

FILED  
Court of Appeals  
Division II  
State of Washington  
3/11/2020 10:23 AM  
NO. 53516-5-II

COURT OF APPEALS DIVISION II  
OF THE STATE OF WASHINGTON

---

JASON GERARD,

Appellant,

vs.

PIERCE COUNTY,

Respondent.

---

REPLY BRIEF OF APPELLANT JASON GERARD

---

CAROLYN A. LAKE,  
WSBA #13980  
Attorney for Appellant Gerard  
Goodstein Law Group PLLC  
501 South G Street  
Tacoma, Washington 98405  
(253) 779-4000

TABLE OF CONTENTS

**TABLE OF AUTHORITIES.....ii**

**I. County Violated Mr. Gerard’s Due Process By ‘Accepting’ the County’s Staff Report with No HE Review & No Meaningful Opportunity to object by Appellant ..... 2**

**II. County’s Two Views into Gerard Property Were Illegal Searches Performed without Warrant, or Consent, and No Facts Support Any Warrant Exception Exists. .... 5**

    A. County Searches Unconstitutional ..... 5

    B. Appellant Gerard Unquestionably Has Standing. ....8

**III. Alleged Violations Lack Substantial Evidence in the Record & Appeal Should be Granted..... 10**

    A. No Substantial Evidence Exists in The Record to Support Any Violation..... 10

    B. Record Lacks Substantial Evidence in the Record to Support Solid Waste, Gross Vehicle & alleged Contractor Storage Yard Violations..... 12

        1. No Substantial Evidence Supports Solid Waste Violation..... 12

        2. No evidence in Support of Gross Vehicle Weight.. 13

        3. No Substantial evidence that Appellant Gerard Operated a Contractor Yard. .... 14

**IV. Conclusion..... 16**

TABLE OF AUTHORITIES

CASES

*Baker v. Carr*, 369 U.S. 186, 204 (1962)..... 9

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

*Callegod v. Washington State Patrol*, 84 Wn. App. 663, 673, 929 P.2d 510, rev. denied, 132 Wn.2d 1004, 939 P.2d 215 (1997)..... 15

*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

*City of Redmond v. Central Puget Sound Growth Management Hearings Bd.*, 136 Wn.2d 38, 959 P.2d 1091 (1998)..... 14

*DeFunis v. Odegaard*, 82 Wn. 2d 11, 24 (Wash. 1973) ..... 9

*Flast v. Cohen*, 392 U.S. 83, 99, 20 L.Ed.2d 947, 88 S.Ct. 1942 (1968) ..... 8

*Hays v. Wilson*, 17 Wn.2d 670, 137 P.2d 105 (1943)..... 9

*Hill v Garda CL NW Inc*, 394 P3rd 390, WA St Crt App 2017 ..... 13

*In re S.M.*, 9 Wn. App. 2d 325 (Wash. Ct. App. 2019) ..... 3

*Johnson v. City of Seattle*, 184 Wash. App. 8, 18 (Wash. Ct. App. 2014) ..... 3

*Mathews v. Eldridge*, 424 U.S. 319, 333, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976)..... 3

*Michigan v. Clifford*, 464 U.S. 287, 291-93, 104 S. Ct. 641, 646-47, 78 L. Ed. 2d 477, 483-84 (1984)..... 5

*Post v. City of Tacoma*, 167 Wash.2d 300, 313, 217 P.3d 1179 (2009) ..... 3

*State v. Hendrickson*, 129 Wn.2d 61, 70, 917 P.2d 563 (1996)..... 8

*State v. Hornback*, 73 Wn. App. 738, 743, 871 P.2d 1075, 1078 (1994) ..... 7

*State v. Human Relations Research Foundation*, 64 Wn.2d 262, 269, 391 P.2d 513 (1964) ..... 9

*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)..... 5

STATUTES

RCW 36.70C.130(1)..... 10

RCW 36.70C.130(1)(c) ..... 14, 16

RCW 70.95.030(22)..... 12

RCW 70.95.030(28)..... 12

PIERCE COUNTY CODE

PCC 18.140.050 ..... 10  
PCC 8.08.030 ..... 12

RULES

HEX Rule 1.08(A) ..... 3  
HEX Rule 1.08(E)(2)..... 3

CONSTITUTIONAL PROVISIONS

Article I, Section 7 of the Washington Constitution..... 2, 5  
U.S. Constitution Fourth Amendment ..... 2, 5

This appeal of Appellant Jason Gerard should be granted because (1) the Pierce County Hearing Examiner (“HE”) violated Mr Gerard’s due process by admitting the 122-page County Staff Report without any meaningful review by the HE nor any meaningful opportunity to object by Gerard. In addition, (2) the County Officer’s view of Mr. Gerard’s property on two of the three enforcement visits was from an illegal vantage point, where the County Officer had neither a warrant nor consent to allow entry, and Mr. Gerard has standing to object. Further, (3) no substantial evidence exists in the record to support any violation, once any ‘evidence’ is properly excluded based on the County’s faulty due process and illegal searches. Last, (4) even setting aside the proper exclusion of ‘evidence,’ the County still lacks any evidence in this record to support its claims of (a) solid waste, (b) vehicle over 30,000 lbs weight and (c) contractor storage yard violations, since nowhere does the County link what was claimed to be viewed on site to the actual definition of “solid waste” as contained in the County Code, there is zero testimony regarding the weight of any vehicle alleged to be on Mr. Gerard’s property, and the evidence presented is more consistent with on-going construction of a residential home and accessory uses, than of a contractor’s yard, as

the County claims.

**I. County Violated Mr. Gerard’s Due Process By ‘Accepting’ the County’s Staff Report with No HE Review & No Meaningful Opportunity to object by Appellant**

The County’s defense for its action of allowing wholesale, unconstitutional, and as described by the County, “automatic”<sup>1</sup> admission of the voluminous County Staff Report is to cite to various sections of the County’s internal HE administrative rules. More is required. First, the U.S. Constitution Fourth Amendment and Article I, Section 7 of the Washington Constitution require due process safeguards, and trump any local administrative rules, which are inconsistent.<sup>2</sup>

Next, even the HE Rules cited by the County do not support the County’s claim that the Rules allow “automatic” admission of the Staff Report<sup>3</sup>. Read correctly, the cited Rules implicitly require the HE to undertake some level of consideration of the offered materials, before allowing admission, which was not undertaken here. The County mistakenly relies on the following HE Rules:

---

<sup>1</sup> County Response Brief at 8

<sup>2</sup> Any grant of police power to local government is subject to constitutional limitation, which is judicially enforced. *Biggers v. City of Bainbridge Island*, 162 Wash.2d 683, 169 P.3d 14, 17–19 (2007).

<sup>3</sup> County Response Brief at 8, “The Hearing Examiner Rules of Procedure (“HEX Rules”) also address the “automatic” admission of the staff report” Emphasis provided.

- “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), and
- “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).

The cited HEX Rule 1.08(E)(2) expressly refers to admission “unless an objection there to is sustained,” which by its clear language anticipates that objections to admission can be made, which the HE should consider and rule on. Likewise, the language of HEX Rule 1.08(A) requires “due process” to be applied. In turn, due process requires a meaningful opportunity for the Appellant to object and the HE to rule, prior to admission of evidence.<sup>4</sup> That process did not occur here.

The County erroneously claims that Appellant was allowed to object and that the objection was not sustained.<sup>5</sup> Not true. Here is

---

<sup>4</sup> “[T]he fundamental requirement of 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), as quoted in *In re S.M.*, 9 Wn. App. 2d 325 (Wash. Ct. App. 2019). “A party’s opportunity to be heard must be meaningful both in time and manner. *Mathews v. Eldridge*, 424 U.S. 319, 333, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976).” As quoted in *Johnson v. City of Seattle*, 184 Wash. App. 8, 18 (Wash. Ct. App. 2014), where due process violation found, “Once cited, Johnson had no opportunity to present his defense and was provided no procedural safeguards. Johnson, like Post, could not present his defense to the hearing examiner. See 167 Wash.2d at 312–13, 217 P.3d 1179.”

<sup>5</sup> Mr. Gerard made a vague objection (“there’s been no request for admission or support for admitting...so we would move to strike those...”) and it was not sustained. CP 64-65.

the actual exchange. 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>6</sup> and moved to strike those exhibits and the County’s Staff Report.<sup>7</sup> The Deputy Examiner claimed the Staff Report “was already part of the record”<sup>8</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?

**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>9</sup>

The Deputy Examiner stated he would address Appellant’s objections in his written decision, but he failed to do so in any way<sup>10</sup>. While it may be accurate that Washington courts have discussed hearings with *relaxed* evidence standards in many contexts<sup>11</sup>, relaxed standard do not mean *the absence of any due process* standards at all, as was done here. The HE was required to

---

<sup>6</sup> CP 64. TR 48:17-23

<sup>7</sup> CP 64. TR 48:17–25.

<sup>8</sup> CP 64- 65. TR 48:25-49:11.

<sup>9</sup> CP64-65. TR 48:17-49:11.

<sup>10</sup> CP 141-146. AR 6-11

<sup>11</sup> County Brief at 14.

undertake at least some measure of consideration of offered items before admission, which was not done here. The HE erred in admitting the Staff Report.

**II. County's Two Views into Gerard Property Were Illegal Searches Performed without Warrant, or Consent, and No Facts Support Any Warrant Exception Exists.**

**A. County Searches Unconstitutional**

The County's two views into Appellant Gerard's property on April 21 and November 17, 2017 were illegal searches performed without warrant, or consent, and no facts support any warrant exception exists.<sup>12</sup> The County makes no claim that it obtained an administrative warrant for its entry's onto the 'neighboring property' from which gathered evidence alleged to be against Appellant.

The County also lacked consent for entry from the actual owner of the 'neighboring property'. As an example of its lack of vigor in

---

<sup>12</sup> 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>12</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). 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, the searches were improper.

abiding by constitutional protections, the County dismissively characterizes the lack of consent to enter as “small irregularities elicited regarding the identity of neighboring property owners giving such consent.”<sup>13</sup>

First, the County incorrectly describes that it had the “consent of the property owner” for the April 21 and November 17, 2017 visits.<sup>14</sup> But testimony from the Complainant who accompanied the Officer proved that wasn’t true. 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>15</sup> and that his son had written the “permission letter upon which the County relied.<sup>16</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.

Next, contrary to the County’s claims, the ‘neighboring property’ from which the County Officer viewed Appellant Gerard’s property to collect alleged ‘evidence’ in support of its enforcement action,

---

<sup>13</sup> County Brief at 14.

<sup>14</sup> County Brief at 3.

<sup>15</sup> CP 61. TR 45:13-20.

<sup>16</sup> CP 61. TR 45:14-16.

was not ‘impliedly open’.<sup>17</sup> There is ***no evidence in the record*** that the County’s Officer’s location was on “areas of the curtilage, such as driveways, walkways or access routes leading to a residence” when he peered into Appellant’s property on either of the two site visits to the neighboring property.<sup>18</sup>

Nor was the County Officer’s purpose for being on the ‘neighboring property’ benign, like the examples cited by the County, “Examples...include speaking to the homeowner about a complaint, educating the owner about code requirements and how to apply for a permit.”<sup>19</sup> The Officer undisputedly was present on April 21 2017 and November 17, 2017 solely to collect evidence against Mr. Gerard.<sup>20</sup>

Instead, under the facts of this record, the Officer’s view from

---

<sup>17</sup> County Brief at 12, citing *State v. Hornback*, 73 Wn. App. 738, 743, 871 P.2d 1075, 1078 (1994). In fact, the facts of this case show the officer’s location was more like that in *Ridgeway*, where evidence was suppressed. In *Ridgeway*, the court held a search warrant invalid because information in the warrant had been gathered by an intrusion into a portion of the defendant's curtilage not impliedly open to the public. The court held that the "undisputed physical facts of [the] case [did] not allow the inference that Ridgeway opened his property to uninvited visitors." 57 Wn. App. at 918. Ridgeway's house was "located in an isolated setting, hidden from the road and from neighbors". 57 Wn. App. at 918. His "long driveway [was] blocked by a closed gate" and "the deputies were required to deviate from the direct route to the house". 57 Wn. App. at 918-19.” *State v. Hornback*, 73 Wn. App. 738, 745 n.2 (Wash. Ct. App. 1994). See CP 213 that depicts the remote area from which the Officer spied onto Gerard’s property, covered with vegetation with no roads, driveways or even buildings visible.

<sup>18</sup> County Brief at 12-13.

<sup>19</sup> County Brief at 13.

<sup>20</sup> CP 155 and 156. (AR 20-21).

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

*Hendrickson*, 129 Wn.2d at 71. The County fails this burden.

### **B. Appellant Gerard Unquestionably Has Standing.**

Rather than undertake searches which abide by constitutional protections, the County here unbelievably argues, without supporting citations, that Appellant Gerard “lacks standing” to complain of the illegal search, because Gerard is not “adversely affected” by the non-consensual entry on to the neighboring property, from which County Officers stood to view and gather alleged evidence against him.<sup>21</sup>

As the United States Supreme Court noted in *Flast v.*

*Cohen*, 392 U.S. 83, 99, 20 L.Ed.2d 947, 88 S.Ct. 1942 (1968):

The "gist of the question of standing" is whether the party seeking relief has "alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of

---

<sup>21</sup> County Brief at 14, “**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 property.” Emphasis added.

difficult constitutional questions." *Baker v. Carr*, 369 U.S. 186, 204 (1962).

The Washington Supreme Court has made similar statements.

In *State ex rel. Hays v. Wilson*, 17 Wn.2d 670, 137 P.2d 105 (1943), the Supreme Court ruled that one seeking relief must show a clear legal or equitable right and a well-grounded fear of immediate invasion of that right.

Further, in *State v. Human Relations Research Foundation*, 64 Wn.2d 262, 269, 391 P.2d 513 (1964), the WA Supreme Court stated:

A litigant who challenges the constitutionality of a statute must claim infringement of an interest peculiar and personal to himself, as distinguished from a cause of dissatisfaction with the general framework of the statute.

as quoted in *DeFunis v. Odegaard*, 82 Wn. 2d 11, 24 (Wash. 1973).

Here, this Appellant was notified by the County of the types of enforcement actions that may be taken against him, based on the alleged "evidence" gathered from the illegal vantage point.<sup>22</sup> Those penalties include Criminal Misdemeanor Charges against Appellant, punishable by a fine of \$1,000.00 or by imprisonment of not more than 90 days, or both.<sup>23</sup> Appellant's interest in the

---

<sup>22</sup> CP 230.

<sup>23</sup> CP 230, "Criminal Misdemeanor Charges. Any person who knowingly fails to comply with the terms of a final written order can be charged with a misdemeanor." A

validity of the searches clearly constitutes the requisite "personal stake in the outcome of the controversy" necessary to establish standing.

### **III. Alleged Violations Lack Substantial Evidence in the Record & Appeal Should be Granted**

#### **A. No Substantial Evidence Exists in The Record to Support Any Violation**

Once any 'evidence' is properly excluded based on the County's faulty due process and illegal searches, there remains no evidence in the record to support any violation was committed. 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).

Further, this Court should grant relief because Appellant has established at least one or more of the standards of RCW 36.70C.130(1) (a)-(f) is met.<sup>24</sup> The Staff Report consists of 122

---

misdemeanor shall be punishable by a fine of \$1,000.00 or by imprisonment of not more than 90 days, or both (per PCC 18.140.050).

- The imposition of a penalty shall not excuse or allow the violation to continue.
- Each day the violation exists is a separate offense.

<sup>24</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;

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>25</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”. As such, the “admission” of the Staff Report as “automatic” was not harmless.

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 HE 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.

---

(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.

<sup>25</sup> CP 151-277.

## **B. Record Lacks Substantial Evidence in the Record to Support Solid Waste, Gross Vehicle & alleged Contractor Storage Yard Violations.**

Even setting aside the proper exclusion of ‘evidence,’ the County still lacks any evidence in this record to support its claims of (a) solid waste, (b) vehicle over 30K weight and (c) contractor storage yard violations.

- Nowhere does the County link what was claimed to be viewed on site to the actual definition of “solid waste” as contained in the County Code.
- The County supplied zero testimony regarding the weight of any vehicle alleged to be on Mr Gerard’s property.
- Last, the evidence presented is more consistent with on-going construction of a residential home and accessory uses, than of a contractor’s yard, as the County claims.

### **1. No Substantial Evidence Supports Solid Waste**

**Violation.** Appellant’s Opening Brief describes that the County at enforcement hearing failed to provide any specifics evidence to support its claim of solid waste violations. The County’s Code has a lengthy definition of what constitutes “solid waste.”<sup>26</sup> The County

---

<sup>26</sup> The Pierce County Code PCC 8.08.030 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 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

did not present evidence on these specific elements at hearing, but instead also relies only the conclusion that undisclosed “solid waste” was on the property.<sup>27</sup> In its Response brief, the County repeats this reference to conclusion in its fact section.<sup>28</sup> The County’s lack of response to this identified defect is a concession.<sup>29</sup>

**2. No evidence in Support of Gross Vehicle Weight.** The County falsely claims in its Response that Mr. Gerard violated regulations with respect to gross vehicle weight.<sup>30</sup> However, the County presented no evidence of any kind regarding the weight of any vehicle on Appellants property. There are no references in the record to support this County claim. The County cites to CP 34-39, but that transcript testimony is devoid of reference at all to truck weight; likewise, the only other County cite is to CP 163 – where the notice of violation recites the County code, **not** what was on the Appellant’s property.

---

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.

<sup>27</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”. CP 35- TR 19: 17-25.

<sup>28</sup> County Response Brief at 3, referring to: “200 cubic yards of solid waste” and “improperly stored solid waste”.

<sup>29</sup> *Hill v Garda CL NW Inc*, 394 P3rd 390, WA St Crt App 2017.

<sup>30</sup> County Response at 1, and 5, “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.”

### **3. No Substantial evidence that Appellant Gerard**

**Operated a Contractor Yard.** The HE's conclusion that Mr Gerard operated a Contractor Yard at this site is not supported by evidence that is substantial when viewed in light of the whole record before the court, and this is error via RCW 36.70C.130(1)(c). 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). Here, the County Officer testified only about what he viewed on site on three dates. The County Officer made no distinction from what construction materials that are commonly associated with on-going residential construction - which the County witness admitted was ongoing on at the site, versus what evidence would be required to support a claimed violation of operating an ongoing construction yard.<sup>31</sup>

The initial citizen complaint thought that industrial or contracting debris was being burned or buried on site. These are not

---

<sup>31</sup> CP 152-155.

activities associated with running a contractor yard.<sup>32</sup> That witness's only observations "as far as business activity" were also consistent with the new residential 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>33</sup>.

Further, the County produced no County, state, or records of any kind that linked a contractor yard registration, license, advertisement, invoice, receipt, tax or employment statement to the subject site.<sup>34</sup> Last, Appellant Gerard denied that he was running a contractor yard at the site.<sup>35</sup>

This Court should find that there is not "substantial evidence; " i.e., "a sufficient quantity of evidence to persuade a fair-minded person of the truth or correctness" of the HE decision. *Callegod v. Washington State Patrol*, 84 Wn. App. 663, 673, 929 P.2d 510, rev. denied, 132 Wn.2d 1004, 939 P.2d 215 (1997)).

---

<sup>32</sup> CP 152.and TR 43:16-18 and TR 45:21-25.

<sup>33</sup> TR 46:8-14.

<sup>34</sup> CP 152-155.

<sup>35</sup> CP 156.

#### **IV. Conclusion.**

Appellant Gerard's appeal should be granted because this land use decision is not supported by admissible evidence that is substantial when viewed in light of the whole record before the court, pursuant RCW 36.70C.130(1)(c).

The County HE erred by admitting the County Staff Report over objection & without allowing meaningful consideration of the Report's admissibility. The County HE rules that do or are interpreted to allow submission of unauthenticated and hearsay materials without due process and without meaningful consideration of objections violates constitutional due process. The HE that made the land use decision engaged in unlawful procedure or failed to follow a prescribed process in "automatically" admitting the County Staff Report, and those errors are not harmless. Once the Staff Report is properly excluded, the County lacks sufficient "evidence" in the record to support its case.

The Appellant has standing to challenge the County searches. The County site visits failed to comply with the US and Washington Constitution's protections. The Exclusionary Rule be applied as a remedy for the warrantless searches. This enforcement action should be overturned where County lacks legally admissible

evidence.

This land use decision is a clearly erroneous application of the law to the facts. In making this land use decision, the HE engaged in unlawful procedure or failed to follow a prescribed process, and that error was not harmless.

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 11th day of March 2020.

GOODSTEIN LAW GROUP PLLC

By: s/Carolyn A. Lake

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

**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:

David Owen Pierce County Prosecutor's Office 955 Tacoma Ave S., Ste. 301 Tacoma, WA 98402-2160 Email: <a href="mailto:david.owen@piercecountywa.gov">david.owen@piercecountywa.gov</a>	<input checked="" type="checkbox"/> U.S. First Class Mail <input type="checkbox"/> Via Legal Messenger <input type="checkbox"/> Overnight Courier <input checked="" type="checkbox"/> Electronically via email
---	---

DATED this 11<sup>th</sup> day of March 2020, at Tacoma, Washington.

s/Carolyn A. Lake  
Carolyn A. Lake

# GOODSTEIN LAW GROUP PLLC

March 11, 2020 - 10:23 AM

## 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

### The following documents have been uploaded:

- 535165\_Briefs\_20200311102140D2682946\_6561.pdf  
This File Contains:  
Briefs - Respondents Reply  
*The Original File Name was 200311.pldg.GERARD REPLY Brief.pdf*
- 535165\_Motion\_20200311102140D2682946\_9716.pdf  
This File Contains:  
Motion 1 - Other  
*The Original File Name was 200311.pld.Motion to Accept Reply Brief.pdf*

### A copy of the uploaded files will be sent to:

- david.owen@piercecountywa.gov
- pcpatvecf@piercecountywa.gov

### Comments:

---

Sender Name: Deena Pinckney - Email: dpinckney@goodsteinlaw.com

**Filing on Behalf of:** Carolyn A. Lake - Email: clake@goodsteinlaw.com (Alternate Email: dpinckney@goodsteinlaw.com)

Address:  
501 South G Street  
Tacoma, WA, 98405  
Phone: (253) 779-4000

**Note: The Filing Id is 20200311102140D2682946**