erroneous

decisions on admission of ‘evidence’ based on the County’s approach that allows unrebutted, zero-to- low burden for admission; and, as for the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural protections would afford is little to none, to require consideration of objections prior to wholesale admission of everything the County enforcers seek to include ‘in the record’.

In *Post*, on appeal, the Supreme Court ultimately held that the civil infraction ordinance at issue offended procedural due process under *Mathews***Error! Bookmark not defined.**, 424 U.S. at 333, 96 S.Ct. 893, because “it purport[ed] to authorize the unlimited and unreviewable issuance and enforcement of subsequent civil infractions and penalties ***without any system of procedural safeguards.***” *Post*, 167 Wash.2d at 315, 217 P.3d 1179. Emphasis added.

The same is true here. Balance, instead of constitutional due process violations, is all that is sought here.

Although in desperate need of streamlining, land use law balances the tension between the need for intelligent planning to achieve efficient and responsible use of our resources on the one hand, and the right of property owners to use and enjoy their own property on the other hand. Done right, master plans can serve both needs.

*Biggers v. City of Bainbridge Island*, 162 Wash.2d 683, 169 P.3d 14, 17–19 (2007), *Concurrence*.

**B. COUNTY DID NOT PROVE ITS CASE BY REQUIRED PREPONDERANCE OF EVIDENCE & OMITTED REQUIRED ELEMENTS OF THE CLAIMED OFFENSES**

By denying Appellant’s appeal, the Deputy Examiner erred because the decision is not supported by admissible evidence that is substantial when viewed in light of the whole record before the court. Further, the County did not present proof as to each element of the offenses claimed to be committed. This is reversible error.

**1. County’s Failure to Prove Each Element of the Claimed Violations is Due Process Violation & Reversible Error**

The County did not meet its burden to prove all elements of the claimed offenses. The elements of what constitutes ‘junk vehicles’ or ‘solid waste’ claimed to be stored on the property are defined in the Pierce County Code. Pierce County Code 8.08.030 defines what elements need be shown to establish whether or not nuisance violations are met for inoperable and junk vehicles. ‘‘Apparently inoperable’ requires proof that the offending vehicle does not appear to comply with the requirements for vehicles used on public streets ‘‘with regard to brakes, lights, tires, safety glass or other safety equipment.’’ There was no County testimony that supports

these required elements were met; that any of the vehicles observed met that definition, thus the County did not prove the elements of the offenses charged.

The County Code also requires proof of specific elements to establish "extensively damaged" vehicles exists so as to constitute a nuisance. It calls for evidence that the vehicle has visible damage to, or is missing, a minimum of three of the following parts or components. The County code lists fifteen elements as to precisely what type of missing parts or components have to be shown to exist and requires proof as to a minimum of three of those elements that need to be proven. The County did not present evidence that these required elements were met: that vehicles meeting the required definition of "extensively damaged" were located on Appellant's property. The County's failure to prove each element of the claimed violations is a due process violation and reversible error.

*State v. Brown*, 147 Wn.2d 330, 58 P.3d 889 (2002), stands for the proposition that *the omission of an element of a crime in jury instructions is a due process violation. Accord: Cronn v. State*, No. 52157-8-I (WA 3/7/2005) (Wash., 2005) "The Legislature has codified the State's burden as follows: 'Every person charged with the commission of a crime is presumed innocent unless proved

guilty. No person may be convicted of a crime unless each element of such crime is proved by competent evidence beyond a reasonable doubt.' RCW 9A.04.100(1)." *State v. Brown*, 58 P.3d 889, 147 Wash.2d 330 (Wash., 2002).

Both the United States and Washington Constitutions require a jury be instructed **on all essential elements** of the crime charged. *State v. O'Donnell*, 142 Wn. App. 314, 322, 174 P.3d 1205 (2007). Although all the pertinent law need not be incorporated in one instruction, an instruction that purports to be a complete statement of the crime **must contain every element** of the crime charged. *State v. Mills*, 154 Wn.2d 1, 8, 109 P.3d 415 (2005); *State v. Emmanuel*, 42 Wn.2d 799, 819, 259 P.2d 845 (1953).

The omission of an element of a charged crime creates manifest error affecting a constitutional right that can be considered for the first time on appeal. *State v. Mills*, 154 Wn.2d at 6; *State v. Gonzalez*, 2 Wn. App. 2d 96, 105, 408 P.3d 743 (2018), *State v. Waldvogel (In re Waldvogel)* (Wash. App., 2018).

While the burden of proof in this current setting is 'preponderance of evidence,' the requirement to prove **each element** of the offense charged is the same, and consequence of the County's omission should be the same. *State v. Smith*, 131

Wash.2d 258, 265, 930 P.2d 917 (1997) ("failure to instruct on an element of an offense is automatic reversible error"). This is particularly true, since the County asserts this land use offense is punishable as a criminal misdemeanor. **AR 96.**

In *Cronin*, *Bui* and *Stein*,<sup>55</sup> the Washington Supreme Court acknowledged and applied the rule of automatic reversal for failure to instruct on every element of the offense charged. *Cronin*, 142 Wash.2d at 581, 14 P.3d 752 (*Cronin*), 582 (*Bui*); *Stein*, 144 Wash.2d at 247-48, 27 P.3d 184. And see *State v. Eastmond*, 129 Wash.2d 497, 502, 919 P.2d 577 (1996) ("By omitting an element of the crime of assault, the trial court here committed an error of constitutional magnitude."); *State v. Byrd*, 125 Wash.2d 707, 713-14, 887 P.2d 396 (1995) ("The State must prove every essential element of a crime beyond a reasonable doubt for a conviction to be upheld. It is reversible error to instruct the jury in a manner that would relieve the State of this burden." (citations omitted)); *State v. Pope*, 100 Wash.App. 624, 630, 999 P.2d 51 ("A harmless error analysis is never applicable to the omission of an essential element of the crime in the 'to convict' instruction. Reversal is required."),

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<sup>55</sup> *State v. Cronin*, 142 Wash.2d 568, 14 P.3d 752 (2000); *State v. Bui* consolidated on review with *Cronin*; *State v. Stein*, 144 Wash.2d 236, 27 P.3d 184 (2001); *Neder v. United States*, 527 U.S. 1, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999).

*review denied*, 141 Wash.2d 1018, 10 P.3d 1074 (2000).

## **2. County Did Not Prove Its Claimed Violations by Preponderance of the Evidence**

PCC 1.22.090(G)(2) places the burden on the County to establish that the violations cited in the Notice of Violation to Appellant actually occurred by a preponderance of the evidence<sup>56</sup>, which it failed to do. In legal terms, a preponderance of evidence means that a party has shown that its version of facts, causes, damages, or fault is more likely than not the correct version.<sup>57</sup> The Merriam Webster Legal Dictionary defines “preponderance of the evidence” to be “the standard of proof in most civil cases in which the party bearing the burden of proof must present evidence which is more credible and convincing than that presented by the other party or which shows that the fact to be proven is more probable than not”.

<https://www.merriam-webster.com/legal/preponderance%20of%20the%20evidence>

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<sup>56</sup> PCC 1.22.090(G)(2) (a) “When an appeal is submitted by the recipient of a final enforcement decision or order, the initial burden shall be on the County to prove, by a preponderance of evidence, that the use, activity, or development is not in conformance with the regulations contained in Pierce County Code or the terms of a permit or approval.”

<sup>57</sup> Washington Pattern Instruction Civil 155.03 defines preponderance of the evidence”, stating that a jury must be persuaded that the proposition on which that party has the burden of proof is more probably true than not true. The term “preponderance of the evidence”, means the greater weight of the evidence. Preponderance of the evidence means that the trier must be persuaded, considering all the evidence in the case, that it is more probably true than not true. *State v. Sublett*, 176 Wn.2d 58, 292 P.3d 715 (2012).

The concept of “preponderance of the evidence” can be visualized as a scale representing the burden of proof, with the totality of evidence presented by each side resting on the respective trays on either side of the scale. If the scale tips ever so slightly to one side or the other, the weightier side will prevail. If the scale does not tip toward the side of the party bearing the burden of proof, that party cannot prevail.

As respect to the contracting yard, the record from both the notes of County engineer Jeff Sharp and his description of the property and also from the testimony of County inspector Mr. Howe, that new construction was on-going at the site.<sup>58</sup> The County’s conclusory testimony about claimed “solid waste” violation describes no more than the materials and appearance that are obviously associated with residential construction (trucks, wood scraps, piping, and the such), and nothing more. And the county witness made no distinction from what construction materials would be commonly associated with on-going construction - which the County witness admitted was ongoing on the property, versus what evidence would be required to support a claimed violation of operating an ongoing construction yard. The Deputy Examiner

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<sup>58</sup> TR39:18-23, TR 29:21-23, TR 12:13-14.

erred as the County did not meet its burden in this case.

The sum total of the on-site activity described was equally consistent with ongoing construction taking place as it was of the County's claimed "contractor's yard". Accepting that the scales of justice at this point are equally balanced, the Deputy Examiner had to determine if, how, and to which side, the balance of any other evidence produced at hearing tips the scales. **But** that's all there is to consider. The County presented no other admissible "evidence", meaning the scales of justice are tipped in favor of Appellant, or at most are equally balanced. The County, as the party bearing the burden of proof must, but failed to, present evidence which is more credible and convincing than that presented by the other party or which shows that the fact to be proven is more probable than not. And by failing to present testimony on the specifics of what the County claimed to be solid waste or nuisance as required by the County's own cod- based definitions, the County also did not meet its burden to establish those elements were met as well.

**C. APPEAL SHOULD BE GRANTED AS CLAIMED  
EVIDENCE OBTAINED IN VIOLATION OF  
CONSTITUTION.**

This appeal should be granted based on the County's failed burden alone; in addition, the appeal should also independently be

granted on constitutional grounds as well.

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

Any search of the property owners' property was undertaken without a warrant and was not subject to the "closely guarded exceptions" to the warrant requirement. As such, all searches violate both the Washington and U.S. Constitution. *See State v. Ladson*, 138 Wn.2d 343, 348, 979 P.2d 833, 838 (1999).

The protections of the U.S. Constitution Fourth Amendment and article I, section 7 of the Washington Constitution ***extend to administrative and regulatory searches***<sup>59</sup>. *Camara v. Municipal Court*, 387 U.S. 523, 523-32, 87 S. Ct. 1727, 1727-33, 18 L. Ed. 2d 930, 930-38 (1967). Emphasis added.

Searches conducted for ***administrative*** purposes, whether or not criminal prosecution is anticipated, are governed by the Fourth Amendment. *See, e.g., Michigan v. Clifford*, 464 U.S. 287, 291-93, 104 S. Ct. 641, 646-47, 78 L. Ed. 2d 477, 483-84 (1984) (Fourth Amendment applies to inspection of home that was partially damaged by fire, even when purpose of inspection is to determine fire's origin and no criminal conduct is suspected). Probable cause

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<sup>59</sup> *See* Justice Charles W. Johnson, Article, Survey of Washington Search and Seizure Law: 1998 Update, 22 Seattle U. L. Rev. 337, 529-533 (1998).

must exist even for warrants issued for health and safety inspections. *Seattle v. McCready*, 123 Wn. 2d 260, 280, 868 P.2d 134, 144-45 (1994) (McCready I). Therefore, such searches must either be conducted pursuant to a warrant or fall within one of the narrowly drawn exceptions to the warrant requirement. *Id.*; *Thurston County Rental Owners Ass'n v. Thurston County*, 85 Wn. App. 171, 183, 931 P.2d 208, 215 (1997), review denied, 132 Wn.2d 1010 (1997). Here, all three searches were improper.

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

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

While the County argues against the Examiner enforcing basic constitutional protections, it clearly understands the importance of seeking the accused's voluntary consent to a warrantless entry and interrogation. Whether the County's searches were pursuant to criminal investigations or administrative enforcement, warrants should have been sought and obtained. Since they were not, the

County's unauthorized search undertaken to support the enforcement action violates Appellant's rights under the Washington and United States Constitution, requiring suppression of all evidence and alleged statements obtained as a result of the entry search, including all such references in the County's offered Staff Report and exhibits.

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

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

*Hendrickson*, 129 Wn.2d at 71. When an unconstitutional search or seizure takes place, "any subsequently uncovered evidence becomes fruit of the poisonous tree and must be suppressed." *Ladson*, 138 Wn.2d at 359 (citations omitted). In this case, the County Inspector apparently performed a warrantless search prior to issuing the Notice. The County had the burden but did **not** show that any of the enumerated exceptions to the prohibition on unlawful searches exist.

#### **4. Requirement for Warrant or Exceptions Extend to Civil Enforcements as well.**

The fact that a search is part of an administrative or regulatory program or has a purpose other than criminal prosecution also does **not** affect an individual's reasonable expectation of privacy in the premises being searched. *See Camara*, 387 U.S. at 528-29 (search of home for housing code violations); *See v. Seattle*, 387 U.S. 541, 545-46, 87 S. Ct. 1737, 1740-41, 18 L. Ed. 2d 943, 947-48 (1967) (search of commercial premises for fire code violations). In *Camara*, the U.S. Supreme Court makes it clear that constitutional warrant requirements are **not diminished** merely because the agency (here the County) seeks to enforce health, safety, and welfare codes.

The Supreme Court took pains to extinguish each rationale offered for short-circuiting constitutional protections in an administrative context, such as we have here.<sup>60</sup>

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<sup>60</sup>“ But we cannot agree that the Fourth Amendment interest at stake in these [health safety and welfare] inspection cases are merely ‘peripheral.’ It is surely anomalous to say that the individual and his private property are fully protected by the Fourth Amendment only when the individual is suspected of criminal behavior. (FN6) For instance, even the most law-abiding citizen \*531 has a very tangible interest in limiting the circumstances under which the sanctity of his home may be broken by official authority, for the possibility of criminal entry under the guise of official sanction is a serious threat to personal and family security. And even accepting Frank’s rather remarkable premise, inspections of the kind we are here considering do in fact jeopardize ‘self-protection’ interests of the property owner. Like most regulatory laws, fire, health, and housing codes are enforced by criminal processes. In some cities, discovery of a violation

The final justification suggested for warrantless administrative searches is that the public interest demands such a rule; it is vigorously argued that the health and safety of entire urban populations is dependent upon enforcement of minimum fire, housing, and sanitation standards, and that the only effective means of enforcing such codes is by routine systematized inspection of all physical structures. . . ***But we think this argument misses the mark. The question is not, at this stage at least, whether these inspections may be made, but whether they may be made without a warrant.***

*Camara* at 533.<sup>61</sup> *Emphasis added.* Under either a criminal or administrative search, the state is required to obtain a warrant prior to a search absent specific and “closely guarded” exceptions to the rule. *Michigan v. Clifford*, 464 U.S. 287, 294, 104 S.Ct. 641 (1984).

The protections of the U.S. Constitution Fourth Amendment<sup>62</sup> and

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by the inspector leads to a criminal complaint. Even in cities where discovery of a violation produces only an administrative compliance order, [FN8] refusal to comply is a criminal offense, and the fact of compliance is verified by a second inspection, again without a warrant. [FN9] Finally, as this case demonstrates, refusal to permit an inspection is itself a crime, punishable by fine or even by jail sentence.”

*Camara* at 530-531.

<sup>61</sup> *Camara* at 533 “For example, to say that gambling raids may not be made at the discretion of the police without a warrant is not necessarily to say that gambling raids may never be made. In assessing whether the public interest demands creation of a general exception to the Fourth Amendment’s warrant requirement, the question is not whether the public interest justifies the type of search in question, but whether the authority to search should be evidenced by a warrant, which in turn depends in part upon whether the burden of obtaining a warrant is likely to frustrate the governmental purpose behind the search. See *Schmerber v. State of California*, 384 U.S. 757, 770–771, 86 S.Ct. 1826, 1835–1836, 16 L.Ed.2d 908. It has nowhere been urged that fire, health, and housing code inspection programs could not achieve their goals within confines of a reasonable search warrant requirement. Thus, we do not find the public need argument dispositive.”

<sup>62</sup> As applied to the states via the 14<sup>th</sup> Amendment.

article I, section 7 of the Washington Constitution extend to administrative and regulatory searches<sup>63</sup>. *Camara v. Municipal Court*, 387 U.S. 523, 523-32, 87 S. Ct. 1727, 1727-33, 18 L. Ed. 2d 930, 930-38 (1967).

### **5. County's Searches Not Constitutional**

In the present case, there is ***no evidence*** that the County Inspector's entry on to the private property from which the Inspector's observations were (a) made pursuant to a lawful warrant, or (b) absent a warrant, subject to "specific and "closely guarded" exceptions to the rule requiring an administrative search warrant when entering private property for civil enforcement purposes. Clearly the record lacks proof that the County obtained permission from the actual owner or person with authority for its searches, upon which the County's case is built.

The record shows that for both the April 21, 2017 and November 17, 2017 searches undertaken by Inspector Howe, the County entered onto property owned by the 94 years old owner Mr Daskam.<sup>64</sup> The record shows that the County also knew Mr Daskam "cannot be reached" to give permission for that search. AR 44 and

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<sup>63</sup> See Justice Charles W. Johnson, Article, *Survey of Washington Search and Seizure Law: 1998 Update*, 22 Seattle U. L. Rev. 337, 529-533 (1998).

<sup>64</sup> TR 19:12-18 and TR 23:12-19

AR 142.

Accordingly, the two entries on land, upon which the County relied on for its Notice of Violation were not constitutionally permissible.<sup>65</sup> The Deputy Hearing Examiner erred in not suppressing all evidence obtained as a result of the warrantless entries, without which, the County lacks any basis for the enforcement action.

### **6. Appellant Has Standing to Contest Searches**

Generally, "[a] person has standing to raise constitutional questions when his interest is a 'personal stake in the outcome of the controversy.'" *Marchioro v. Chaney*, 90 Wash.2d 298, 303, 582 P.2d 487 (1978) (internal quotation marks omitted) (quoting *DeFunis v. Odegaard*, 82 Wash.2d 11, 24, 507 P.2d 1169 (1973)).

That is, a person challenging a government action must be

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<sup>65</sup> There were three other searches, but none yielded anything the County relied on. On **March 2, 2017**, Mr Howe testified that he stopped on the road to Appellant's property because he saw the property was posted with "no trespass" signs. AR 41, 142. The most Inspector Howe could describe was that the site was in the "midst of construction" TR 12:13-15. A later visit on what the County describes as **March 7<sup>th</sup> or 9<sup>th</sup>**, Inspector Howe viewed Appellant's site from the Complainant's site. TR 11: 10-13. The most Inspector Howe could see was "recent construction" TR 12: 13-15, and "construction debris", TR 14:3-7. There was no observed evidence of in-operable or extensively damaged vehicles, Garbage, or decaying vegetation. On **April 18, 2017**, County Engineering staffer Sharpe visited Appellant's site – with permission. As a result, Inspector Sharpe recorded he also observed active construction, with machinery and materials and a cleared area for vegetable garden (AR 71 and TR 36:20-24), but he found no grading and fill violation – AR 169, and closed his file. Notably, the County did not present Inspector Sharpe in support of its case.

adversely affected by that action.<sup>66</sup> Thus, in order to challenge an IID search as unconstitutional, at least one of the petitioners in this case must be personally affected by such a search...<sup>67</sup> Appellant was personally affected by view from property, which the County had no consent to enter.

**7. County Presented No Evidence of Affirmative Consent.**

The County did not have affirmative consent of the actual property owners and made no attempts to verify the legitimacy of the written letter upon which it relied for “permission’ for the entry on to land that occurred on the last two of the three visits. And as a result of testimony, the Examiner was aware the letter which supposedly granted permission was **not** from the actual owner. This does not equate to consent. The true standard for determining consent to a warrantless entry is that consent must be **affirmatively given**, it **cannot** be waived by inaction.<sup>68</sup> There are three requirements for establishing a consensual warrantless search: “(1) the consent must be voluntary; (2) the person granting consent must have authority to consent; and (3) the search must

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<sup>66</sup> See *Citizens Council Against Crime v. Bjork*, 84 Wash.2d 891, 893, 529 P.2d 1072 (1975).

<sup>67</sup> *Blomstrom v. Tripp*, 402 P.3d 831, 189 Wash.2d 379, at 391 (Wash., 2017).

<sup>68</sup> See *State v. Walker*, 136 Wash.2d 678, 682-86 (1998).

not exceed the scope of the consent.”<sup>69</sup>

Consent requires affirmative permission to enter the property, not mere acquiescence. Factors in determining consent include: (1) whether the consenting person was in custody; (2) whether officers' guns were drawn; (3) whether the person was told he or she had the right to refuse a request to search; (4) whether the person was told he or she was free to leave; (5) whether Miranda warnings were given; and (6) whether the person was told a search warrant could be obtained.<sup>70</sup> In the present case, not one of the six factors was met by County. The County cannot simply ignore the rules which define consent.<sup>71</sup>

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

Nor do the County’s offered “facts” do not meet the “Open View Doctrine,” or “Plain View Doctrine.”<sup>72</sup> The claimed visual evidence and photos were obtained by the County after inspector unlawfully entered onto private property. The open view doctrine applies to

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<sup>69</sup> *Walker*, 136 Wash.2d at 682, 965 P.2d 1079.

<sup>70</sup> *United States v. Castillo*, 866 F.2d 1071, 1082 (1988).

<sup>71</sup> *United States v. Spires*, 3 F.3d 1234, 1237 (9th Cir. 1993).

<sup>72</sup> The open-view doctrine further states that, “contraband that is viewed when an officer is standing in a lawful vantage point is not protected.” *State v. Neeley*, 113 Wash.App. 100, 109, 52 P.3d 539 (2002)(emphasis added). This doctrine reasons that no ‘search’ has occurred where an officer is lawfully present at a vantage point and detects something by using one or more of his or her senses. *Neeley*, 113 Wash.App. at 109, 52 P.3d 539 (quoting *State v. Cardenas*, 146 Wash.2d 400, 408, 47 P.3d 127, 57 P.3d 1156 (2002), cert. denied, 538 U.S. 912, 123 S.Ct. 1495, 155 L.Ed.2d 236 (2003)).

observations made “while lawfully present at the vantage point.”<sup>73</sup> “It is clear that police with legitimate business may enter areas of the curtilage which are impliedly open.”<sup>74</sup> However, the County’s witness testimony concedes that the County inspector actually intruded onto the private property to investigate alleged violations but lacked permission from the actual property owner to do so. In no way was the County staff/agents/officer operating from a lawful vantage point. Accordingly, the County’s evidence gleaned from the unlawful entry should be suppressed.

**9. Community Caretaking Exception Does Not Apply.**

Finally, the County may resort to the argument that the warrantless entry can be excused via the “community care giving” exception. The facts will not support such a claim. Government agents may enter private property without a warrant when facing exigent circumstances (emergency exception). The exception recognizes the “‘community caretaking’ function and exists so officers can assist citizens and protect property.”<sup>75</sup> The emergency exception justifies a warrantless search when (1) the agent/officer subjectively believes that someone needs assistance for health or

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<sup>73</sup> *State v. Rose*, 128 Wn.2d 388 (1996).

<sup>74</sup> *State v. Seagull*, 95 Wash.2d 898, 902, 632 P.2d 44 (1981).

<sup>75</sup> *State v. Schlieker*, 115 Wash.App. 264, 270, 62 P.3d 520 (2003) (quoting *State v. Menz*, 75 Wash.App. 351, 353, 880 P.2d 48 (1994)).

safety reasons, (2) a reasonable person in the same situation would similarly believe there was a need for assistance, and (3) the need for assistance reasonably relates to the place searched.<sup>76</sup> When analyzing these factors, the agent/officer's actions are viewed according to the situation as it appeared to the officer at the time.<sup>77</sup> No such emergency existed here. Clearly the 'community caretaking' exception does not apply to the facts of this case.

**VI. CONCLUSION AND REQUEST FOR RELIEF.**

Appellant requests that the Court grant this appeal and reverse the Hearing Examiner's Land Use Decision and dismiss the charges. Remand is not the appropriate remedy as the 'evidence' unlawfully viewed cannot be remedied, and without which the County's case fails. RESPECTFULLY SUBMITTED this 17<sup>th</sup> day of October 2019.

GOODSTEIN LAW GROUP PLLC

By: s/Carolyn A. Lake

Carolyn A. Lake, WSBA #13980  
Attorneys for Appellant Gerard

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<sup>76</sup> *State v. Kinzy*, 141 Wash.2d 373, 386-87, 5 P.3d 668 (2000) (quoting *Menz*, 75 Wash.App. at 354, 880 P.2d 48).

<sup>77</sup> *State v. Lynd*, 54 Wash.App. 18, 22, 771 P.2d 770 (1989).

**CERTIFICATE OF SERVICE**

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

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

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DATED this 17th day of October 2019, at Tacoma, Washington.

s/Carolyn A. Lake  
Carolyn A. Lake

# GOODSTEIN LAW GROUP PLLC

October 17, 2019 - 11:05 AM

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