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Case No. 36895-1-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON
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ROBERT BONNEVILLE, Appellant

vs.

PIERCE COUNTY, *et al.*, Respondents.

BRIEF OF APPELLANT BONNEVILLE

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TABLE OF CONTENTS

A. Assignments of Error	1
-------------------------------	---

Assignments of Error

No. 1	1
No. 2	1
No. 3	1
No. 4	1

Issues Pertaining to Assignments of Error

No. 1	2
No. 2	2
No. 3	2
No. 4	2

B. Statement of the Case	2
--------------------------------	---

C. Argument	5
-------------------	---

D. Conclusion	50
---------------------	----

TABLE OF AUTHORITIES

Table of Cases

<i>Bosteder v. City of Renton</i> , 155 Wash.2d 18 (2005).....	27,46, 47
<i>Butler v. Joy</i> , 116 Wn. App. 291 (2003).....	6, 7
<i>Camara v. Municipal Court</i> , 387 U.S. 523, 18 L. Ed. 2d 930, 87 S. Ct. 1727 (1967).....	27, 28
<i>CLEAN v. City of Spokane</i> , 133 Wn.2d 455, 947 P.2d 1169 (1997).....	9
<i>Coggle v. Snow</i> , 56 Wn. App. 499, 508, 784 P.2d 554 (1990).....	8
<i>Conner v. City of Santa Ana</i> , 897 F.2d 1487 (9th Cir. 1990).....	28,48, 49
<i>Exendine v. City of Sammamish</i> , 127 Wash.App. 574, 586-587 (2005).....	14
<i>Holman v. City of Warrenton</i> , 242 F.Supp.2d 791, 807 (D.Or. 2002).....	16
<i>Howard v. Vandiver</i> , 731 F.Supp. 1290, (ND Miss. 1990).....	35
<i>Kennedy v. Sea-Land Service</i> , 62 Wn. App. 839, 816 P.2d 75 (1991).....	10
<i>Kerley Industries, Inc. v. Pima County</i> , 785 F.2d 1444, (9th Cir.1986).....	16
<i>Macomber v. Travelers Property and Cas. Corp.</i> , 277 Conn. 617 (Conn.,2006).....	44
<i>Makula v. Village of Schiller Park, Ill.</i> , 1998 WL 246043 (N.D. Ill.).....	39

<i>Mansour v. King County</i> , 131 Wash. App. 255 (2006).....	15, 21, 22, 24
<i>Marks v. Benson</i> , 62 Wn. App. 178, 813 P.2d 180 (1991).....	11
<i>Mathews v. Eldridge</i> , 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976).....	19
<i>Missions Springs v. City of Spokane</i> , 134 Wash.2d 947 (1998)	17, 21
<i>Monell v. Department of Soc. Servs.</i> , 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978).....	45
<i>Monroe v. Pape</i> , 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961).....	13
<i>Nguyen v. State, Dept. of Health Medical Quality Assurance</i> , 144 Wash.2d 516 (2001).....	17, 18, 19, 22, 23, 24, 25, 26
<i>Owens v. City of Independence, Mo.</i> , 445 US 622, 657 (1980).....	45
<i>R/L Assocs., Inc. v. Seattle</i> , 113 Wash.2d 402, 780 P.2d 838 (1989).....	16
<i>Regan v. Seattle</i> , 76 Wn.2d 501 (1969)	8
<i>Sokolov v. Village of Freeport</i> , 420 NE 2d 55 (1981).....	38, 39
<i>Spokane Research & Defense Fund v. Spokane County</i> , 139 Wn. App. 450, (2007).....	11
<i>State v. Browning</i> , 67 Wash. App. 93 (1992).....	27, 28, 42, 43,
<i>State v. Chrisman</i> , 100 Wash.2d 814, 676 P.2d 419 (1984).....	32
<i>State v. Flowers</i> , 57 Wash. App. 636 (1990).....	35
<i>State v. Khounvichai</i> , 149 Wash.2d 557, 69 P.3d 862 (2003)	32
<i>State v. Kull</i> , 155 Wash.2d 80 (2005).....	31, 32
<i>State v. Ladson</i> ,	

138 Wn.2d 343, 979 P.2d 833 (1999).....	32, 33, 34
<i>State v. Simpson</i> , 95 Wash.2d 170 (1980).....	29, 30
<i>State v. Williams</i> , 142 Wash.2d 17 (2000).....	37
<i>State v. Young</i> , 123 Wash.2d 173 (1994).....	30, 31
<i>U.S. v. Chicago, etc., R.R. Co.</i> ,	
282 U.S. 311 (1931).....	38, 39
<i>Young v. Key Pharms., Inc.</i> ,	
112 Wn.2d 216, 770 P.2d 182 (1989).....	10
<i>Zinerman v. Burch</i> ,	
494 U.S. 113, 125, 110 S.Ct. 975, 983,	
108 L.Ed.2d 100 (1990)	13

Table of Statutes, Regulations, and Rules

US Const. Amend IV.....	10,15
Washington State Constitution,	
Article 1, §7.....	29, 31
42 U.S.C. § 1983.....	13
Pierce County Code § 18.60.050.....	36
PCC § 1.22.120 (A).....	15, 19, 21, 26
CR 56	10

A. Assignments of Error

1. The lower court erred in refusing to grant Appellant's motion for a continuance of the summary judgment motion.
2. The lower court erred in entering the Respondents' motion for summary judgement dated September 21, 2007.

Issues Pertaining to Assignments of Error.

1. Should a court allow a *pro se* litigant a continuance to allow newly retained legal counsel to review a dispositive motion for summary judgment and properly respond to that motion? (*Assignment of Error 1*)
2. Did the Lower Court admit Hearsay and Other Impermissible Evidence in Making Her Decision to Grant Summary Judgment?
3. Were There Genuine Issues of Material Fact that Precluded Summary Judgment? (*Assignment of Error 2*)
4. Did the Lower Court fail to apply the law correctly

to the facts of the case? (*Assignment of Error 2*)

B. Statement of the Case.

For almost 20 years, Appellant Robert Bonneville operated a real estate appraisal business out of the basement portion of his home. Appellant, himself, built his home -- a three bedroom, 2 bath, split entry home of approximately 2000 square feet above grade on 1 acre of rural, heavily forested land - in 1979. CP 372 (Declaration of Robert Bonneville at ¶3). On July 1, 2004, Deputy Hearing Examiner Mark E. Hurdelbrink issued a decision granting Appellant a Conditional Use Permit under Case No. CP20-03 permitting him to continue his business under certain conditions including, but not limited to, that he have no more than four non-resident employees and he utilize no more than 1500 square feet for his activity. As a further condition, Appellant was further required to permit Pierce County law and code enforcement officers “unlimited and unfettered access to

the site for inspection and monitoring purposes.” CP 372

Over Mr. Bonneville’s objection, Pierce County law enforcement employees, Lupino (clad in bullet proof armor), Greeson and Dan Wullick, an armed, uniformed Pierce County Sheriff’s Deputy, conducted a non-consensual, warrantless search of Respondent’s residence and business on November 22, 2006. CP 373. This search was based upon information provided Pierce County from a disgruntled employee over a year prior to the search. During the course of this armed invasion of Mr. Bonneville’s home and business, Pierce County law enforcement officers intruded into each and every room including his upstairs bedrooms, closets, bathrooms, living room, dining room, sun room, and kitchen as well as the lower floor garage, mother in law unit, recreation room and designated business office areas. CP 373. Further, Pierce County law enforcement, armed and uniformed, interrogated Appellant’s independent contractor licensed

appraisers, secretarial employee, independent contractor bookkeeper, as well as his significant other, her daughter, and her daughter's friend.

On February 14, 2007, Pierce County provided Appellant with notice that on March 28, 2007 at 1:00 p.m., Applicant would be seeking to have hearing examiner Mark E. Hurdelbrink revoke his permit based upon evidence the County obtained during the course of the November 22, 2006 warrantless, non-consensual search, to wit: that Respondent allegedly had more than four non-resident employees and utilized more than 1500 square feet for his activity. All evidence supporting this revocation hearing was obtained as a result of a warrantless, nonconsensual search. CP 373, lines 11-16. On March 2, 2007, the same Pierce County law enforcement officers attempted to conduct a further non-consensual, warrantless search of the same areas of Mr. Bonneville's residence and business.

Exhibit 1H to the Staff Report (“Miscellaneous Correspondence”), CP 43-57, contains numerous documents (statements and/or notes from former employee Hillary Brocenos as well as statements from County employees Lupino, Greeson and Wulick) that consist of hearsay statements of witnesses that (1) Mr. Bonneville has not been permitted to cross-examine, denying him due process, and, (2) are inadmissible hearsay.

C. Argument

I. The Court Erred In Refusing to grant a continuance of the County’s Motion for Summary Judgment.

The lower court denied Appellant’s newly retained counsel’s oral motion for a continuance of the summary judgment motion in order to allow newly retained legal counsel to prepare and file a response. The day before the summary judgment hearing, Appellant retained present

counsel and asked him to appear at the hearing to request a continuance so that the issues presented could be properly addressed. At that hearing, Mr. Bonneville's present counsel advised the judge he had not even seen the motion, exhibits, and accompanying declarations, and thus he was not prepared to argue the substantive issues at that time. The lower court denied this request for a continuance, and dismissed the complaint with prejudice, and only the complaint, leaving the counterclaim for trial.

In a very similar case, *Butler v. Joy* 299, 116 Wn. App. 291 (2003), the Court of Appeals, Div. III, held the lower court erred in denying plaintiff's newly retained counsel's oral motion for a continuance of the hearing on a motion for summary judgment. The *Butler* court stated

under CR 56(f), a lower court may continue a motion for summary judgment if affidavits of the nonmoving party show a need for additional time to obtain affidavits, take depositions, or conduct other discovery. The lower court may deny a motion for a continuance when (1) the requesting party does not have a good reason for the delay in

obtaining the evidence; (2) the requesting party does not indicate what evidence would be established by further discovery; or (3) the new evidence would not raise a genuine issue of fact.

Butler at 299 (citations omitted).

The lower court's denial of a summary judgment continuance is reviewed on the basis of an abuse of discretion. *Id.*

In *Butler*, the plaintiff initiated her litigation *pro se*. After the defendant's attorney filed his motion for summary judgment based on the insufficiency of service, plaintiff retained her attorney just the day before the summary judgment hearing. He appeared without written affidavits in support of a continuance and presented the motion orally. *Id.* at 299. The hearing was not recorded, and the appeals court had no indication whether the attorney argued that he needed more time to obtain further discovery or what further evidence he expected to produce. As the court recognized, “[s]trictly speaking, his

motion does not fit within the guidelines of a CR 56(f) continuance. However, “[t]he primary consideration in the lower court’s decision on the motion for a continuance should have been justice.” *Id.* (citing *Coggle v. Snow*, 56 Wn. App. 499, 508, 784 P.2d 554 (1990)). Although additional discovery was not needed to decide the issue of insufficient service of process, the court held plaintiff’s attorney deserved an opportunity to prepare a response on the issues of law. *Id.* As noted in *Coggle*, it is hard to see “how justice is served by a draconian application of time limitations” when a party is hobbled by legal representation that has had no time to prepare a response to a motion that cuts off any decision on the true merits of a case. *Coggle*, 56 Wn. App. 499, 508.

Finally, the purpose of a summary judgment is to promote judicial economy and to avoid a useless trial. *Regan v. Seattle*, 76 Wn. 2d 501, 503 (1969). Here, although the lower court dismissed the complaint, the

counterclaim is still being litigated and the parties are still litigating, conducting discovery, and preparing for a trial on the merits. No purpose of judicial economy is being served.

Thus, the Court of Appeals held that the denial of the continuance was an abuse of discretion.

II. There exist Genuine Issues of Material Fact that Preclude Summary Judgment.

The crux of this case is that Pierce County violated the Appellant's civil and constitutional rights with a warrantless, nonconsensual search of his home. Pierce County says Mr. Bonneville consented to the search, CP 8, lines 10-19, and Mr. Bonneville says he did not. CP 373, ¶7.

An appeal from summary judgment is reviewed *de novo*. *CLEAN v. City of Spokane*, 133 Wn.2d 455, 462, 947 P.2d 1169 (1997). Summary judgment is appropriate only where the moving party demonstrates by evidence that

would be admissible in court an absence of any issue of material fact. *Young v. Key Pharms., Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989). “If a genuine issue as to any material fact exists, a trial is not useless and such a motion should not be granted. The burden is on the moving party ...to establish the absence of any genuine issue of material fact.” *Id.* Only after the moving party meets its burden of either producing factual evidence showing that it is entitled to judgment as a matter of law, does the burden shift to the nonmoving party. *Kennedy v. Sea-Land Service*, 62 Wn. App. 839, 816 P.2d 75 (1991).

In the case before this Court, the lower court accepted hearsay and other inadmissible evidence submitted by the County. CP 378, ln. 24. Additionally, Appellant’s Responsive Affidavit demonstrate genuine issues of material fact. CP 372-74.

CR 56 requires that affidavits submitted in summary judgment proceedings be made on personal knowledge

and set forth such facts as would be admissible in evidence. *Marks v. Benson*, 62 Wn. App. 178, 182, 813 P.2d 180 (1991). The affiant must affirmatively show competence to testify to the matters stated. It is not enough that the affiant be “aware of” or be “familiar with” the matter; *personal knowledge is required*. Unsupported conclusional statements and legal opinions cannot be considered in a summary judgment motion.” *Id.* See *Spokane Research & Defense Fund v. Spokane County*, 139 Wn. App. 450, 59 (2007) (where the court held letters attached to the moving party’s memorandum could not satisfy the requirements of CR 56).

Here, Pierce County submitted, and the lower court accepted without reservation, all of the gross hearsay contained in the Pierce County Staff Report. CP 2, lines 9-24; and CP 23 -42 (the “Staff Report,” attached as exhibit 1 to Pierce County’s motion for summary judgment). Indeed, that Staff Report contains hearsay

within hearsay, comments from other agencies, third parties, and unsupported conclusions. CP 48, 49; 52; 53.

Also, the declaration of Mark Luppino contains hearsay, again accepted without reservation by the lower court. CP 378. *See* Ex. 8 to the Summary Judgment Motion (*e.g.*, describing what a neighbor said, page 2, lines 5-6; declaring the transcript of a hearing is true and correct, page 3, line 3-4; conclusions as to the number of employees that were at Appellant's home, page 3, line 19).

Again, at the time of the summary judgment hearing, Appellant's attorney had not even seen the declarations and Staff Report so as to make an objection to this hearsay.

In short, the County's argument that it did not violate any of the constitutional rights of Appellant is based on the factual propositions alleged, but unproved, in the Staff Report and hearsay contained in the other supporting documents.

III. Appellant is Not Required to Exhaust LUPA Remedies Prior to Filing an Action Under 42 USC 1983.

Supreme Court precedent clearly holds exhaustion of state administrative remedies is not required before a litigant may have a cause of action pursuant to 42 U.S.C. § 1983. *Zinerman v. Burch*, 494 U.S. 113, 125, 110 S.Ct. 975, 983, 108 L.Ed.2d 100 (1990) (“[T]he constitutional violation actionable under § 1983 is complete when the wrongful action is taken.”); *see also Monroe v. Pape*, 365 U.S. 167, 183, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961) (“it is no answer that the State has a law which if enforced would give relief. The federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal [remedy] is invoked.”), *overruled on other grounds by Monell v. Department of Soc. Servs.*, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978).

Mr. Bonneville does not now ask that this Court review the underlying administrative decision. Rather, he seeks redress for the violation of specific state and federal constitutional rights, *e.g.*: the right to a constitutionally adequate standard of proof prior to having a property interest revoked and the right to be free of warrantless searches of his home, his bedroom, his bathroom and his business. None of these issues are remotely the province of an administrative hearing officer or a LUPA action. *Exendine v. City of Sammamish*, 127 Wash. App. 574, 586-587 (2005). Thus, there is simply no authority for the County's assertions as it pertains to the exhaustion doctrine.

II. Appellant's Right to a Constitutionally Adequate Standard of Proof in a Proceeding to Revoke a Property Interest.

Respondents concede that the standard of proof required to be utilized by the trier of fact in the

underlying administrative proceeding is the substantial evidence standard contained in Pierce County Code (hereafter, "PCC") § 1.22.120 (A). As discussed below, the constitutionally required standard is proof by clear, cogent and convincing evidence.

In *Mansour v. King County*, 131 Wash. App. 255, 264-265 (2006), the court found the aforementioned mere substantial evidence standard failed to meet minimum due process requirements. In that case, the property interest at stake was a pet dog.

In the present case, Pierce County has revoked Appellant's existing cottage industry permit which will force him to relocate his business after he had spent thousands of dollars to conduct his business within his home, CP 372, ¶5, based upon the same standard of proof that the courts of our state have already determined was not fit for a dog.

A. Appellant Has A Protected Property

Interest Triggering Due Process Safeguards.

Respondents incredibly assert that “the mere issuance of a Cottage Industry II permit does not constitute a property interest giving procedural due process protections.” CP 15, line 9-10. To the contrary, our Supreme Court has held “[a]long with the vast majority of federal courts, we recognize that denial of a building permit, under certain circumstances, may give rise to a substantive due process claim.” (*citations omitted.*) *R/L Assocs., Inc. v. Seattle*, 113 Wash.2d 402, 412, 780 P.2d 838 (1989). “We see no reason to treat denial of a conditional use permit any differently. Such denial therefore can constitute a due process violation.” *Id.*

Obviously, if the denial of a conditional use permit invokes constitutional due process protections, the revocation of such a permit likewise requires due process protections. *Holman v. City of Warrenton*, 242 F.Supp. 2d 791, 805, 807 (D.Or. 2002); *Kerley Industries, Inc. v. Pima*

County, 785 F.2d 1444, 1446 (9th Cir.1986).

The nature and scope of that protected property interest was described by the Supreme Court in *Mission Springs v. City of Spokane*, 134 Wash.2d 947 (1998) as follows:

Mission Springs had a constitutionally cognizable property right in the grading permit it sought. The right to use and enjoy land is a property right. ...Property in a thing consists not merely in its ownership and possession, but in the unrestricted right of use, enjoyment and disposal.

Mission Springs at 963 (citations omitted.)

B. How Much Process Is Due?

In *Nguyen v. State, Dept. of Health Medical Quality Assurance*, 144 Wash.2d 516 (2001), our Supreme Court addressed the issue of how much process is due in the context of the standard of proof in a revocation proceeding. The Court first noted:

Procedural due process imposes constraints on governmental decisions which deprive individuals of 'liberty' or 'property' interests

within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment. *Mathews v. Eldridge*, 424 U.S. 319, 332, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976).

Nguyen, 144 Wash.2d at 522. The Court then found that the standard of proof is a fundamental due process safeguard:

A process satisfies minimum constitutional requisites inherently due when it provides adequate safeguards to the citizen confronted by an action instigated against him by the state. Primary among these safeguards is the standard of proof. "The function of a standard of proof ... is to 'instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication.'" (*citations omitted*).

Nguyen at 524.

Next, the *Nguyen* Court analyzed the varying degrees of standard of proof to determine which standard was appropriate in the revocation of a property interest context, *Nguyen* at 524-25, and after analyzing the various

standards of proof available for use, the Supreme Court discussed which of those standards of proof was constitutionally required in a revocation context:

The United States Supreme Court generally uses a three-part test to examine the minimum constitutional process due in a variety of procedural situations. In *Mathews*, 424 U.S. at 335, 96 S.Ct. 893, the Court considered whether a hearing prior to administrative termination of social security benefits was constitutionally required. The Court structured its consideration on three relevant factors: (1) the private interest that will be affected by the official action; (2) the risk of erroneous deprivation of such interest through the procedures used; and (3) the governmental interest in the added fiscal and administrative burden that additional process would entail. *Id.*

Nguyen at 526.

Applying the *Mathews* three prong test to the standard of proof provided by PCC § 1.22.120 (A) reveals the following.

1. PRIVATE INTEREST

In the present case, the private interest involved is

Appellant's right to use and enjoy his property in the first instance without undue governmental interference, and, in the second instance, the harm that revocation of his Cottage Industry approval will inflict on his ability to continue operating his business pursuant to the approval.

Appellant has invested many thousands of dollars in renovating and setting up his appraisal business in his basement. Revocation of his approval would require him to relocate his business causing him significant expense in the relocation process and adding significant costs to his continued operation in terms of rent that he would not have had to otherwise pay, not to mention the cost and harm incurred as a result of the disruption of his normal business routine occasioned by the forced relocation. CP 372, ¶15.

Not only would Appellant suffer the harm that revocation would impose intrinsically on his protected property right ("The right to use and enjoy land is a

property right. ...Property in a thing consists not merely in its ownership and possession, but in the unrestricted right of use, enjoyment and disposal.” *Mission Springs* at 963), but Appellant would also suffer specific and calculable hard dollar deprivation.

2. RISK OF ERRONEOUS RESULT

The risk of erroneous result in the present case clearly requires a heightened standard of proof. The substantial evidence standard of proof provided by PCC § 1.22.120 is the lowest standard of proof of the four standards of proof and is traditionally used as an appellate standard of review rather than a working standard by which the finder of fact determines those facts. In fact, the Court in *Mansour* found that the substantial evidence standard was NOT a standard of proof at all and certainly not appropriate for use by a trier of fact. *Mansour* at 264-265.

Pierce County revoked Appellant’s Cottage Industry

approval based upon a hair's breadth more than no evidence at all. As noted by *Mansour*, due process requires significantly more than "no evidence at all," or a "hair's breadth" more than no evidence at all before Appellant can be deprived of his constitutionally protected property interest in the continued operation of his appraisal business from the basement of his home pursuant to his existing cottage industry approval.

The Supreme Court in *Nguyen*, considered and firmly rejected the County's argument holding:

One might argue the procedure Dr. Nguyen received did not create an unacceptable risk of erroneous deprivation because he received a hearing before an administrative agency, he had notice of the charges against him, he had the opportunity to be heard, the right to call witnesses, the right to be represented by counsel, and the right to judicial review. The problem with this approach, however, is that none of these procedural safeguards can substitute for, nor is even relevant to, failure to impose the requisite minimum burden of proof which is specifically designed "to impress the factfinder with the importance of the decision" and thereby reduce the chance of error.

Nguyen at 529, 530 (citation omitted).

Additionally, Pierce County's exhaustion argument essentially contends that Mr. Bonneville's ability to seek appellate review is further adequate protection. The Supreme Court in *Nguyen* firmly rejected this contention as well holding:

Moreover, with respect to the risk of erroneous deprivation in this proceeding, there is little solace to be found in the availability of judicial review which is high on deference but low on correction of errors. RCW 34.05.570(3)(e) (A court shall grant relief from an agency order if it decides the order "is not supported by evidence that is substantial when viewed in light of the whole record before the court."). Appellate review cannot cure an inadequate standard of proof. *Santosky*, 455 U.S. at 757 n. 9, 102 S.Ct. 1388. Appellate courts only determine whether factual findings are supported by substantial evidence and, if so, whether the findings in turn support the conclusions of law and judgment. *Green Thumb, Inc. v. Tiegs*, 45 Wash.App. 672, 676, 726 P.2d 1024 (1986).

Problems inherent in an interest-depriving procedure are thus only compounded when the possibilities for factual review are extremely limited. The risk of

error is increased precisely because the opportunity for correcting error is minimal. Under the second *Mathews* factor, an increased risk of erroneous result is indicative of the fact that due process requires an increased standard of proof. (*emphasis added.*)

Nguyen at 530. See also, *Mansour* at 267.

As *Nguyen* and *Mansour* hold, the usual panoply of due process protections is not adequate to protect against erroneous deprivation in the absence of a higher standard of proof. A greater standard of proof is a constitutional minimum in any proceeding whose purpose is to revoke or otherwise deprive a person of a protected property interest. The risk of error is simply too great.

3. GOVERNMENT INTERESTS

The third and final factor for consideration is “the Government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.” *Nguyen* at 532. The Court in *Nguyen* made short shrift of this factor holding:

Does requiring proof by a clear preponderance in a medical disciplinary proceeding somehow impose unacceptable fiscal and administrative burdens upon the government? Obviously not. An increased burden of proof would not have the slightest fiscal impact upon the state, as it would not appreciably change the nature of the hearing per se.

Nguyen at 532.

In the present case, it cannot be seriously argued by the County that imposition of a standard of proof of clear, cogent and convincing evidence imposes any, let alone “unacceptable fiscal and administrative burdens upon the government.” For the County, there is no quantifiable cost to bear for having to undertake its constitutional burden.

Having fully and exhaustively analyzed the *Matthews* considerations as required by *Nguyen*, it is apparent that any proceeding in which the County seeks to revoke Appellant’s Cottage Industry approval must be a proceeding with full due process protections including the

higher standard of proof of clear, cogent and convincing evidence. “Appellate review cannot cure an inadequate standard of proof.” *Nguyen* at 530. The Respondents’ motion for summary judgment, to the extent supported by a claim that the standard of proof contained in PCC § 1.22.120 (A) is constitutionally adequate, ought to have been argued in the lower court, and denied.

III. Respondents Warrantless searches of his Home and Business Violated Clearly Established Constitutional Rights.

Pierce County makes no claim to have obtained a search warrant prior to searching the Bonneville family home and business including his bedrooms and bathrooms on any of the three occasions searches occurred. County law and code enforcement clearly knew that a search warrant was a viable option having previously obtained such a warrant to search his property. Respondents’ asserted need to conduct these warrantless searches was to

obtain evidence that Mr. Bonneville was not sleeping in his own bed, that there were more than four non-resident employees, and that he was utilizing more than 1500 square feet for his business.

A. Warrantless Searches Are Unconstitutional Under the Fourth Amendment.

A warrantless search of a person's property for the purpose of finding evidence of Code violations is unlawful and a violation of the Fourth Amendment to the United States Constitution as well as the constitution of the State of Washington. *State v. Browning*, 67 Wash.App. 93 (1992); *Bosteder v. City of Renton*, 155 Wash.2d 18 (2005).

In *Camara v. Municipal Court*, 387 U.S. 523, 18 L. Ed. 2d 930, 87 S. Ct. 1727 (1967), the Supreme Court held that warrantless administrative searches conducted in order to gather evidence for purposes of nuisance abatement proceedings were unconstitutional. The Court specifically held that "a search of private property without

consent is 'unreasonable' unless it has been authorized by a valid search warrant." *Camara*, at 528-529.

In *Conner v. City of Santa Ana*, 897 F.2d 1487 (9th Cir. 1990) the Ninth Circuit Court of Appeals held:

It is clear that the warrant requirement of the fourth amendment applies to entries onto private land to search for and abate suspected nuisances. On the strength of those cases, the district court granted the Conners' summary judgment motion against the City of Santa Ana as to the July 1, 1983 warrantless entry.

Conner v. City of Santa Ana, 897 F.2d at 1490 (citations omitted).

In *Browning*, the court determined that a building inspection by building inspectors was a search for Fourth Amendment purposes. *Browning*, 67 Wash. App. at 85. The court thereafter suppressed evidence seized as a result of the unlawful search. *Browning* at 87. Based upon the foregoing, it is clear that, absent consent, Respondents' searches and seizures occurring on Appellant's property were per se unconstitutional.

B. ARTICLE 1, SECTION 7 of the Washington State Constitution Provides Greater Protection Than Does the Fourth Amendment.

In *State v. Simpson*, 95 Wash.2d 170 (1980), the Washington Supreme Court discussed in detail the historical context of Article 1, Section 7 vis-à-vis the Fourth Amendment as follows:

The language of the search and seizure provision of our state constitution, Const. Art. 1, § 7, differs significantly from the fourth amendment to the United States Constitution.

... Historical evidence reveals that the framers of the Washington Constitution intended to establish a search and seizure provision that varied from the federal provision. The Constitutional Convention was presented with a proposed state provision identical to the Fourth Amendment, and rejected it in favor of the present Const. Art. 1, § 7.

The intentional difference between the state and federal provisions naturally does not permit a reading of the state provision that is more restrictive of Applicant' rights than federal law. However, there is precedent for interpreting this particular language in a state constitution as conferring upon a Applicant a higher degree of protection than is provided

by the federal constitution. Const. Art. 1, §7 differs from the Fourth Amendment in that it clearly recognizes an individual's right to privacy with no express limitations.

Simpson, 95 Wash.2d at 177-178 (*citations omitted*). In *State v. Young*, 123 Wash.2d 173, 179 (1994) the Court again reiterated that the Washington Constitution provides greater protection and further noted that our Constitution actually protects two sometimes disparate spheres of privacy as follows:

Examination of the constitutional history of Const. art. 1, § 7, which represents the third *Gunwall* factor, reveals our State Constitutional Convention rejected the language of the federal constitution's Fourth Amendment. Instead, the Convention adopted the language of Const. art. 1, § 7, intentionally providing greater protection of individual rights. *State v. Stroud*, 106 Wash.2d 144, 148, 720 P.2d 436 (1986). In particular, our state constitution places a greater emphasis on the right to privacy. *State v. Simpson*, 95 Wash.2d 170, 178, 622 P.2d 1199 (1980).

In *State v. Young*, 123 Wash.2d at 179.

Further, the *Young* Court held that article I, section 7 contains two distinct objects of protection: a “person’s ‘private affairs’, and a person’s ‘home’.” As in *Young*, both are at issue in the present case.

Recently, the Supreme Court surveyed the field of search and seizure law in our State and reiterated fundamental principles that are implicated in the present case. In *State v. Kull*, 155 Wash.2d 80 (2005) the Court held:

Article I, section 7 provides: “No person shall be disturbed in his private affairs, or his home invaded, without authority of law.” The constitution thus protects both a person's home and his or her private affairs from warrantless searches. However, this court has held that the home receives heightened constitutional protection. Generally, a person’s home is a highly private place. In no area is a citizen more entitled to privacy than in his or her home. For this reason, “the closer officers come to intrusion into a dwelling, the greater the constitutional protection.” The “heightened protection afforded state citizens against unlawful intrusion into private dwellings places an onerous burden upon the government to show a compelling need to act outside of our

warrant requirement.”

Kull, 155 Wash.2d at 84-85 (*citations omitted*).

Under article I, section 7, warrantless searches are *per se* unreasonable. *State v. Khounvichai*, 149 Wash.2d 557, 562, 69 P.3d 862 (2003); *State v. Chrisman*, 100 Wash.2d at 814, 818, 676 P.2d 419 (1984).

More like a raid on a suspected meth lab, the government, in the form of armed, armor plated and uniformed officers intruded into all aspects of the Bonneville family home and business from bedroom to closet to bathroom to office and interrogated both his family and friends, employees, guests, and invitees. These intrusions violated both spheres of privacy recognized by the Washington Constitution.

In *State v. Ladson*, 138 Wn.2d 343, 979 P.2d 833 (1999), the Washington Supreme Court refused to recognize the validity of “pretext” searches holding:

Article I, section 7, is explicitly broader than

that of the Fourth Amendment as it “‘clearly recognizes an individual’s right to privacy with no express limitations’”and places greater emphasis on privacy. Further, while the Fourth Amendment operates on a downward ratcheting mechanism of diminishing expectations of privacy, article I, section 7, holds the line by pegging the constitutional standard to “those privacy interests which citizens of this state have held, and should be entitled to hold, safe from governmental trespass absent a warrant.”

Ladson, at 348-351 (*citations omitted*). The Court then went

on to note that:

“As a general rule, warrantless searches and seizures are per se unreasonable.” They are, however, subject to “a few ‘jealously and carefully drawn exceptions’ ... which “provide for those cases where the societal costs of obtaining a warrant ... outweigh the reasons for prior recourse to a neutral magistrate.”

Exceptions to the warrant requirement fall into several broad categories: consent, exigent circumstances, searches incident to a valid arrest, inventory searches, plain view, and *Terry* investigative stops. The burden is always on the state to prove one of these narrow exceptions.

Id. (*citations omitted*). Finally the Court observed:

The ultimate teaching of our case law is that the police may not abuse their authority to conduct a warrantless search or seizure under a narrow exception to the warrant requirement when the reason for the search or seizure does not fall within the scope of the reason for the exception.

Ladson at 357.

The true purpose of the November 22, 2006 raid and search of the Bonneville home is described by Officer Lupino as follows:

The inspection is to provide additional information to be used for a Revocation Hearing regarding Respondent's permit. Respondent faces the possibility he may have to cease and desist all business activity, and will have to relocate this business to an approved zone. *He also faces additional criminal charges being brought against him for failing to comply with a Hearing Examiner decision.*

CP 64 (*emphasis added*). In the present case, not only are the November 2006 and March 2007 searches unlawful "pretext" searches under *Ladson*, not only were they unconstitutionally unlimited in time, scope or duration,

they were based upon information so stale it would not provide probable cause for the issuance of a search warrant, had one been sought.

Mr. Bonneville respectfully submits that there was no basis for the County's motion to have been granted as the searches clearly violated Appellant's constitutional rights.

C. Whether Consent To Search Was Voluntary Is Always A Question Of Fact Not Appropriate For Determination By Summary Judgment.

The issue of whether or not Appellant somehow consented to Pierce County's warrantless searches is always a question of fact and inappropriate for disposition by summary judgment. *Howard v. Vandiver*, 731 F.Supp. 1290, 1295 (ND Miss. 1990); *State v. Flowers*, 57 Wash. App. 636, 644-645 (1990). As described in greater detail below, the issue of consent is hotly contested therefore giving rise to a genuine issue of material fact precluding

summary judgment. CP 373, ¶7.

D. FORCED CONSENT TO “UNLIMITED AND UNFETTERED” SEARCHES OF APPELLANT’S HOME AND BUSINESS AS A QUID PRO QUO FOR ISSUANCE OF A CONDITIONAL USE PERMIT IS NO CONSENT AT ALL AND IS, ITSELF, UNCONSTITUTIONAL

Pierce County asserts that the Right of Entry Agreement that the Hearing Examiner required Mr. Bonneville to execute provides them with unlimited and unfettered access to his family home and business. Such is not true.

First, the Right of Entry Agreement drafted by Respondents and executed by Appellant provides for no such unlimited access. Second, unlimited and unfettered access such as applicant claims is its right violates the very provisions of the Pierce County Code which grants a Right of Entry. Specifically, PCC § 18.60.050 provides

that “the Right of Entry Agreement shall: (E). Conform to the Right of Entry Agreement format outlined in 18.60.060 - Appendix A.” Paragraph (B)(3) of the required format provides that, “Nothing in this agreement grants Pierce County the right to enter into any structure without the express consent of the property owner(s) or resident(s).”

By the terms of the Pierce County Code, Respondents had no right to unfettered, unlimited access to Appellant’s home and business. Additionally, Respondents were required to advise Appellant that he was entitled to refuse to consent to a warrantless search of his property and that if consent were given, it could be revoked or limited at any time. *State v. Williams*, 142 Wash.2d 17, 25 (2000). This required disclosure was never made, rendering the alleged consent void.

Finally, Pierce County and the Hearing Examiner did not have the right to condition approval of Appellant’s

permit upon the forbearance of Appellant's right to be free of warrantless searches. Coerced consent cannot be a condition of the permit such as here. In *Sokolov v. Village of Freeport*, 420 NE 2d 55, 57 (1981), the Court refused to accept the government's contention that the *quid pro quo* for a rental permit was the applicant's implied consent to inspections at reasonable times by law enforcement. The court based its holding on *U.S. v. Chicago, etc., R.R. Co.*, 282 U.S. 311, 328-329 (1931). In *Chicago* the U.S. Supreme Court held:

It long has been settled in this court that the rejection of an unconstitutional condition imposed by a state upon the grant of a privilege, even though the state possess the unqualified power to withhold the grant altogether, does not annul the grant. The grantee may ignore or enjoin the enforcement of the condition without thereby losing the grant. There are many decisions to this effect; but we need cite only *Frost & Frost Trucking Co. v. R. R. Comm.*, 271 U. S. 583, 593-599, 46 S. Ct. 605, 70 L. Ed. 1101, 47 A. L. R. 457, and *Hanover Ins. Co. v. Harding*, 272 U. S. 494, 507, 508, 47 S. Ct. 179, 71 L. Ed. 372, 49 A. L. R. 713 where the cases are collected and reviewed. The decisions rest upon a principle,

which 'is broader than the applications thus far made of it,' *Frost Trucking Co. v. R. R. Com.*, *supra*, at page 598 of 271 U. S., 46 S. Ct. 605, 609. Broadly stated, the rule is that the right to continue the exercise of a privilege granted by the state cannot be made to depend upon the grantee's submission to a condition prescribed by the state which is hostile to the provisions of the federal Constitution.

Chicago, 282 U.S. at 328-29 (*citations omitted*).

The *Sokolov* Court specifically held:

Additionally, we note that the village may not compel the owner's consent to a warrantless inspection upon the theory that these searches are a burden which a property owner must bear in exchange for the right to open his property to the general public for rental. It is beyond the power of the state to condition an owner's ability to engage his property in the business of residential rental upon his forced consent to forego certain rights guaranteed to him under the Constitution.

Sokolov, at 57. *See also, Makula v. Village of Schiller Park, Ill.*,

1998 WL 246043 (N.D. Ill.).

Pierce County's insistence upon a right of access to both the family home and business that is "unlimited and

unfettered” in exchange for the issuance of a cottage industry permit is a clear and direct violation of Mr. Bonneville’s Constitutional Rights and is not even permitted under the Pierce County Code.

E. Appellant’s Alleged Verbal Consent No Consent At All And Was Not Voluntary.

Respondents’ assertion that Appellant “invited” unfettered access by the government into the privacy of his bedroom and business is not only frightening in and of itself, it is wholly wrong. Respondents’ selective citation to passages from the previous underlying administrative hearing is misleading and erroneous. First of all, what is painfully obvious is that the entire atmosphere at the hearing led Mr. Bonneville to understand that if he did not acquiesce to the hearing examiner’s desire for unfettered access, he would not be granted a permit. Second, the quotations offered by Respondents were clearly qualified by the following:

I think if they want to set up a pattern where somebody comes through once a month until they feel I'm in compliance, that's fine. Once a week is fine. Just let me know: we'll tour them through there. I think that would be an acceptable condition.

Hearing Transcript, Respondents' Exhibit 4 to Summary Judgment Motion at 72:25-73:4. "If you come up with a schedule of inspections, be it routine or random, I will meet that schedule at any time." *Id.* at 85:5-8:

Further, Mr. Bonneville had made it clear that he would designate other persons with authority to grant permission to search in his absence. *Id.* at 85:9-21. What is clear is that Appellant envisioned a schedule of inspections and that he retained the right to grant permission or not. Appellant did not grant blanket permission for the government to enter his home, his bedroom, his bathroom or his business at any time, day or night, at the government's mere whim or fancy. Respondents' contentions are an Orwellian nightmare and

do not nearly pass constitutional muster.

Nor does mere acquiescence substitute for free and voluntary consent. The issue was addressed by the Court in *State v. Browning*, 67 Wash. App. 93 (1992) as follows:

The Brownings assert that the building inspector entered the residence unlawfully because Browning did not consent to the entry and the inspector did not present his credentials or request entry as required by the Uniform Building Code (UBC). We agree.

In *Bumper v. North Carolina*, 391 U.S. 543, 88 S.Ct. 1788, 20 L.Ed.2d 797 (1968), four policemen announced that they had a warrant to search a house, and the owner responded “go ahead.” At trial, no warrant was produced, but the prosecutor argued that the search was permissible on grounds that a valid consent to the search had been given. The Supreme Court reversed the appellant’s conviction and stated:

When a prosecutor seeks to rely upon consent to justify the lawfulness of a search, he has the burden of proving that the consent was, in fact, freely and voluntarily given. This burden cannot be discharged by showing no more than acquiescence to a claim of lawful authority.

The claim of lawful authority referred to in *Bumper* has not been limited to situations in which officers claim to have a search warrant. 3 LaFave, Search & Seizure § 8.2(a), at 179 (2d ed. 1987). “The claim of such a right,

though not expressly stated, is implicit when the police, instead of asking for permission to make the search, say that they have come to search or that they are going to search.” (Footnotes omitted.) Search & Seizure § 8.2(a), at 179-80.

In *United States v. Most*, 876 F.2d 191 (D.C.Cir.1989), the Court of Appeals rejected the government's argument that acquiescence or nonresistance may support an inference of implied consent. The court stated, “[i]t is clear … that for constitutional purposes nonresistance may not be equated with consent.” *Most*, 876 F.2d at 199. See also *Patzner v. Burkett*, 779 F.2d 1363, 1369 (8th Cir.1985) (proof that a person merely acquiesced does not support a presumption that consent was given); *United States v. Gonzales*, 842 F.2d 748, 754 (5th Cir.1988) (acquiescence cannot substitute for free consent), overruled on other grounds in *United States v. Hurtado*, 905 F.2d 74 (5th Cir.1990).

State v. Browning, 67 Wash. App. at 97-98. Appellant wholly denies consenting to Respondents warrantless searches. CP 373, lines 12-13, 15-16, and 17-19. As such, an issue of fact remains precluding summary judgment.

IV. CONSPIRATORIAL LIABILITY

As noted by the court in *Macomber v. Travelers Property and*

Cas. Corp., 277 Conn. 617 (Conn., 2006):

The [elements] of a civil action for conspiracy are: (1) a combination between two or more persons, (2) to do a criminal or an unlawful act or a lawful act by criminal or unlawful means, (3) an act done by one or more of the conspirators pursuant to the scheme and in furtherance of the object, (4) which act results in damage to the Appellant. (Internal quotation marks omitted.) There is, however, “no independent claim of civil conspiracy. Rather, [t]he action is for damages caused by acts committed pursuant to a formed conspiracy rather than by the conspiracy itself... Thus, to state a cause of action, a claim of civil conspiracy must be joined with an allegation of a substantive tort.”[T]he essence of a civil conspiracy ... [is] two or more persons acting together to achieve a shared goal that results in injury to another." *Id.*, at 779, 835 A.2d 953.

Thus, the purpose of a civil conspiracy claim is to impose civil liability for damages on those who agree to join in a tortfeasor's conduct and, thereby, become liable for the ensuing damage, simply by virtue of their agreement to engage in the wrongdoing.

Macomber v. Travelers Property and Cas. Corp., 277 Conn. at 635-636. (*citations omitted*). Here, a fair reading of the conduct of the Respondents in conducting warrantless searches of Appellant's property leads to the conclusion of joint action. At this early stage of the proceeding, no discovery has occurred and Respondents have not been

deposed. Appellant requests an opportunity to conduct such discovery prior to the Court ruling on the issue of conspiracy pursuant to CR 56 (f).

V. THE QUESTION OF IMMUNITY

Respondents baldly and wrongly state, “All Respondents are entitled to Qualified Immunity.”

A. Pierce County Is Not Entitled To Any Immunity.

In *Owens v. City of Independence, Mo.*, 445 US 622, 657 (1980), the Supreme Court of the United States clearly held that municipalities enjoy no immunity whatsoever from liability under 42 USC 1983. In *Monel v. New York City Dept. of Soc. Serv.*, 436 U.S. 658 (1978), the Supreme Court held that “when execution of a governmental policy or local custom whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury [on a Appellant]... the government as an entity is responsible under section 1983.”

In the present case, Appellant asserted in his complaint that Pierce County maintained several policies, practices and customs that proximately caused Appellant's harm. Pierce County has presented no affidavits, evidence or testimony challenging Appellant's assertions. Pierce County has no lawful claim to immunity in any event. Therefore, summary judgment as to Pierce County was not warranted.

B. The Individual Respondents Are Not Entitled to Qualified Immunity

The Court in *Bosteder v. City of Renton*, 155 Wash.2d 18 (2005), in ruling on the specific issue of whether the right to be free from administrative searches based upon unlawfully issued warrants was a "clearly established" constitutional right, culled the field of "clearly established" cases and LaFave made certain general pronouncements in that regard.

The *Bosteder* Court noted that:

Government officers are qualifiedly immune from suit in their individual capacities under § 1983 unless the Appellant can establish that the alleged violation was of a “clearly established” federal constitutional right. *Saucier v. Katz*, 533 U.S. 194, 201-02, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001). Rather than claiming violation of a general right to be free from unreasonable searches and seizures, “the right the official is alleged to have violated must have been ‘clearly established’ in a more particularized, and hence more relevant, sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.” *Anderson v. Creighton*, 483 U.S. 635, 640, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987). An official action is not protected by qualified immunity just because it has not previously been held unlawful so long as “in the light of pre-existing law the unlawfulness [is] apparent.” *Id.* If the Respondents raise the affirmative defense of qualified immunity in their motions for summary judgment, “the Appellant bears the burden of demonstrating the existence of the allegedly ‘clearly established’ constitutional right.” *Robinson v. City of Seattle*, 119 Wash.2d 34, 65-66, 830 P.2d 318 (1992).

Initially, then, we must outline what the officers were “doing,” and then determine whether a reasonable officer would know that such conduct violated Bosteder’s federal constitutional rights “in the light of pre-existing law.” *Anderson*, 483 U.S. at 640, 107 S.Ct. 3034.

Bosteder, 155 Wash.2d at 36-37.

With the foregoing in mind, let us examine the conduct of the individual Respondents and the state of the law. Unlike the individual Respondents in *Bosteder*, what these individual Respondents were “doing” was not conducting a good faith search based upon a search warrant issued by a Judge however erroneously. No. These Respondents were searching Appellant’s property without even the mistaken pretext of an unlawfully issued search warrant. Aside from the myriad of excuses they have given to justify their unlawful and unconstitutional conduct, these individual Respondents blatantly, arrogantly, and unrepentantly assert the right to unfettered access to Appellant’s bedroom and bathroom at their whim and fancy.

In *Conner v. City of Santa Ana*, 897 F.2d 1487, 1490 (9th Cir. 1990) the Ninth Circuit Court of Appeals held:

It is clear that the warrant requirement of the fourth amendment applies to entries onto private land to search for and abate suspected nuisances. *Michigan v. Tyler*, 436 U. S. 499, 504-507 (1978) (*string cite omitted*), *Camara v. Municipal Court*, 387 U.S. 523, 590 (1967) (*string cite omitted*). On the strength of those cases, the district court granted the Conners' [Appellants'] summary judgment motion against the City of Santa Ana as to the July 1, 1983 warrantless entry.

Conner, 897 F.2d at 1490. The *Conner* court further rejected a similar claim to qualified immunity as these Respondents make holding:

Qualified immunity from suit must be granted when the law allegedly violated is not clearly established. In this case, the District Court concluded that the law was not clearly established because the municipal code seemingly authorized the warrantless searches and seizures. First, the municipal code does not state that warrants are not required. Second, in light of *Tyler* it is difficult to understand how the law requiring a warrant was anything less than clear.

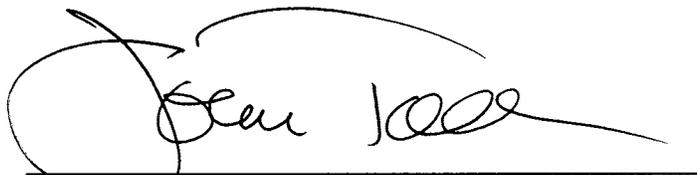
Conner, at 1492 (*citations and footnote omitted*). Based upon the facts and law, this Court is required to reject

Respondents' claim of qualified immunity.

E. CONCLUSION

Simply put, there was no basis for the lower court's granting of Respondents' motion for summary judgment. Largely, that motion was unsupported and unsupportable by any authority whatsoever. Therefore, Appellant requests this Court reverse and vacate the lower court's order granting summary judgment.

Respectfully submitted this 1st day of February, 2008.

A handwritten signature in black ink, appearing to read "Joseph P. Tall", written over a horizontal line.

Joseph P. Tall, WSBA #14821
Of Sorrel & Tall, Inc., PS
Attorney for Appellant Bonneville

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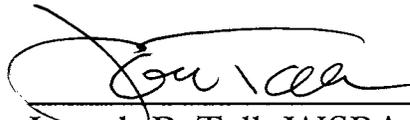
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DECLARATION OF SERVICE

1. The undersigned certifies, declares and affirms that on February 1, 2008, he mailed, postage prepaid, a true copy of the foregoing Designation of Clerk's papers to the Respondents'/Respondents' attorney Ronald Williams, Deputy Prosecuting Attorney, at the Pierce County Prosecuting Attorney's Office, 955 Tacoma Avenue South, Suite 301, Tacoma, WA 98402-2160.

I make the foregoing Declaration under penalty of perjury under the laws of the state of Washington.

DATED this 1st day of February, 2008 at Seattle, Washington.



Joseph P. Tall, WSBA # 14821
Of Sorrel & Tall, Inc., PS
Attorney for Appellant Bonneville