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NO. 53516-5-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

JASON GERARD,
Appellant,

v.

PIERCE COUNTY,
Respondent

BRIEF OF RESPONDENT PIERCE COUNTY

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I. INTRODUCTION

This is a land use appeal filed under the Land Use Petition Act ("LUPA") RCW Chapter 36.70C. Appellant Jason Gerard is appealing a decision of the Pierce County Hearing Examiner ("Examiner") who upheld an administrative decision issued by Pierce County Planning and Public Works Code Enforcement ("Code Enforcement"). The decision was from an appeal of Code Enforcement's action relating to unlawful industrial uses in a rural zone, unlawful vehicle storage, and improperly stored solid waste. Mr. Gerard has a contractor yard, which is an industrial use and only allowed in a R-10 zone with an approved Conditional Use Permit ("CUP"). A CUP has not been approved for Mr. Gerard's property. Mr. Gerard is also storing vehicles in a manner that is not customarily incidental and subordinate to a single-family residence. Vehicle storage not associated with the designated use is not permitted in the R-10 zone. Additionally, Mr. Gerard violates regulations with respect to gross vehicle weight. Lastly, the record shows that there is improperly stored solid waste on the property.

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

otherwise in error.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the Hearing Examiner harmfully engage in an unlawful procedure by admitting the Staff Report?
2. Did Pierce County Code Enforcement violate Mr. Gerard's Constitutional rights?
3. Was the Examiner's Decision supported by substantial evidence?
4. Was the Examiner's Decision an erroneous interpretation of the law?
5. Is the Examiner's Decision a clearly erroneous application of the law to the facts?

III. STATEMENT OF THE CASE

Jason Gerard is the owner of improved property located at 6522 366th Street S, Roy, Washington/tax parcel no. 0217263016 ("the Property"). CP 173. The Property is zoned Rural 10 (R-10). CP 171, 173. In early 2017, Code Enforcement received a complaint about illegal activities on the Property. CP 25, 169-171. Mr. Gerard is the owner of Penetration Dirtworks, LLC. CP 32, 188-192. The LLC was active until October 31, 2017, and the Labor and Industries license was suspended on January 22, 2017. *Id.* The normal expiration date was to be January 25, 2018. CP 188. On March 17, 2017, Mr. Gerard spoke with the Code

Enforcement Officer and admitted to running a contractor's storage yard on the property and storing work vehicles. CP 31, 204.

A Code Enforcement officer viewed the Property on March 9, 2017, from a neighboring property (with consent of that property owner) and confirmed commercial vehicles, construction equipment, construction materials, steel supports, and large plastic pipes being stored on the property as well as approximately 200 cubic yards of improperly stored solid waste. CP 28, 30, 181, 184-187. A second observation of the Property on April 21, 2017, from a neighboring property (with consent of that property owner) confirmed a large area of recently excavated soil, excavating equipment, semi-trailers, large trucks as well as improperly stored solid waste. CP 35-37, 202, 207, 210-212.

Pierce County Code Enforcement again viewed the Property from neighboring property (with consent of that property owner) on November 17, 2017, and confirmed several heavy equipment vehicles, construction materials, and improperly stored solid waste as well as a large dirt berm that had been constructed and significantly obstructed the view from the neighboring parcel. CP 39-40, 202, 249-252. In fact, a large RV had been placed on top of the berm in an apparent effort to further block view of the property. CP 39, 251. Code Enforcement Officers were still able to observe the property and confirm the violations from a different vantage

point. CP 39-40.

At no point in their process did Pierce County Code Enforcement enter Mr. Gerard's property. CP 41. None of Pierce County Code Enforcement's photos were taken with any enhancement (such as a zoom feature). *Id*. All such photos were taken while at a lawful vantage point. CP 27-28, 41. None of Pierce County Code Enforcement's process relied on aerial photography. CP 41.

A Final Notice and Order to Correct and Notice of Violation and Abatement (FNOTC/NOVA) was sent to Mr. Gerard on December 13, 2017. CP 163-165. The FNOTC/NOVA was appealed to the Pierce County Hearing Examiner and a decision was issued on June 18, 2018. CP 161-162, 140-146. According to Pierce County Code ("PCC") § 18A.10.090(B), the R-10 zone is intended to provide for rural uses at a rural density. Contractor yards are an industrial use and are only allowed in a R-10 zone with an approved Conditional Use Permit (CUP) per § 18A.17.020. Pierce County Code § 18A.33.280(B) defines a contractor yard as "an area for construction or contracting business offices, interior or outdoor storage, repair, or maintenance of heavy equipment, vehicles, or construction supplies and materials." Pierce County Code § 18.25.030 defines CUP as "a written decision of the Examiner authorizing a conditional use to locate at a specific location." A CUP has not been

issued for Mr. Gerard's property. CP 27-28, 181. Vehicle storage not associated with a single-family residence is not permitted in the R-10 zone. See PCC §§ 18A.10.090 and 18A.17.020. The vehicles on Mr. Gerard's property are clearly not customarily incidental and subordinate to a residential use and therefore stored improperly. CP 181, 206. Moreover, PCC § 18A.37.080 authorizes the parking of one vehicle up to 30,000 pounds gross vehicle weight on Mr. Gerard's property. Mr. Gerard also violates this regulation. CP 34-39, 163. The improperly stored solid waste is a violation of PCC § 8.08.050(F) CP 163, 181, 206.

On August 15, 2018, a LUPA petition was filed in Thurston County Superior Court under case no. 18-2-04106-34. CP 1-13. Oral argument took place on May 31, 2019. On the same day, Thurston County Superior Court Judge Erik D. Price issued an order stating that the Examiner's decision to overrule Mr. Gerard's objection to the Staff Report was affirmed, and that the Examiner's Decision was supported by substantial evidence, was a correct interpretation of the law, was a correct application of the law to the facts of the case, and was not unconstitutional. CP 126-127. The Examiner's decision was affirmed. *Id.* This timely appeal followed.

IV. ARGUMENT

A. Standard of Review

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

The Court may grant relief to the petitioner only if the petitioner carries the burden of establishing that one of the standards contained in RCW 36.70C.130 has been met. The relevant standards are:

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

RCW 36.70C.130(1). Interpretations of law are reviewed de novo. *Milestone Homes Inc., v. City of Bonney Lake*, 145 Wn. App. 118, 126,

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

B. <u>The Staff Report was lawfully made a part of the record and no objection was sustained</u>

Mr. Gerard objected to the admission of the County's staff report. CP 64-65. The Examiner acknowledged that the staff report is "already a part of the record." *Id.* This is accurate, and reference to staff report as a part of the hearing process is not, by itself, objectionable. The Pierce County Code states that "The Examiner shall receive and examine available relevant information, including environmental documents, conduct public hearings…" PCC § 1.22.080(B). The Pierce County Code goes on to state "Staff reports shall be filed with the Examiner, mailed to

the applicant and appellant, and made available to the public at least five working days prior to the scheduled hearing. Copies shall be provided to the public upon request at the cost of reproduction." PCC § 1.22.100(C). The only remedy contemplated about irregularities in a staff report is a continuance:

> If any person demonstrates to the Examiner that the staff report was not made available or mailed in a timely manner pursuant to subsection C. above, and requests a continuance, the Hearing Examiner may continue the hearing or leave the official record open to a date certain. If no request is made, the right to raise the issue of untimeliness shall be waived.

PCC § 1.22.100(D). The code clearly contemplates that the staff report is the basis for the hearing and does not need to be "admitted."

The Hearing Examiner Rules of Procedure ("HEX Rules") also address the "automatic" admission of the staff report.[1] "The staff report and all written submissions shall be maintained in the official file…." HEX Rule 1.06. "Public hearings are not subject to the evidentiary rules of the court system, but are guided by the concept of due process." HEX Rule 1.08(A). "The staff report and all documents offered from the official County file will be admitted, unless an objection thereto is sustained." HEX Rule 1.08(E)(2). Mr. Gerard made a vague objection ("there's been no request for admission or support for admitting…so we would move to

[1] Attached hereto as Appendix A is a true and correct copy of the Pierce County Office of the Hearing Examiner Rules of Procedure for Hearings

strike those…") and it was not sustained. CP 64-65. Mr. Gerard never articulated any further and/or more particular objection, though he was afforded an opportunity to present such. Mr. Gerard did, in fact, present an otherwise relatively lengthy closing argument. CP 65-67. Washington courts have emphasized the need for procedural safeguards to protect due process rights: "[T]he addition of any procedural safeguards would provide exceedingly greater mitigation against the risk of erroneous deprivation, rather than no safeguards at all." *Post v. City of Tacoma*, 167 Wn. 2d 300, 314, 217 P.3d 1179, 1186 (2009). Mr. Gerard had opportunity to present his own evidence and argue about (and object to) the County's evidence which is framed in the County Code and HEX Rules—the very system of procedural safeguards contemplated in *Post*.

The Examiner has wide latitude to admit evidence: "Evidence, including hearsay evidence, is admissible if in the judgment of the Examiner it is the kind of evidence upon which reasonably prudent persons are accustomed to rely upon in the conduct of their affairs." HEX Rule 1.08(B). Washington courts have discussed hearings with relaxed evidence standards in many contexts. For example, in the context of a driver's license revocation: "[b]y their own provisions, the rules of evidence apply only to court proceedings…[t]his court, which promulgates the rules of evidence, has authority to prescribe rules for

courts, but authority to prescribe rules for administrative proceedings has not been expressly delegated to the judicial branch. RCW 2.04.190." *Ingram v. Dep't of Licensing*, 162 Wash. 2d 514, 525, 173 P.3d 259, 264 (2007). It is nothing unusual for courts to acknowledge the use of a report without subjecting it to the same scrutiny over admission as would happen in court proceedings:

> To expedite the suspension and revocation hearings, RCW 46.20.308(8) relaxes evidentiary rules providing that the "sworn report ... of the law enforcement officer and any other evidence accompanying the report ... and the certifications authorized by the criminal rules for courts of limited jurisdiction" shall be admissible without further evidentiary foundation. Because this statute allows the arresting officer's report to come in as prima facie evidence that the officer had reasonable grounds to believe the driver was under the influence, officers rarely attend the administrative hearings to testify unless they are subpoenaed. It is evident that the Legislature intended the administrative license suspension hearing to be adjudicated in a short span of time.

State v. Vasquez, 148 Wn. 2d 303, 316, 59 P.3d 648, 653–54 (2002). Clearly a vastly different context, but this is analogous to the Pierce County Code's and HEX Rules' relaxed standards.

Finally, the HEX Rules go on to describe the content of the record, which includes the staff report and all accompanying documents, all briefs admitted, and all evidence admitted. Importantly, the staff report is not described as needing to be "admitted" as the other evidence is. It is already a part of the record—already "admitted." Specifically the Rules state:

"The record of a quasi-judicial hearing conducted by the Examiner *shall* include at least the following: …The staff report and all accompanying documents…." HEX Rule 1.16 (emphasis added).

C. Code Enforcement did not violate Mr. Gerard's Constitutional rights

Pursuant to the Fourth Amendment of the U.S. Constitution:

> The Right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. IV. Under the Fourth Amendment, a "search" occurs when the state intrudes upon an area where a person has a reasonable expectation of privacy.

> A Fourth Amendment search occurs where (1) there is a subjective manifestation of privacy in the object searched, and (2) society recognizes that privacy interest as reasonable. *Kyllo v. United States*, 533 U.S. 27, 33, 121 S.Ct. 2038, 150 L.Ed.2d 94 (2001). Where there is no privacy interest there is no search and constitutional considerations are not implicated. See *Centimark Corp*., 129 Wn.App. at 375, 119 P.3d 865.

Dodge City Saloon, Inc. v. Washington State Liquor Control Bd., 168 Wn. App. 388, 397, 288 P.3d 343, 347 (2012).

Pursuant to Article 1, Section 7 of the Washington State Constitution: "No person shall be disturbed in his private affairs, or his home invaded, without authority of law." WA Const. art 1, § 7. Under the

Washington State Constitution, a violation of privacy occurs when the State has unreasonably intruded into a person's private affairs. It is undisputed that these Constitutional prohibitions against intrusions onto private property apply to all government officials and agents. *State v. Vonhof*, 51 Wn App. 33 (1988). However:

> Police officers on legitimate business may enter an area of curtilage which is impliedly open to the public, such as an access route to a house or a walkway leading to a residence. *State v. Seagull*, 95 Wn.2d 898, 902, 632 P.2d 44 (1981); *State v. Ferro*, 64 Wn.App. 181, 183, 824 P.2d 500, review denied, 119 Wn.2d 1005, 832 P.2d 488 (1992).

State v. Chaussee, 72 Wn. App. 704, 708, 866 P.2d 643, 646–47 (1994). As a general rule, government officials conducting legitimate business may enter areas which are "impliedly open" to other members of the public without obtaining a search warrant. *State v. Seagull*, 95 Wn. 2d 898, 902, 632 P.2d 44, 47 (1981).

> The curtilage of a home enjoys heightened Fourth Amendment protection. *State v. Ridgway*, 57 Wn.App. 915, 918, 790 P.2d 1263 (1990). However, a person does not have a reasonable expectation of privacy in areas of the curtilage impliedly open to the public. 57 Wn.App. at 918, 790 P.2d 1263. Thus, an entry by law enforcement officials onto those areas of the curtilage, such as driveways, walkways or access routes leading to a residence, does not constitute a search and does not implicate the Fourth Amendment. *State v. Hoke*, 72 Wn.App. 869, 866 P.2d 670, 673 (1994).

State v. Hornback, 73 Wn. App. 738, 743, 871 P.2d 1075, 1078 (1994).

To determine whether a place is "impliedly open", you look to the totality of the circumstances. *Seagull* at 902.

> If an officer on legitimate business enters an area of the curtilage impliedly open to the public, such as a driveway, walkway, or access route leading to the residence or to the porch of the residence, no privacy interest is invaded. State v. Ferro, 64 Wn.App. 181, 824 P.2d 500, review denied, 119 Wn.2d 1005, 832 P.2d 488 (1992); see also, State v. Seagull, 95 Wn.2d 898, 902, 632 P.2d 44 (1981); State v. Petty, 48 Wn.App. 615, 618, 740 P.2d 879, review denied, 109 Wn.2d 1012 (1987). The Seagull court aptly described the limits placed on an official entering an area of the curtilage, stating: "An officer is permitted the same license to intrude as a reasonably respectful citizen." Seagull, 95 Wn.2d at 902, 632 P.2d 44.

State v. Hoke, 72 Wn. App. 869, 874, 866 P.2d 670, 673 (1994). Examples of legitimate business include speaking to the homeowner about a complaint, educating the owner about code requirements and how to apply for a permit.

Mr. Gerard's argument that Pierce County violated Mr. Gerard's privacy rights in any way—and the arguments stemming from that assertion—is false. Code Enforcement officers did not search the property or any buildings on the property, these arguments are irrelevant, and cannot be made true by mere *ipse dixit* assertions. Mr. Howe testified that he (and Mr. Gain on November 17, 2017) did not search the property or any buildings on the property. CP 27-28, 39-41, 202.

Code Enforcement simply did not access Mr. Gerard's property.

All photos were taken from lawful vantage points, including neighboring properties with the consent of those property owners. CP 27-28, 39-41, 202. No aerial photographs were used in the Code Enforcement investigation. CP 41. The record very clearly demonstrates there was no search and there were no constitutional violations.[2]

There have been small irregularities elicited regarding the identity of neighboring property owners giving such consent, but the record is clear that Code Enforcement obtained consent from the neighboring property owners or agents thereof. CP 27, 35-37, 39-40, 50, 202. Mr. Gerard raises speculative questions about the permission obtained from the neighboring property owners. Not only is the consent supported by the record, but Mr. Gerard does not have standing to assert the rights of neighboring property owners. "[A] person challenging a government action must be adversely affected by that action. See *Citizens Council Against Crime v. Bjork*, 84 Wn.2d 891, 893, 529 P.2d 1072 (1975)." *Blomstrom v. Tripp*, 189 Wn. 2d 379, 391, 402 P.3d 831, 837 (2017). Mr. Gerard may ultimately have been *impacted* by the County's ability to view his property from a neighboring parcel—that is entirely distinct from being *adversely affected* by the act of the County entering the neighboring

[2] As such, Respondent submits that direct response to arguments about warrant requirements and exceptions thereto are unnecessary and not in the interest of judicial economy.

property.

D. Mr. Gerard has not established that one of the other standards contained in RCW 36.70C.130 has been met

1. The land use decision was supported by evidence that is substantial.

"Substantial evidence," the absence of which would require reversal of an administrative decision on appeal, is evidence sufficient to persuade an unprejudiced, rational person that a finding is true. *Bayfield Resources Co. v. Western Washington Growth Management Hearings Bd.*, 158 Wn.App. 866, 244 P.3d 412 (2010). Mr. Gerard's contention that the findings are not supported by substantial evidence relies exclusively on his attempt to have this Court exclude the staff report and find Code Enforcement's actions unconstitutional. Additionally, the Examiner's findings are supported by the testimony of the Code Enforcement Officer. CP 24-56.

Mr. Gerard also argues that the evidence was not substantial in that the County failed to "prove each element of the claimed violation…." Appellant's Opening Br. 24. This is not the correct standard for a LUPA analysis and all cases cited by Appellant are criminal cases. The only appropriate analysis in this context is whether the decision is "supported by evidence that is substantial when viewed in light of the whole record

before the court." RCW 36.70C.130(1)(c).

2. *The land use decision was a correct interpretation of the law.*

A court may overturn a land use decision that is an erroneous interpretation of the law, after allowing for such deference as is due the construction of a law by a local jurisdiction with expertise; this standard does not require a court to give complete deference, but rather, such deference as is due. *Washington State Dept. of Transp. v. City of Seattle* 192 Wn.App. 824, 368 P.3d 251 (2016). The Examiner concluded that Mr. Gerard was in violation of multiple aspects of County zoning and nuisance code. The Pierce County Code has clear requirements and constraints and the examiner correctly interpreted their plain language. The Examiner clearly articulated this interpretation in Findings 4, 9, and 10. CP 143-144.

3. *The land use decision was a correct application of the law to the facts.*

A land use decision is a clearly erroneous application of the law to the facts, so as to warrant reversal of the decision when the reviewing court on the record is left with the definite and firm conviction that a mistake has been committed. *Washington State Dept. of Transp. v. City of Seattle*, 192 Wn.App. 824, 368 P.3d 251 (2016). Mr. Gerard does not clearly identify the allegedly problematic applications of law to facts. The Examiner's decision appropriately reviewed the facts in detailed and

careful findings and concluded that Mr. Gerard was in violation of zoning, vehicle storage laws, and solid waste laws. CP 143-145.

E. Pierce County is entitled to reasonable attorney's fees

If the Hearing Examiner's decision is upheld, the County is entitled to costs and reasonable attorney fees pursuant to RCW 4.84.370. Under applicable law, the County, as the prevailing party, is entitled to an award of reasonable attorneys' fees and costs associated with defending this appeal. *Bellevue Farm Owners Association v. State of Washington Shorelines Hearing Board*, 100 Wn. App. 341, 365-366, 997 P.2d 380 (2000). Per RCW 4.84.370(1), reasonable attorney fees and costs shall be awarded to the prevailing party on appeal only if that party also prevailed in all prior proceedings. 100 Wn App. 365-366. Mr. Gerard did not prevail before the Pierce County Hearing Examiner or in Thurston County Superior Court and is therefore not eligible for an award of costs and attorney fees under RCW 4.84.370.

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

V. CONCLUSION

Mr. Gerard has not met his burden of showing that the Examiner's decision was not based upon substantial evidence or was an erroneous

interpretation or application of the law. Mr. Gerard's constitutional allegations against Code Enforcement staff are either not supported by the facts in this case or not supported by relevant legal authority and analysis. Mr. Gerard has not met his burden. The Examiner's decision should be upheld and the County is entitled to an award of costs and reasonable attorney's fees.

DATED this 18th day of November, 2019.

MARY E. ROBNETT
Prosecuting Attorney

s/ David C. Owen
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CERTIFICATE OF SERVICE

The undersigned declares that I am over the age of 18 years, not a party to this action, and competent to be a witness herein. On November 18, 2019, I caused a copy of the foregoing to be served on all parties as follows:

Carolyn Lake Goodstein Law Group 501 South G Street Tacoma, WA 98405	☒ by United States First Class Mail ☐ by ABC Legal Messenger ☐ by Electronic Mail ☐ by Federal Express/Express Mail ☒ by ECF

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

DATED at Tacoma, Washington, this 18th day of November, 2019.

s/ Jennifer L. Crocker
JENNIFER L. CROCKER
Legal Assistant
jennifer.crocker@piercecountywa.gov

APPENDIX A

PIERCE COUNTY

OFFICE OF THE HEARING EXAMINER

RULES OF PROCEDURE FOR HEARINGS

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Revised November, 2014

GENERALLY APPLICABLE RULES

1.01 **AUTHORITY**. These rules are adopted pursuant to the authority set forth in Section 1.22.080(D) of the Pierce County Code and apply to quasi-judicial hearings conducted by the Pierce County Hearing Examiner. The Hearing Examiner's authority is set forth in Chapter 1.22 of the Pierce County Code entitled "The Pierce County Hearing Examiner Code." These rules supplement and must be read together with Chapter 1.22 of the Pierce County Code, and may be amended from time to time. Copies of these rules are available at the Examiner's office, Office of the Pierce County Planning and Land Services (PALS) at the Pierce County Annex, and Office of the Pierce County Council.

The Hearing Examiner's jurisdiction is limited to those matters specifically identified in the Pierce County Code or assigned to the Examiner by the Pierce County Council.

1.02 **EX-PARTE COMMUNICATIONS**. Any communication between any participant in a hearing and the Examiner that occurs outside of the hearing and in the absence of the other participants is an ex-parte communication.

A. No person shall communicate ex-parte directly or indirectly with the Examiner concerning the merits or facts of any matter assigned to or under consideration by the Examiner.

B. This rule does not prohibit ex-parte communications about procedural matters, nor does it apply to written submissions made before the record is closed and available to all participants.

1.03 **DISQUALIFICATION OF HEARING EXAMINER**. Any person acting as Hearing Examiner is subject to disqualification for bias, prejudice, conflict of interest, or any other cause for which a judge can be disqualified under the Code of Judicial Conduct.

A. Whenever the Examiner believes that his or her relationship to participants or financial interest in the subject of hearing create the appearance that the proceedings will not be fair the Examiner shall either:

1. Voluntarily step down from the case; or

2. Disclose the relationship or interest on the record and state that he or she has a bona fide conviction that the interest or relationship will not interfere with the rendering of an impartial decision.

B. Any party or interested person may request the Examiner to disqualify himself or herself as soon as reasonably possible upon discovering grounds for disqualification. The Examiner shall determine whether to grant the request, stating facts and reasons for the determination.

C. The fact that an Examiner has considered the same or a similar proposal in another hearing, has made a ruling adverse to the interest of a party in the present or another hearing, or has considered and ruled upon the same or similar issue in the same or similar context shall not be a sole basis for disqualification.

1.05 FILING AND SERVICE OF DOCUMENTS

A. In all cases, written materials and exhibits should be submitted in advance of the hearing.

1. In land use cases, written materials submitted in advance of a hearing may be filed with the Hearing Examiner's office, 902 South 10th Street, Tacoma, Washington, 98405, or at Pierce County Planning and Land Services at the Pierce County Annex, 2401 South 35th Street, Tacoma, Washington, 98409. Materials may be submitted via electronic mail, via facsimile (with original mailed or submitted at the hearing), personally delivered, or sent by mail. If the materials exceed 10 pages in length, the materials must be submitted via mail or personally delivered.

2. In non-land uses cases, the applicant should follow the Department's instructions regarding the submittal of materials. For example, on animal control and business licensing cases, materials and exhibits should be submitted to the Auditor's office which will provide copies to the Hearing Examiner.

B. Documents required to be served on other participants may be personally delivered, transmitted by facsimile or electronic mail, or sent by mail.

C. Authorized documents submitted subsequent to the hearing may be filed in the same manner.

1.06 OFFICIAL HEARING FILE

The staff report and all written submissions shall be maintained in the official file. The official file shall be available for public inspection and copying during normal

business hours at the Examiner's office. The Examiner's office may charge a reasonable fee to reimburse for the cost of document copying.

1.07 HEARING DATE/CONTINUANCE

Hearings will normally be held at the time and place specified in the notice thereof. PALS or the Examiner may continue the scheduled hearing for good cause shown.

1.08 EVIDENCE

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

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

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

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

E. Exhibits

1. Documents, photographs, drawings, and physical evidence may be offered as exhibits and each will be assigned an exhibit number. Exhibits offered will be retained until after a final decision is rendered and all appeal proceedings, if any, have been resolved.

2. The staff report and all documents offered from the official County file will be admitted, unless an objection thereto is sustained.

3. Documentary evidence may be received in the form of copies of relevant excerpts from larger documents.

4. Persons desiring to introduce letters or written documents should present the original to the Examiner and provide copies to County staff and the applicant/appellant.

5. Applicants submitting written documents shall submit the original to the Examiner, a copy to County staff, and a copy to any appellants.

1.09 TESTIMONY

A. All oral testimony shall be taken under oath or affirmation.

B. The Examiner may impose reasonable limitations on the nature and length of testimony. In so doing, the Examiner shall give consideration to:

1. Expeditious completion of the hearing;

2. Providing parties of record a fair opportunity to present their cases;

3. Providing an opportunity for all members of the public to be heard when the matter is scheduled for hearing, or when public testimony is scheduled.

C. Subject to the Examiner's approval, and where the rights of the participants will not be prejudiced, testimony of a witness may be taken by deposition or by electronic means such as a speaker telephone or computer.

D. Attorneys presenting legal arguments need not be sworn. Arguments made by attorneys are not considered evidence.

1.10 CROSS-EXAMINATION

In accordance with Section 1.22.110(E) of the Pierce County Code, the Examiner shall offer the opportunity to all parties or their counsel to cross-examine expert witnesses, including County staff. No combative, rude, or degrading questioning will be allowed. In order to achieve efficiency the Examiner may:

A. Require or permit parties and interested persons to express their areas of concern to the Examiner for the Examiner to ask the appropriate questions of the witness;

B. Establish reasonable time limits on cross-examination consistent with the requirements of due process;

C. Allow concurrent cross-examination of two or more witnesses who have testified on the same subject matter.

D. Allow cross-examination of non-experts or members of the public when in the opinion of the Examiner such cross-examination will substantially assist in the creation of a complete record, and will not discourage members of the public from testifying.

E. Encourage rebuttal evidence to respond to both expert and non-expert testimony as an alternative to cross examination.

1.11 CONTINUATION FOR RE-OPENING HEARING/LEAVING RECORD OPEN

A. Every effort shall be made to complete the hearing within the allotted time on the scheduled date. If such is not possible, the Examiner may continue the hearing for completion on a future date. When the Examiner specifies the date, time, and place of the continuation of the hearing prior to recessing the hearing, no further public notice is required. If the announced date, time, or place is changed or determined subsequent to recess, all parties of record (persons who print their name and address on the sign-up sheet) will be sent written notice via mail or electronic mail.

B. The Examiner may leave the record open for the receipt of additional requested information or legal briefing, to allow participants to respond in writing to issues raised at the hearing, for evidence not available at the date of the hearing, or for other good reason.

C. After closing the record the Examiner may re-open the hearing for good cause shown at any time prior to the issuance of a decision or decision on reconsideration. The Examiner at any time may re-open the hearing if he or she becomes aware that the decision was based on fraudulent evidence, misrepresentation, or other misconduct by a party of record; or for any similar reason which would require reopening the hearing in the interest of justice.

D. Where through mistake, misconception of facts, or erroneous application of law the Examiner issues a decision which he or she recognizes may be in error, the Examiner may, prior to the expiration of the appeal period and after due and prompt notice to parties of record, reconvene the hearing for the purpose of considering and correcting the error. Following the hearing, the Examiner will issue a new final decision which will restart the appeal time period.

1.12 SITE VISIT

A. The Examiner may visit the site either before or after a hearing. If the Examiner conducts a post hearing site inspection, the hearing record will not close until the inspection is completed.

B. Unless authorized by the Examiner, no parties of record may accompany the Examiner on a site visit.

C. 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 that were the subject of substantial testimony and/or evidence.

D. If the site visit requires entry into or around a private residence, the Examiner's office will schedule an appointment with the occupant or property owner who may be present on the premises during the site visit. No ex-parte contact may occur during the site visit. If the owner, occupant, or their representatives attempt to discuss the case, the Examiner will leave the premises and advise the parties of the reason why the site visit was not completed.

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 may 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 and is not intended to be a verbatim transcript of the testimony.

1.14 FAILURE TO APPEAR

A. If an applicant/appellant fails to appear at a regularly scheduled hearing, an order may 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, 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

Public 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 hearing. The Examiner shall control the course of proceedings. In cases involving a land use permit application, the following order will be followed unless otherwise directed by the Examiner.

A. Presentation of the Staff Report by County staff.

B. Presentation by the applicant or their representatives.

C. Statements by persons in support of the application.

D. Statements by persons who oppose the application, or who have questions or concerns.

E. Response by the applicant to include answers to questions.

F. Response by County staff.

1.16 CONTENT OF RECORD

The record of a quasi-judicial hearing conducted by the Examiner shall include at least the following:

A. All public notices and any amendments thereto;

B. The staff report and all accompanying documents;

C. All briefs, and memoranda admitted;

D. All documentary or physical evidence admitted;

E. Electronic recording of the proceedings;

F. The Hearing Examiner's findings, conclusions, and decision together with any other rulings made in the matter.

1.17 PUBLIC PARTICIPATION AND PRIVATE ORGANIZATION PRESENTATIONS

A. Members of the public are invited and encouraged to express their views and to offer factual testimony and exhibits in cases involving a land use permit application. Public testimony may be presented orally, in writing, or both. Written public testimony may be submitted either in advance of or during the hearing. Copies of any written testimony submitted to the Examiner should also be submitted to the County and the applicant/appellant. The Examiner may leave the record open to provide an opportunity for written responses to evidence and testimony presented by other participants. The County and the applicant/appellant may respond to such written responses.

B. Whenever the position of any formal or informal organization is to be presented, the organization should designate a representative with authority to coordinate the presentation and to speak for the group. Any communication with the organization by the Examiner or any party of record should be through the designated representative. Organized presentations by neighborhood groups are encouraged since formal presentations with designated speakers covering specific topics prevent repetitious testimony.

C. If the designated representative notifies the Examiner in advance of the hearing of an organized presentation, the Examiner will allow an uninterrupted presentation by the organization to the extent practical.

1.18 PRE-HEARING CONFERENCES

A. Pre-hearing conferences promote efficient case management of complex cases by providing an informal process for early identification of issues, limitation of issues, and resolution of procedural matters. Evidence generally will not be received at a pre-hearing conference except where necessary for the Examiner to rule on a motion.

B. The Examiner on motion of any party, including Pierce County, or on the Examiner's own motion, may convene a pre-hearing conference to:

1. Identify, clarify, limit, or simplify issues;

2. Hear and consider pre-hearing motions;

3. Schedule hearings, identify parties and expert witnesses, determine the order of and limits upon testimony, obtain stipulations as to fact and law, identify and admit or reject exhibits, order discovery, and consider and act upon any other matter which may assure an efficient and orderly hearing. A request for a pre-hearing conference should be made to the Examiner as soon as the need is recognized and should be at least 21 days prior to the scheduled hearing date. The request should include the reasons why a pre-hearing conference is necessary and identify any issues or motions. Parties receiving timely notice of a pre-hearing conference should identify at the conference any motions not previously made which he/she intends to make. Parties or interested persons may also file timely written pre-hearing motions for consideration at the pre-hearing conference. Failure to make or disclose a motion which could have been brought at the pre-hearing conference may be grounds for its denial when made.

C. Following a pre-hearing conference the Examiner shall issue an order specifying all items agreed to or decided upon. The order shall be binding upon all parties and interested persons who received timely notice of the conference.

1.19 SUBPOENAS

Per PCC 1.22.110.D. the Examiner may require County staff to appear at the Public Hearing. For subpoenas for other persons, see PCC 1.22.080.C, "Examiner - Powers and Duties- Subpoena Authority."

1.20 MOTIONS

A. An application to the Examiner for an order shall be by motion, which unless made during a hearing shall be in writing, state with particularity the grounds therefor, and set forth the relief sought. Each written motion shall have appended to it the order which the motion seeks.

B. For motions for continuance or for scheduling changes or other motions that are likely to be uncontested, the moving party shall affirmatively seek the stipulation of all parties and present a stipulated order wherever possible.

C. If the motion is contested, any party may request that the Examiner hold a motion hearing. At a motion hearing the Examiner will consider the arguments of the parties, but will not take evidence. Unless a motion hearing is requested by one or more parties or the Examiner independently sets a motion hearing date, the Examiner will normally decide the motion exclusively on the parties' written submissions. Where any party requests a motion hearing that party shall procure from PALS and the Examiner an available date for the motion hearing and prepare a note that sets the time, date, and location of the motion hearing. The moving party shall note the motion for hearing at the time and date deemed by the Examiner and PALS to be available for that purpose. The motion, order, and note for motion hearing shall then be filed and served. The Examiner will decide whether or not a motion hearing will be held and notify the parties accordingly. Motion hearings may occur telephonically.

D. Unless an order provides otherwise, the following schedule governs all written motions (including any supporting affidavits, memoranda of law, or other documentation):

1. All responses to any motions shall be filed and served ten calendar days from the date the motion is received. The moving party shall then have seven calendar days from receipt of the response to file and serve a reply.

2. In exigent or exceptional circumstances a party may at any time request the Examiner to modify the above schedules by requesting a scheduling conference (which may be telephonic) with the Examiner.

E. The Examiner will decide a motion on the written record unless he or she orders a motion hearing.

1.21 MISCELLANEOUS

A. The Examiner may invite parties to submit proposed findings and conclusions on either the entire matter or upon a specific issue, either in advance of or following the close of the hearing. Such proposed findings and conclusions will be made exhibits to the record.

B. In complex cases the Examiner may issue and circulate a preliminary decision to parties of record and allow a reasonable time to submit written comments.

1.22 MEDIATION

A. Mediation is a process by which two or more parties including the applicant/appellant and Pierce County staff with the assistance of an impartial person (the mediator) attempt to reach a full or partial agreement on a disputed matter. Persons participate in the mediation process only if and only for as long as they voluntarily choose to do so. A participant is bound by the outcome of the mediation process only if that person or his or her duly designated representative signs the mediation agreement. Payment of mediation costs shall be apportioned by agreement of the parties.

B. The Examiner upon his or her own motion or upon request by the County, the applicant/appellant, or party of record may refer a matter to mediation. The request for mediation shall identify with reasonable specificity the application or appeal to which it applies and the scope of the mediation proposed. No party of record is obliged to respond to a request for mediation. No inferences shall be drawn from a refusal to participate in mediation or the failure to respond to a request for mediation.

C. A request for mediation or agreement to participate in mediation by the applicant/appellant shall constitute an agreement to extend all time limits applicable to the review and hearing process.

D. A mediator may be selected by the parties to the mediation, or upon request, the Examiner will appoint a deputy hearing examiner to conduct the mediation.

E. All agreements resulting from mediation shall be reduced to writing by the mediator and signed by the persons who have agreed thereto or their representatives.

F. If the mediated agreement resolves all issues concerning a matter on appeal, the mediated agreement shall include a stipulation for entry of an order dismissing the appeal. If a mediated agreement resolves some, but not all issues, or is not agreed to by all parties to the appeal, the agreement shall be binding only upon those parties who have agreed thereto with respect to the issues resolved through mediation.

G. For matters other than appeals the Examiner shall accord substantial weight to the mediated agreement in resolving issues between or among the parties to the mediated agreement, and shall implement said agreement unless clearly erroneous. However, the mediated agreement does not obviate the need for nor limit the scope of any public hearing required by law. The Examiner retains the authority to approve, disapprove, or modify the mediated agreement.

H. With respect to parties or persons who did not agree to the mediated agreement or participate in the mediation, the Examiner shall consider the mediated agreement only as evidence that the mediated resolution may be feasible or reasonable. Such does not preclude any party or person not bound by the agreement from introducing evidence and argument disputing the reasonableness of the agreement or proposing an alternative resolution of the dispute.

PIERCE COUNTY PROSECUTING ATTORNEY CIVIL DIVISION

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Transmittal Information

Filed with Court:	Court of Appeals Division II
Appellate Court Case Number:	53516-5
Appellate Court Case Title:	Jason Gerard, Appellant v. Pierce County, Respondent
Superior Court Case Number:	18-2-04106-3

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