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NO. 36895-1-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

ROBERT BONNEVILLE, Appellant

v.

PIERCE COUNTY, et al., Respondents

COURT OF APPEALS
DIVISION II
JAN 11 PM 1:51
STATE OF WASHINGTON
BY DEPUTY

BRIEF OF RESPONDENTS PIERCE COUNTY, MARK LUPPINO,
AND MARCIA GREESON

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I. INTRODUCTION

The lawsuit below was initiated by Plaintiff in response to Pierce County's efforts to revoke his Cottage Industry permit when he failed to comply with the conditions of that permit. In essence, the Plaintiff claimed in the lawsuit below that he had a constitutional right to violate the Pierce County Code and disobey the order of the Hearing Examiner. The court below properly dismissed the Plaintiff's action on summary judgment.

II. STATEMENT OF THE CASE

This claim originated in 1999 when a neighbor complained about the Plaintiff illegally conducting a substantial business enterprise on his property in a residential zone. Ten to twelve cars were parked daily at this home, the business was expanding, and a parking lot had been added. A Staff Report from the Pierce County Department of Planning and Land Services, dated April of 2004, sets forth these facts and chronicles in part the long and laborious efforts Defendants Marcia Greeson, Mark Luppino, and other Planning Department employees have made to try to encourage the Plaintiff to comply with the County zoning codes. Pages 2-7 of that report gives a detailed history of those dealings dating back to September of 1999, over six years ago. (See Exhibit 1 to the Defendants' motion for summary judgment, CP 24-29.) Over the six-year span numerous letters

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were sent, phone calls were made, site visits made, cease and desist orders issued, citations issued, the police were called, and a criminal complaint was filed. (See Exhibit 1, pages 2-7, CP 24-29.) Despite all of the measures taken by the County, the Plaintiff continued to illegally operate his business out of his home. Finally, to avoid the consequences of orders to cease and desist, the Plaintiff applied for a non-conforming use permit in August 2001. (See Exhibit 1, page 4, CP 26.) This permit was never granted because the Plaintiff failed to provide the Department of Planning and Land Services with documentation that his business was legally established prior to the adoption of Gig Harbor Regulations in 1975. (See Exhibit 2, pages 1-2, CP 42-43.) Plaintiff apparently abandoned pursuing this course. He continued to operate the business and additional site visits and complaints ensued.

In March 2004, after a meeting with County staff, in order to prevent a criminal prosecution, Plaintiff decided to apply for a land use permit, specifically a Cottage Industry II permit. On July 1, 2004, the Hearing Examiner granted the permit with several restrictions. (See Exhibit 3, CP 44-58.) The right to inspect the Plaintiff's property to ensure compliance was a central part of this order. The Hearing Examiner noted in his order:

The concern is that the applicant will not adhere to the conditions of approval stated in this decision. He has shown that he does not follow directives. The condition of approval relating to allowing unfettered access to the property by agency employees and the right to come straight to the Examiner with permit revocation requests will insure that the conditions are followed.

(See Exhibit 3, page 10, CP 53.)

As evidence of his consent for inspections of his property, the Plaintiff, in his testimony at the hearing on the permit, gave no objection to the Hearing Examiner's inspection requirement. Indeed, it was the Plaintiff who recommended that the County have access to his property to ensure compliance with the permit conditions. Mr. Bonneville said:

Probably the simplest way is to set up with somebody from the county that can come through there at any time, count heads, and -- and agree on the space.

(Exhibit 4 at page 62, lines 22-25, CP 120.)

At summary judgment, the court was provided with the entire transcript of the hearing before the Hearing Examiner. The County further cited to several sections wherein Mr. Bonneville volunteered to allow the County to inspect his property in order to verify his compliance with the Hearing Examiner's order. (See, Defendants' Motion for Summary Judgment, pgs. 3-4.)

Furthermore, in addition to the Hearing Examiner's decision requiring inspections, Mr. Bonneville also signed a Right of Entry

Agreement on February 22, 2004, where he consented. (See Exhibit 5, CP 181.)

The Right of Entry Agreement specifically states:

The Grantor agrees to allow Pierce County personnel and its representatives access to the subject property for the purposes of inspection

(Exhibit 5, page 1, CP 181.) The Right of Entry Agreement was even notarized by the Plaintiff's attorney, Fred Hetter. (Exhibit 6 page 47, line 16-19, CP 229.)

Lastly, on November 22, 2005, the Plaintiff consented verbally by inviting Defendants into his home and gave them a tour of his residence. (Exhibit 7, page 3, lines 14-15, CP 326.) During the inspection, the County found significant violations of the permit including the presence of at least seven employees and at least 15 work stations set up. (Exhibit 7, page 3, lines 17-18, CP 326.) During the inspection Mr. Bonneville was notified that he was in violation of several conditions of his Cottage Industry II permit and these violations would be reported to the Hearing Examiner. (Exhibit 7, page 3, lines 18-19, CP 326.) On February 1, 2007, as a result of the findings of that inspection, an application to revoke the permit was filed by the Planning Department. This lawsuit was filed on December 28, 2006, apparently as an effort to hinder the revocation process.

A. **The Court Below Properly Exercised Its Discretion In Refusing To Grant The Plaintiff Bonneville's Second Request For Continuance Of The County's Motion For Summary Judgment**

On the date set for hearing of the County's Motion for Summary Judgment, September 21, 2007, the Plaintiff asked the court for a continuance of the hearing. The reason given was that the Plaintiff had just hired an attorney the day before the hearing and the attorney was not prepared to argue the motion. (See Transcript of September 21st hearing, pages 3-5, Attached hereto as Appendices 12-14.) This was the second time the Plaintiff asked to delay the hearing on the County's motion for summary judgment. Previously on September 7, 2007, the Plaintiff successfully obtained a continuance of the hearing, asserting that his mother was ill. The Plaintiff had not filed any papers in response to the summary judgment at that time. This request was made during oral argument on the date of the hearing. The court reluctantly agreed to the continuance, but warned the Plaintiff that it was his lawsuit, that he needed to read and follow the rules, and that he needed to get a response to the County's motion by the end of the next business day. (See, Transcript of September 7th hearing, pages 3-7, Attached hereto as Appendices 3-7.)

The trial court denied Plaintiff's request for a continuance on this, his second request for a continuance. The court noted that the case had already been continued once, that this effort to continue the case again

appeared to be another "tactic" by the plaintiff to delay the matter, and that the plaintiff is the one who filed the lawsuit and that he had "every opportunity to contact an attorney since the inception of the case." (See Transcript of September 21, 2007 hearing, page 8, lines 10-24, Attached hereto as Appendix 17.)

The appellate court will review a trial court's denial of a continuance for abuse of discretion. *Public Util. Dist. No. 1 v. Int'l Ins. Co.*, 124 Wn.2d 789, 813, 881 P.2d 1020 (1994). The denial of the Plaintiff's motion for continuance was not an abuse of discretion. A trial court abuses its discretion if it exercised its discretion on untenable grounds or for untenable reasons, or if the discretionary act was manifestly unreasonable. *Qwest Corp. v. City of Bellevue*, 161 Wn.2d 353, 369, 166 P.3d 667 (2007).

Here, hiring an attorney the day before the summary judgment hearing was a transparent attempt to delay the court proceedings. He secured a continuance to this same summary judgment motion previously by alleging that his mother was ill. Mr. Bonneville was granted that continuance but was warned by Judge Worsick that he filed his lawsuit, and that he needed to read and comply with the rules of civil procedure.

Mr. Bonneville had plenty of time to hire an attorney. He has at least one time had an attorney assisting him in his dealings with the

hearing examiner. A consent to search agreement prepared in connection with his permit was notarized by his attorney, Fred Hetter. (See, Exhibit 6 page 47, line 16-19, CP 229.)

Appellant cites *Butler v. Joy*, 116 Wn. App. 291 (2003), in support of his claim that a continuance should have been granted. The facts in *Butler* are a far cry from those at issue here, where Bonneville was already granted one continuance and demonstrated a pattern of missing deadlines and deliberately delaying court proceedings. In *Butler*, Ms. Butler's previous counsel withdrew from representation and she retained new counsel in a little over a month. *Butler*, 116 Wn. App. at 300. Also, Ms. Butler had not yet requested a continuance on the summary judgment motion in dispute. *Id.* at 299. Here, Mr. Bonneville was previously granted a continuance on the summary judgment motion. Unlike *Butler*, Mr. Bonneville did not have counsel that withdrew from representation -- the first time he hired *any* attorney was the day before oral arguments were scheduled for the Summary Judgment motion. (See also *Mannington Carpets v. Hazelrigg*, 94 Wn. App. 899, 973 P.2d 1103 (1999).)

B. The Court Below Properly Considered Admissible, Relevant Evidence in Making Its Decision to Grant Summary Judgment

The Plaintiff makes for the first time on appeal an argument that some of the evidence considered by the court below was inadmissible

hearsay. This argument has been waived by Mr. Bonneville. Where no objection or motion to strike is made prior to entry of summary judgment, a party is deemed to waive any deficiency in the affidavits submitted for that motion. *Lamon v. McDonnell Douglas Corp.*, 91 Wn.2d 345, 352, 588 P.2d 1346 (1979). To preserve for review a claim that an affidavit is defective, a party must register an objection which specifies the deficiency or must move to strike the affidavit before the trial court's entry of summary judgment. *Smith v. Showalter*, 47 Wn. App. 245, 248, 734 P.2d 928 (1987). This rule clearly applies to objections that the affidavits are not made on personal knowledge, do not set forth facts that would be admissible in evidence, or do not show affirmatively that the affiant is competent to testify to the matters stated therein. CR 56(e); *Smith v. Showalter, supra*; *Lamon v. McDonnell Douglas Corp.*, 91 Wn.2d 345, 352, 588 P.2d 1346 (1979).

Here, Mr. Bonneville did not make a motion to strike the challenged evidence or move for reconsideration, therefore the court should not consider Bonneville's challenge to this evidence on appeal.

If the Court chooses to consider Mr. Bonneville's challenge to this evidence, the trial court properly considered the Staff Report and the Declaration of Mark Luppino in making its decision.

The information in the Staff Report does not constitute hearsay. "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. Wash. R. Evid. 801. Here, the Staff Report, and the similar information in the Declaration of Mark Luppino were not offered to show the truth of the matter asserted, but were offered to show how this case originated and when Mr. Bonneville's actions were brought to the attention of the Pierce County Planning Department.

The Staff Report written by Marcia Greeson further is admissible under the business record exception to the hearsay rule.

A record of an act, condition or event, shall in so far as relevant, be competent evidence if the custodian or other qualified witness testifies to its identity and the mode of its preparation, and if it was made in the regular course of business, at or near the time of the act, condition or event, and if, in the opinion of the court, the sources of information, method and time of preparation were such as to justify its admission.

RCW 5.45.020. For a business record to be admissible it must:

(1) be in record form, (2) be of an act, condition or event, (3) be made in the regular course of business, (4) be made at or near the time of the act, condition or event, and (5) the court must be satisfied that the sources of information, method, and time of preparation justify the admittance of the evidence.

State v. Ziegler, 114 Wn.2d 533, 538, 789 P.2d 79 (1990). A business record may be admitted by the custodian and identified by one who has

supervised its creation. *State v. Smith*, 16 Wn. App. 425, 433, 558 P.2d 265 (1976).

Here, the Staff Report was prepared in the regular course of business by Marcia Greeson. Marcia Greeson is the records custodian for the files and records maintained by the Pierce County Planning Department. (See Greeson's Declaration, page 1, lines 21-22.) Even if portions of the Staff Report constitute inadmissible hearsay, we can presume the court disregarded the inadmissible evidence. *See State v. Melton*, 63 Wn. App. 63, 68, 817 P.2d 413 (1991) (A trial judge is presumed to be able to disregard inadmissible evidence . . .).

Furthermore, Mr. Bonneville has not shown prejudice even if there was an error. The Staff Report was only a small part of the evidence that the court considered. Error without prejudice is not grounds for reversal. *Northington v. Sivo*, 102 Wn. App. 545, 551, 8 P.3d 1067 (2000).

Mr. Bonneville further argues that those portions of Mark Luppino's Declaration about the hearing before the Hearing Examiner (Exhibit 8, page 3, lines 3-4), and about the number of employees he observed are hearsay. In his declaration, Mr. Luppino stated that he has personal knowledge of both of these items. Mr. Luppino attended the hearing and subsequently read the hearing transcript. His testimony on this matter is therefore made from personal knowledge and is admissible.

He also had personal knowledge of the matter as he directly observed 10-12 employees on Mr. Bonneville's property on November 22, 2005. (See Exhibit 8, page 4, lines 14-19.) All of these matters were properly considered by the court below.

C. Mr. Bonneville's Procedural Due Process Rights Were Not Violated

1. Appellant Does Not Have a Recognized Property Interest Triggering Due Process Safeguards

Appellant's right to illegally run a business without proper permits is not constitutionally protected. The Appellant illegally expanded his business over the years without proper permits and failed to demonstrate that his business was legally established prior to the adoption of Gig Harbor Regulations in 1975. Thus, Appellant's due process safeguards are not triggered in this instance because he purchased the property subject to applicable zoning restrictions and has not demonstrated a vested right in legally operating a substantial business on his property.

The County submitted evidence at summary judgment to support these facts. Plaintiff did not contest these facts at summary judgment nor here in his Appellant's Brief. Accordingly, his argument fails.

Further, Mr. Bonneville's Cottage Industry II permit does not amount to an unrestricted right for him to operate his home business on

the property in question. The permit was granted subject to several explicit conditions, including the provision stating:

The Hearing Examiner maintains jurisdiction over this case for a period of three years to insure that all conditions of approval are satisfied. If enforcement is necessary because there has not been adherence to the conditions of the approval, then the conditional permit will be subject to revocation directly by the Hearing Examiner.

(Exhibit 3, pages 12-13, CP 55-56.) Mr. Bonneville failed to appeal the Hearing Examiner's decision and continued to operate his appraisal business from his home after the decision was rendered. Thus, Mr. Bonneville gave his implied consent to the Hearing Examiner's jurisdiction and the hearing procedures.

The Cottage Industry II permit does not amount to a property interest triggering due process safeguards because Mr. Bonneville failed to abide by the conditions of the permit. Mr. Bonneville has a well-documented history of non-compliance (See Exhibit 1, pages 2-7, CP 24-29.) When the County employees visited the property on November 22, 2006, they found that the number of employees working at the property far exceeded the permit's restrictions. (Exhibit 8, page 3, lines 8-9, CP 330.) Mr. Bonneville's failure to abide by the conditions of the Cottage Industry permit destroyed any constitutionally protected property interests that the Cottage Industry II permit may have granted him.

2. PCC § 1.22.120 Does Not Violate Mr. Bonneville's Constitutional Rights

Mr. Bonneville contends that the administrative proceeding to revoke his Cottage Industry II approval is unconstitutional and his procedural due process rights were violated. Mr. Bonneville contends that the "substantial evidence" standard identified in PCC § 1.22.120 fails to meet minimum due process requirements. He primarily relies on *Mansour v. King County*, 131 Wash.App. 255 (2006), to support this contention. However, Mr. Bonneville's reliance on *Mansour* is misplaced.

Mansour is clearly distinguishable from the case at hand. In that case, the appellant appealed an order by the Superior Court of King County that affirmed the decisions of the King County Animal Control and King County Board of Appeals that ordered the individual to remove his dog from the County or have it humanely euthanized. The order was made in response to the individual's dog having been linked to a deadly attack on a neighbor's cat. The dog owner was given insufficient notice and denied the opportunity to subpoena witnesses and records. *Id.* at 259. Furthermore, neither the King County Code nor the Board rules required a particular standard of proof for the removal hearing. *Id.* at 265. The court held "[t]he lack of a clearly ascertainable adequate standard of proof violated Mansour's procedural due process rights." *Id.* at 268. However,

in the case at hand, the Appellant has been given sufficient notice, access to records, and the opportunity to introduce evidence and question witnesses. (See Exhibit 7, page 3, lines 21-25, CP 326.) Furthermore, unlike in *Mansour*, PCC § 1.22.120 identifies a clearly ascertainable standard of proof.

Further, Mr. Bonneville's contention that the Hearing Examiner used the "substantial evidence" standard of proof is erroneous. The Hearing Examiner found by a "preponderance of the evidence" that Mr. Bonneville violated several conditions of his Cottage Industry II permit. The "Conclusion Section" of the Report and Decision of the Pierce County Hearing Examiner, dated September 5, 2007, specifically states: "A preponderance of the Evidences showed that Conditions of Approval No. 3, 10 and 11 were violated. Therefore, the Conditional Use Permit is revoked." (See Revocation Decision, page 14, Attached hereto as Appendix 44.)

3. Mr. Bonneville Was Afforded Sufficient Due Process

Even if the County's enforcement of the zoning restrictions triggered the Defendant's due process rights, PCC § 1.22.120 provides sufficient due process. Procedural due process in Washington requires notice and a meaningful opportunity to be heard. *Olympic Forest Prods. v. Chaussee Corp.*, 82 Wn.2d 418, 421, 511 P.2d 1002 (1973). The scope of

due process involves a balancing of the private interest to be protected, the risk of erroneous deprivation of that interest by governmental procedure, and the government's interest in maintaining such a procedure." *Krein v. Nordstrom*, 80 Wn. App. 306, 310, 908 P.2d 889 (1995).

PCC § 1.22.110 provides strict procedural requirements for public hearings. All public hearings conducted by the Hearing Examiner are tape recorded and witness testimony is given while under oath. PCC § 1.22.110. In addition, all parties have the opportunity to cross-examine expert witness testimony, including County staff. *Id.* Here, Mr. Bonneville was given ample notice of the hearing, an opportunity to respond, present evidence, and examine witnesses. (Exhibit 7, page 3 lines 21-25 to page 4, lines 7-16, CP 326-7.) Thus, considering the fact that he had no legally cognizable right to violate the zoning restrictions, the scope of the hearing called for under the statute, and the actual hearing held, Mr. Bonneville's due process rights were not violated.

D. There Is No Genuine Issue of Material Fact Regarding Whether Mr. Bonneville Voluntarily Consented to the Search of his Property

Mr. Bonneville's claim that Defendants' inspection of his home constituted an unconstitutional warrantless search is wholly without merit. Indeed, the Plaintiff consented to and even invited these searches (see Facts section above). Both the United States and Washington

Constitutions protect a citizen's privacy interests. U.S. Const. amend. 4; Wash. Const. art.1, § 7. However, it is well settled in Washington that a warrantless search is constitutional when valid consent is granted. *State v. Reichenbach*, 153 Wn.2d 126, 131, 101 P.3d 80 (2004). The requirements for consent are less stringent in the administrative context and whether consent to search is voluntary is determined from the totality of the circumstances. *Cranwell v. Meseck*, 77 Wn. App. 90, 102, 890 P.2d 491 (1995).

Here, there is no dispute that the Plaintiff consented to these searches. His consent is manifested in the following five instances: (1) orally in the May 2004 hearing, (2) the Hearing Examiner conditioned approval of the permit on the allowance of the searches, and he did not object nor appeal that order, (3) he prepared his own Right of Entry Agreement, (4) he signed a consent form prepared by the County allowing the searches, and (5) when County employees were on his property, he consented again. The Plaintiff now tries to avoid these facts by alleging that his consent was "involuntary and coerced." (See December 28, 2006, Complaint, page 3, line 7.) However, the facts in the record do not support this claim.

First, the Plaintiff's oral consent made while under oath during the May 13, 2004, hearing was voluntarily and intelligently made. Indeed, it

was the Plaintiff who initially suggested that enforcement of the terms of the conditional permit be enforced through inspection of his property by a designated person from the County. (Exhibit 4, page 62, lines 22-25, CP 120.) Furthermore, the Plaintiff stated on his own accord that he was willing to allow a County employee to inspect his property at any time. (Exhibit 4, page 64, lines 16-22, CP 122.) The Plaintiff came to the hearing voluntarily, and at no time during the hearing was he subjected to physical or verbal threats made by the prosecuting attorney. Nothing in the transcript supports his claim of coercion.

Next, the Plaintiff's actions after the Hearing Examiner's decision show that he voluntarily agreed to abide by the conditions of the permit. The Hearing Examiner's approval of the Cottage Industry permit is explicitly conditioned on on-going access to the Plaintiff's property. (Exhibit 3, page 12, CP 55.) The Plaintiff knew about the Hearing Examiner's decision, failed to appeal it, and continued operating his business after the decision was rendered.

Furthermore, the Plaintiff voluntarily signed a Right of Entry Agreement explicitly granting Pierce County personnel access to the property for purposes of inspection. Indeed, the Plaintiff admitted that when he signed the agreement he understood that he was giving access to County personnel to come on his property and do inspections. (Exhibit 6,

page 44, lines 6-9, CP 226.) Moreover, the agreement was notarized by the Plaintiff's attorney Fred Hetter. (Exhibit 6, page 47, line 16-19, CP 229.) By notarizing the agreement, the Plaintiff's own attorney attested that the Plaintiff acknowledged that the agreement was signed freely and voluntarily. (Exhibit 5, page 2, CP 182.) As further evidence of his consent, the Plaintiff prepared his own Right of Entry Agreement and gave it to Pierce County Planner Marcia Greeson. (See Exhibit 9, CP 332.)

Finally, the circumstances surrounding the Plaintiff's oral consent at the scene show that his consent was voluntary. The Defendants entered the property and asked the Plaintiff for his consent to allow the inspection. (Exhibit 6, page 102, lines 3-6, CP 284.) The Plaintiff initially refused to allow the Defendants on the property, at which time the Defendants attempted to leave. While attempting to leave the property, the Plaintiff verbally changed his mind and invited the Defendants into his home and gave them a tour of his residence. (Exhibit 7, page 3, lines 12-15, CP 326.) There is no evidence in the record that the Defendants physically or verbally threatened the Plaintiff. Plaintiff alleges that County agents had bullet-proof vests. This is simply not true. Plaintiff submitted no evidence of this allegation.

In sum, Plaintiff gave his consent for Pierce County personnel to search his property for the purposes of ensuring that he was not in

violation of the terms of the conditional permit. The above-listed five items show the evidence of his consent, and that it was freely and intelligently given. Given these undisputed facts, the Plaintiff's claim of unconstitutional and illegal searches is without merit.

Mr. Bonneville cites several cases for his argument that warrantless administrative searches are unconstitutional. He cites to the case of *Camara v. Municipal Court*, 387 U.S. 523 (1967). The *Camara* case is distinguishable. In *Camara*, a city ordinance gave city building inspectors the right to enter any building. The plaintiff refused to allow the inspectors to enter and was prosecuted under another ordinance that made it a crime to refuse to comply with the inspectors' requests. He claimed the warrantless search requested by the building inspectors violated his Fourth Amendment rights. The Court held that the administrative search was not peripheral to the occupant's Fourth Amendment interests because a criminal prosecution could and did result from his refusal to submit. Here, unlike in *Camara*, the defendants went on the property after Mr. Bonneville gave his verbal consent. Also, Mr. Bonneville gave his consent in writing allowing access to the defendants. Furthermore, no criminal prosecution resulted from the fruits of the search.

Bonneville also cites to the case of *Connor v. City of Santa Ana*, 897 F.2d 1487 (9th Cir. 1990). In *Connor*, without a warrant, police broke

down the fence surrounding the Conner property and removed two of the vehicles from the property. Previously, the property owners were given an administrative hearing which found that the broken down vehicles constituted a nuisance under the municipal code. The court found entry to abate a known nuisance falls within the warrant requirement of the fourth amendment. Unlike in *Connor*, here, the Defendants went on the property after Mr. Bonneville gave his verbal consent. Also, Mr. Bonneville gave his consent in writing allowing access to the Defendants.

He also cites to the case of *State v. Browning*, 67 Wash.App. 93 (1992). In *Browning*, during the course of an inspection of defendants' home, a building inspector observed numerous marijuana plants. The inspector reported his observations to the police. The court reversed defendants' convictions, holding that the inspector's entry into the house was unlawful because defendants did not consent such entry and the inspector did not present his credentials or request entry as required by the Uniform Building Code. Again, here, unlike in the *Browning* case, the defendants went on the property after Mr. Bonneville gave his verbal consent. Also, Mr. Bonneville gave his consent in writing allowing access to the Defendants. Again, no criminal prosecution resulted from the fruits of the search.

Mr. Bonneville also argues that whether consent to search was voluntary is *always* a question of fact not appropriate for determination by summary judgment. To support this argument, he cites to the cases of *Howard v. Vandiver*, 731 F.Supp. 1290, 1225 (ND Miss. 1990) and *State v. Flowers*, 57 Wash. App. 636, 644-645 (1990). These cases do not say that whether consent is given is always a question of fact -- instead, they say that under the particular circumstances of these cases, summary judgment was inappropriate. Here, where there is so much undisputed evidence of consent, summary judgment was proper.

Mr. Bonneville further argues that 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. (See Brief of Plaintiff.) He asserts that under Pierce County Code §18.60.060 Pierce County does not have the right to enter into any structure without the express consent of the property owners. This is the first time this argument regarding PCC §18.60.060 has been raised in this case. Appellate courts generally do not consider issues that were not raised below. *Wash. Fed'n of State Employees, Council 28 v. Office of Fin. Mgmt.*, 121 Wn.2d 152, 163, 849 P.2d 1201 (1993).

Here, if the Court chooses to consider this argument, the record cited above shows that there is no dispute that there was no evidence of

any force or compulsion against Mr. Bonneville. Rather, he freely volunteered his consent to inspections to verify his compliance with the conditions of this Cottage Industry permit.

Mr. Bonneville also argues for the first time on appeal that Pierce County was 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 at any time. He cites *State v. Williams*, 142 Wash.2d 12, 25 (2000) for this assertion. Mr. Bonneville's interpretation of *State v. Williams* is mistaken. The court there *refused* to hold that police officers must advise citizens of their right to refuse entry every time a police officer enters their home. The court stated:

We recognize that law enforcement officers need to enter people's homes in order to provide their valuable services for the community on a daily basis. We do not find it prudent or necessary to extend *Ferrier* to require that police advise citizens of their right to refuse entry every time a police officer enters their home. Police officers are oftentimes invited into homes for investigative purposes, including inspection of break-ins, vandalism, and other routine responses. *We do not find a constitutional requirement that a police officer read a warning each time the officer enters a home to exercise that investigative duty.* To apply the *Ferrier* rule in these situations would unnecessarily hamper a police officer's ability to investigate complaints and assist the citizenry. Instead, *we limit the requirement of a warning to situations where police seek to conduct a search for contraband or evidence of a crime without obtaining a search warrant.*

State v. Williams, 142 Wn.2d 17, 27-28 (Wash. 2000).

1. Bonneville Argues That Pierce County is Not Entitled to Qualified Immunity

A county cannot be held liable under 42 U.S.C. § 1983 unless the "execution of a government's policy or custom . . . may fairly be said to represent official policy, inflicts the injury." *Jackson v. City of Bremerton*, 268 F.3d 646, 653 (9th Cir. 2001) citing *Monell v. Dep.'t of Soc. Serv.*, 436 U.S. 658, 694 (1978). "[T]he first inquiry in any case alleging municipal liability under § 1983 is the question whether there is a direct causal link between a municipal policy or custom and the alleged constitutional deprivation." *City of Canton, Ohio v. Harris*, 489 U.S. 378, 385 (1989). Mr. Bonneville has failed to show the direct causal link between Pierce County policy and his alleged constitutional deprivation.

2. Bonneville Also Argues That Individual Respondents Are Not Entitled to Qualified Immunity

State officials have broad immunity from suit under 42 U.S.C. § 1983 unless they specifically knew or should have known that their official actions would violate constitutional rights. *Procunier v. Navarette*, 434 U.S. 555, 562, 55 L. Ed. 2d 24, 98 S. Ct. 855 (1978). Government officials are entitled to qualified immunity unless a plaintiff can establish a violation of a federally protected constitutional right that was clearly established at the time of the alleged violation. *Bosteder v. City of Renton*, 155 Wn.2d 18, 36-37, 117 P.3d 316 (2005); *Lunini v. Grayeb*, 395 F.3d

761, 768 (7th Cir. 2005). A plaintiff does not meet this burden simply by showing a violation of a general right to be free from unlawful searches and seizures. *Bosteder*, 155 Wn.2d at 36-37.

The Supreme Court has established a two-part analysis for determining whether qualified immunity is appropriate in a suit against a government official for an alleged violation of a constitutional right. *Boyd v. Benton County*, 374 F.3d 773, 778 (9th Cir. 2004) (citing *Saucier v. Katz*, 533 U.S. 194, 201, 150 L. Ed. 2d 272, 121 S. Ct. 2151 (2001)). Courts must examine (1) whether the government official violated the plaintiff's constitutional rights on the facts alleged and (2) if there was a violation, whether the constitutional rights were clearly established. *Id.*

Here, Plaintiff cannot show that Defendants violated any clearly established constitutional right. Plaintiff simply claims that the site visits were unlawful because he felt coerced into allowing the defendants onto his property. In making this claim, Plaintiff only asserts his rights in a very general sense. His argument ignores the fact that he previously gave written and oral consent, and that when the officers were attempting to leave he invited them onto the property and gave them a tour of his house. Based on the facts pleaded by the Plaintiff, his admissions in the record, his argument before this court, and the applicable law, it is clear that rather than violating any constitutional provisions or statutes, the Defendants

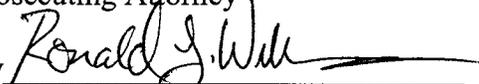
followed the mandate of constitutional statutes in the course of their official duties. As Plaintiff cannot establish the violation of a clearly established constitutional right, the Defendants are entitled to qualified immunity.

III. CONCLUSION

The evidence submitted to the trial court established that Mr. Bonneville freely volunteered his consent on several occasions to the inspection of his property. It was a primary condition for the granting of his Cottage Industry permit, given his history of non-compliance with previous codes. His complaints that such consent was either not given or coerced are baseless. The decision of the trial court below should be affirmed.

DATED: March 10th, 2008.

GERALD A. HORNE
Prosecuting Attorney

By 

RONALD L. WILLIAMS
Deputy Prosecuting Attorney
Attorneys for Respondents
Ph: (253)798-3612 / WSB # 13927

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing BRIEF OF RESPONDENTS PIERCE COUNTY, MARK LUPPINO, AND MARCIA GREESON was delivered this 10th day of March, 2008, to ABC-Legal Messengers, Inc., with appropriate instruction to forward the same to the following parties:

Joseph P. Tall
SORREL & TALL, INC., P.S.
2611 NE 113th Street, Suite 300
Seattle, WA 98125-6700


CHRISTINA M. SMITH

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IN THE SUPERIOR COURT FOR THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF PIERCE

ROBERT BONNEVILLE,)	
)	
Plaintiff,)	
)	Superior Court
v.)	No. 06-2-14268-9
)	
PIERCE COUNTY, ET AL.,)	
)	
Defendants.)	
)	

VERBATIM TRANSCRIPT OF PROCEEDINGS

September 7, 2007
Pierce County Courthouse
Tacoma, Washington
Before the
Honorable Lisa Worswick

Suzanne L. Trimble, CCR, RPR
Official Court Reporter
Department 16 Superior Court
(253) 798-6632

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A P P E A R A N C E S

For the Plaintiff:
ROBERT BONNEVILLE
PRO SE LITIGANT

For the Defendant:
RONALD WILLIAMS
ATTORNEY AT LAW

T A B L E O F C O N T E N T S

PROCEEDINGS

PAGE

September 7, 2007

TESTIMONY

(No witnesses heard.)

OTHER

Motion..... 3

E X H I B I T

EXHIBIT

DESCRIPTION

MARKED/ADMITTED

PAGE

(No exhibits marked or admitted.)

1 BE IT REMEMBERED that on Friday, September 7, 2007,
2 the above-captioned cause came on duly for hearing before the
3 **HONORABLE LISA WORSWICK**, Judge of the Superior Court in and
4 for the County of Pierce, State of Washington; the following
5 proceedings were had, to wit:

6
7 <<<<<< >>>>>>

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9 THE COURT: Mr. Bonneville has filed a letter with
10 the court. The letter is dated September 6, 2007. Today is
11 September 7, 2007. It looks like there's a faxed time of
12 2:36 in the afternoon. The motion, the re-note for summary
13 judgment was filed August 7th. I think it was originally
14 filed.

15 MR. WILLIAMS: July 23rd it was originally filed,
16 Your Honor.

17 THE COURT: Yes. It's been pending for quite a
18 while. I didn't see any response at all from Mr. Bonneville
19 until, actually, this morning. Mr. Bonneville, what is it
20 that you're --

21 MR. BONNEVILLE: Basically I'm asking for an
22 extension, Your Honor. Recently I've been facing a medical
23 nightmare with my mother, being prescribed the wrong medicine
24 when she started falling.

25 THE COURT: Is she okay?

1 MR. BONNEVILLE: She's making a remarkable recovery.
2 For a while it was hard to figure out why she was falling and
3 she hit her head and split her ear open. One of us had to
4 watch her around the clock here. The issues that are before
5 us are so complex. They involve so much research on my part
6 that I just didn't have time to prepare an adequate response.
7 I never got an extension before this. I am just asking for
8 an extension.

9 THE COURT: Why did you wait until yesterday
10 afternoon to seek it?

11 MR. BONNEVILLE: I was working on it. I thought I
12 could maybe pull it together. It's just not very good.

13 THE COURT: Well, it was due 11 days ago. You would
14 have known 10 days ago you wouldn't have it on time.

15 MR. BONNEVILLE: I didn't know there was a cut off
16 to get the material in.

17 THE COURT: Okay. This is your lawsuit.

18 MR. BONNEVILLE: Right.

19 THE COURT: You're representing yourself.

20 MR. BONNEVILLE: Mm-hm. (Replies affirmatively.)

21 THE COURT: You need to read the rules. The motion
22 for summary judgment has rules. We've had the argument
23 before where you've given me stuff late, try to hand it to me
24 the morning at the hearing.

25 MR. BONNEVILLE: I'm thinking there's nobody going

1 to be prejudiced by an extension. It just seems like I've
2 had absolutely no extensions before. The trial court
3 calendar was accommodated. The issues are so complex, Your
4 Honor, that in actual fact, the hearing examiner was supposed
5 to render a decision in 10 days. As of yesterday, there was
6 still no decision. I think there is a decision today. So
7 even trained attorneys are having problems with these matters
8 and issues before us. They're pretty long reaching and far
9 reaching. Along with the medical nightmare that I'm up
10 against, I just didn't have the chance to prepare.

11 THE COURT: And when will your documents be ready?

12 MR. BONNEVILLE: I can have them ready by any time
13 next week, if I can just have the weekend.

14 THE COURT: Counsel.

15 MR. WILLIAMS: Your Honor, the letter says that
16 30 days ago from the date of this letter, September 6th, his
17 mother began to have some medical problems. That would have
18 been 2 weeks after he received the summary judgment motion.
19 There is a rule, CR 56(f), that provides if you want more
20 time on a motion for summary judgment, you have to by
21 affidavit explain what it is you want more time to present.
22 He hasn't complied with the rule. As the court pointed out,
23 he's way late on responding to the summary judgment, even
24 given 2 extra weeks response time because of the delays in
25 the motion.

1 I like to be reasonable. If this was the first time
2 Mr. Bonneville sought to delay a court hearing, I might
3 consider it, but it's not the first time. This is about
4 8 years into the process of him delaying and ignoring court
5 deadlines. I just read a 9th Circuit Court of Appeals from
6 him saying he missed deadlines there and they dismissed. He
7 has attorneys standing by. Eight years, he knows full well
8 the rules, but ignores deadlines and relies on the mercies of
9 the courts to give him more time.

10 This is the third time he's before the court seeking
11 delays of other court hearings. Twice he sought injunctions
12 on the hearings examiner, which both were denied. The
13 hearings examiner ruled, the opinion I saw this morning
14 revoking his permit, which is exactly what he's suing the
15 county over, for them taking action to revoke his permit.
16 This motion is unresponded to, which by definition means it's
17 uncontested. Giving him more time allows him to go outside
18 the rules to contest the motion, which is frankly frivolous.
19 His case is frivolous. I'm very much opposed to him getting
20 more time.

21 MR. BONNEVILLE: Actually, I've never been granted
22 an extension on these matters and even though I tried to
23 resolve the constitutional issues, I've never had a
24 constitutional hearing on the constitutional issues. The
25 County argued in here that the hearing examiner should hear

1 that, then they argued in front of the hearing examiner that
2 in fact he had no jurisdiction to do this. No one has ever
3 heard any of these matters. I think the law favors a
4 resolution by trial rather than by summary judgment. I have
5 not been given any extensions period. In fact, this is going
6 to be decided by technicality, by me just being not versed in
7 the legal rules the way they are and simply having the
8 manpower and the ability to follow through on everything.
9 I'm only asking for next week, so I can have a weekend to
10 work on this still.

11 MR. WILLIAMS: Your Honor, this idea of a
12 constitutional claim he made months ago before this court in
13 a detailed briefings that he could have easily formulated in
14 the response to this motion, but he chose not to. The more
15 time is just a complete red herring.

16 THE COURT: This is what I'm going to do. I'm going
17 to set it over two weeks. You are to have your documents to
18 the County by Monday. You are to read Rule 56 and follow it.
19 It's your lawsuit. You've got to read the rules. If it's
20 not to them by the close of business Monday --

21 MR. BONNEVILLE: I appreciate that.

22 THE COURT: -- then I'm not going to consider
23 anything that's been provided. Technically by setting it
24 over two weeks, you're no longer within Rule 56, which would
25 give you additional time. I would set it over for 12 days,

1 but I won't be hearing motions in 12 days. So I'm going to
2 set it over for 14 days, but still order you have your
3 documents to them by 4:30 on September 10th. If you try to
4 get it to them at 4:31, it won't be considered. Am I making
5 myself clear?

6 MR. BONNEVILLE: Very clear.

7 THE COURT: All right. Sorry, two weeks.

8 MR. WILLIAMS: All right. Should we file a new note
9 of issue?

10 THE COURT: I'll ask Ms. Wolfe to set it, but it
11 will need to be confirmed.

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13 (Proceedings concluded.)

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF PIERCE

ROBERT BONNEVILLE,)
)
 Plaintiff,)
) Superior Court
 v.) No. 06-2-14268-9
)
 PIERCE COUNTY, ET AL.,)
)
 Defendants.)

COPY

REPORTER'S CERTIFICATE

STATE OF WASHINGTON)
) ss
 COUNTY OF PIERCE)

I, Suzanne L. Trimble, Official Court Reporter in the State of Washington, County of Pierce, do hereby certify that the forgoing transcript is a full, true, and accurate transcript of the proceedings and testimony taken in the matter of the above-entitled cause.

Dated this 3rd day of March, 2008.


SUZANNE L. TRIMBLE, CCR
Official Court Reporter
CCR #2173

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6 IN THE SUPERIOR COURT FOR THE STATE OF WASHINGTON
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8 IN AND FOR THE COUNTY OF PIERCE
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10 ROBERT BONNEVILLE,)
11)
12 Plaintiff,)
13 v.) Superior Court
14 PIERCE COUNTY, ET AL.,) No. 06-2-14268-9
15 Defendant.)
16)

17 VERBATIM TRANSCRIPT OF PROCEEDINGS
18

19 September 21, 2007
20 Pierce County Courthouse
21 Tacoma, Washington
22 Before the
23 Honorable Lisa Worswick

24 Suzanne L. Trimble, CCR, RPR
25 Official Court Reporter
Department 16 Superior Court
(253) 798-6632

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A P P E A R A N C E S

For the Plaintiff:
JOSEPH TALL
ATTORNEY AT LAW

For the Defendant:
RONALD WILLIAMS
ATTORNEY AT LAW

T A B L E O F C O N T E N T S

PROCEEDINGS

PAGE

September 21, 2007

TESTIMONY

(No witnesses heard.)

OTHER

Motion for Summary Judgment..... 3

E X H I B I T

EXHIBIT

DESCRIPTION

MARKED/ADMITTED

PAGE

(No exhibits marked or admitted.)

1 BE IT REMEMBERED that on Friday, September 21, 2007,
2 the above-captioned cause came on duly for hearing before the
3 **HONORABLE LISA WORSWICK**, Judge of the Superior Court in and
4 for the County of Pierce, State of Washington; the following
5 proceedings were had, to wit:

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7 <<<<<< >>>>>>

8
9 THE COURT: Bonneville and Pierce County and others.

10 MR. WILLIAMS: Good morning, Your Honor, this is
11 Bonneville v. Pierce County, Mark Luppino, Marcia Greeson,
12 Jill Guernsey and Daniel Wullick, 06-2-14268-9. I'm Ron
13 Williams representing Pierce County and all of the
14 defendants. It's our motion for summary judgment.

15 MR. TALL: Good morning, Your Honor, my name is
16 Joseph Tall, T-A-L-L. I'm an attorney, and I will be
17 representing Mr. Bonneville today for purposes of this
18 motion, and if the court grants our motion for continuance,
19 I'll be filing my notice of appearance this afternoon on his
20 behalf. Before the court begins the motion on summary
21 judgment, I would like to ask for a continuance. I
22 understand this matter has already been continued once at my
23 client's request. He filed his opposition papers in a timely
24 fashion in accordance to your order.

25 However, yesterday he came to my office for assistance.

1 I have not had a chance to look at any of the documents,
2 except for the motion and his opposition and the reply. I
3 haven't seen any of the declarations or the exhibits until I
4 got here this morning and looked at the court file, which I
5 see is about 2 inches thick on the motion.

6 Your Honor, I realize that this is an imposition on the
7 court. This is a serious matter. It appears to be quite
8 complicated. I've spoken with my client. He has articulated
9 to me that there are facts, grounds for opposition to the
10 motion. I'm just unready to argue it, and he is, as well. I
11 have reviewed his responsive papers. They are certainly not
12 in a professional form, and I believe that they fail to
13 articulate his opposition. The purpose of the court rules,
14 of course, is not only to provide for an efficient process,
15 but also to see that substantial justice is done. If the
16 court allows the continuance for a short period of time,
17 Mr. Bonneville will no longer be a pro se litigant, and he'll
18 have an opportunity and the parties have will an opportunity
19 to be dealing with an attorney.

20 Second, although I do not want to minimize the
21 aggravation on the part of the county and the individual
22 defendants on another continuance, they are county employees,
23 and they will not be incurring attorney fees and costs by
24 another continuance. In fact, it is my client that will be
25 paying my fees and costs for the continuance, so he will be

1 suffering a substantial monetary hit.

2 And I feel that if the court would allow me to
3 articulate his claims in a more organized fashion and to
4 provide a declaration in conformity with the rules, then this
5 court could base its decision on the merits as opposed to a
6 pro se litigant's unarticulated attempt to oppose the motion.
7 I feel that even though the case, apparently the motion is as
8 I said approximately 2 inches deep with documents and so
9 forth, I'm sure that I could spend the weekend and the first
10 part of next week going through everything and preparing an
11 opposition declaration and memorandum, which I could file on
12 Friday. And then with an additional 11 days or however long
13 Mr. Williams requests to file a reply, I would be willing to
14 appear before this court at any time convenient to you and
15 Mr. Williams.

16 THE COURT: What's your bar number, Mr. Tall?

17 MR. TALL: 14821.

18 THE COURT: And you have not filed a notice of
19 appearance. Is that correct?

20 MR. TALL: That is correct. I have not had an
21 opportunity yet, but it would be filed today. In fact, I'll
22 fax it to Mr. Williams as soon as I get back to the office.

23 THE COURT: Mr. Williams.

24 MR. WILLIAMS: Your Honor, I'll confess to being
25 impressed and amazed at Mr. Bonneville's latest attempt to

1 delay the proceedings. As the court is aware, the last time
2 it was the mother's medical condition, and this time it is
3 the day before hiring an attorney to represent him.

4 Mr. Tall's persuasive basis for this continuance would be
5 interesting and perhaps beneficial had they been made about
6 9 months ago when Mr. Bonneville filed the lawsuit or
7 anywhere along the lines where he's appeared in multiple
8 hearings here and in the hearing examiner forum with
9 admittedly attorneys in the background helping him with his
10 pleadings, but choosing never to have any of those attorneys
11 appear for him and defend his case and not until the literal
12 11th hour, actually well past the 11th hour, that he chooses
13 to bring an attorney forward who still has not filed a notice
14 of appearance nor made this motion to continue. I just don't
15 think it's reasonable at all to allow for this to be
16 continued any time further.

17 With respect to the defendants who are county employees
18 who are sued for doing their job, two of whom were here in
19 court last time hoping to see this resolved once and for all,
20 but because of Mr. Bonneville's request was not resolved
21 then. It is a significant drain on them mentally and doing
22 their job. So I strongly object to any further continuance
23 in this case.

24 MR. TALL: Your Honor, again, I do not want to
25 minimize the impact on the individual defendants. Nobody

1 wants to be named in a lawsuit, even if the county is
2 providing legal counsel. However, this motion as I
3 understand it was originally filed last July, has been kicked
4 around for a while. There is no trial date set, if I
5 understand the file correctly and a 2 or 3-week continuance
6 in order to allow a professional articulation of the grounds
7 of my client's case I don't think would be an abusive
8 discretion. I don't know why my client contacted me
9 yesterday.

10 THE COURT: What time were you contacted?

11 MR. TALL: He met me yesterday at 10:00 in the
12 morning. I had asked him to bring all of the papers with
13 him. As I said, I've seen the motion, the bare motion, his
14 opposition with his subjoined declaration of a page and then
15 the reply, which is paragraph after paragraph of "it is
16 undisputed" because my client failed to articulate his
17 objection in the form of a declaration, as opposed to putting
18 it in a memorandum.

19 He also sent me an e-mail this morning a little after
20 3:00. I've been trying my best to prepare this morning. My
21 client has brought all of the documents, the exhibits, and
22 the declarations that were filed by the county, which he's
23 prepared to give to me so I can go back to my office and
24 begin preparation of the -- of a more thorough response to
25 the motion for summary judgment.

1 You know, this is obviously a dispositive motion. If
2 it's granted, based upon the documents that have been filed
3 in opposition, it wouldn't be -- I don't believe it would be
4 fair, other than the fact that my client has been given an
5 opportunity to hire an attorney before. Again, you know, I
6 would simply ask that a very short continuance be granted one
7 final time, and I can only represent to the court that I will
8 in fact file a response no matter what happens by next
9 Friday.

10 THE COURT: I'm going to deny the motion for a
11 continuance, Mr. Tall. This is no reflection on you or your
12 valiant efforts on behalf of Mr. Bonneville, but we have a
13 case that has already been continued once before.
14 Mr. Bonneville has appeared before me before. Every step of
15 the way the State has been complaining that Mr. Bonneville
16 has done everything just to delay this case, and I can't help
17 but think this is just another tactic.

18 Let's be clear on this. He is the plaintiff in this
19 matter. He filed the lawsuit in this matter. He has had
20 every opportunity to contact an attorney since the inception
21 of this case and actually before, and he has failed to do so
22 until the day before this motion is to be argued after his
23 prior continuance has been granted. So I'm going to go
24 forward with the motion today.

25 MR. TALL: Thank you.

1 THE COURT: Thank you.

2 MR. WILLIAMS: Your Honor, I don't mean any
3 disrespect. I also object to Mr. Tall arguing because he
4 hasn't entered a motion to appear.

5 THE COURT: I don't normally allow anyone to speak
6 on anyone's behalf without filing a notice of appearance. My
7 understanding is Mr. Tall was arguing the motion for
8 continuance. If he intends to argue beyond this, I will
9 require a notice of appearance be filed. We have something
10 blank we can print up for him to sign, if he intends to
11 argue.

12 MR. TALL: I'll be happy to do so, if there's a
13 blank. Otherwise, I can hand write up a piece of paper and
14 provide it to the court.

15 THE COURT: Can you do that blank order?

16 MR. WILLIAMS: If the court prefers --

17 THE COURT: Give me just one second.

18 MR. WILLIAMS: I'll proceed under the understanding
19 that will be filed, Your Honor.

20 THE COURT: I'm going to have him do it.

21 MR. WILLIAMS: All right.

22 THE COURT: All right. Thank you. Go ahead,
23 Mr. Williams.

24 MR. WILLIAMS: Your Honor, our appearances in the
25 past have been primarily focused on procedural matters. I

1 don't know we've articulated the underlying facts in this
2 case. I've outlined them in my motion. I don't intend to
3 belabor them. Perhaps in a quick summary fashion, this all
4 started in '99 when neighbors complained about Mr. Bonneville
5 conducting a business in a residential area. The county
6 investigated, determined in fact that was happening, over a
7 long period of time tried to work with Mr. Bonneville until
8 finally he obtained a cottage industry permit to allow him to
9 do a limited form of that business in a residential area.

10 In granting that permit, the hearing examiner said and
11 I quote, "The concern is that the applicant will not adhere
12 to the conditions of approval stated in this decision. He
13 has shown that he does not follow directives. The condition
14 of approval relating to allowing unfettered access to the
15 property by agency employees and the right to come straight
16 to the examiner with permit revocation requests will ensure
17 that the conditions are followed." That was a central
18 element of the granting of this permit.

19 So the permit is granted. Sometime thereafter, the
20 agency employees go out to the scene and find sure enough
21 he's not following the conditions of the permit. That was in
22 November of last year. So they began revocation proceedings
23 on that permit. This lawsuit followed. This lawsuit was an
24 attempt by Mr. Bonneville, I would submit to the court, to
25 try to intimidate and delay that revocation proceeding. That

1 aim failed. The permit has since been revoked.

2 But he sued the county employees who were doing their
3 job and later sued the hearing examiner, the deputy
4 prosecutor and the deputy sheriff who were all involved in
5 trying to find out about these violations.

6 And he claims, number one, that they violated his
7 constitutional right to search. As we have laid out in our
8 brief, consent to search is a recognized exception to these
9 claims of violation of constitutional right. His consent to
10 search is set forth in many ways as I've laid forth in my
11 brief. None of those ways are objected to or contested by
12 the plaintiff in this motion, except for the very last one,
13 which was on the scene when the agency employees went to
14 look, and Mr. Bonneville initially wouldn't let them in, and
15 as they were getting in their cars to leave, he said, "Okay.
16 Never mind, I changed my mind. Come in." That's not
17 contested either.

18 He does contest the nature of the situation. He says
19 they're coercing and intimidating him. They deny that, but
20 even if that were considered a factual dispute, his consent
21 is clearly established in an uncontested format in all of the
22 other ways that I set forth in the brief. I don't know if
23 the court needs me to go through all of those. Most of those
24 are him signing his own consent to search and the hearing
25 examiner ordered to search and all of that stuff. That's

1 number one of his complaint, that they violated his rights by
2 searching without consent. That's just not established.

3 The second one is he claims he was not afforded due
4 process. When this lawsuit was filed, he was aiming at the
5 proceeding in front of the hearings examiner to get that
6 cottage industry permit. He said he wasn't allowed due
7 process in that hearing, except for the fact that he never
8 appealed that decision, and the appeal time long ran, and he
9 never said a word about it until filing this lawsuit. So
10 he's not able now to raise a claim of failure of due process.
11 He never appealed that hearing examiner decision.

12 It seems as if he's trying to incorporate now
13 everything that's happened since he filed that lawsuit as not
14 allowing due process there either, but that's just not
15 established by him in any form. Even the hearing examiner in
16 the revocation order I attached said, "Mr. Bonneville was
17 entitled to full notice, hearing. He testified. He called
18 witnesses." There is no violation of due process.

19 And his third claim is that the hearings examiner used
20 an inappropriate standard of proof to make his decision in
21 the previous hearing. Again, he didn't appeal the previous
22 hearing. So he really has no standing to challenge that or
23 if he wanted to challenge that, he should have done it in
24 that LUPA appeal, or if he's trying to challenge what
25 happened since that time, he's untimely. The bottom line is

1 the hearings examiner clearly used the statutory allowed
2 standard of proof as we argued in our motion, and
3 Mr. Bonneville's reliance on a case called Mansour is
4 completely misplaced. That case, there was no elicited
5 standard of proof, and he didn't have hearing -- he didn't
6 have notice and other kinds of defects that the court
7 identified in the Mansour case. None of that is true here.
8 As we pointed out in our motion and oddly enough as the
9 hearings examiner also pointed out in his decision last
10 month, which I quoted on page 9 of my most recent brief where
11 the hearings examiner cited to the Mansour case and said,
12 quote, it does not apply in this proceeding, and that he was
13 given all of his due process.

14 The matter is frankly frivolous, Your Honor, and
15 should be dismissed as we have laid out in our motion.

16 THE COURT: Thank you. Response.

17 MR. TALL: Your Honor, the one issue that I believe
18 clearly establishes that there's a genuine issue of material
19 fact deals with whether or not the consent to search my
20 client's home was lawful or not. Now, the allegation is made
21 both here in argument and also in the -- I believe it's the
22 declaration of Ms. Greeson, the woman who made an inspection,
23 that consent was given. However, in my client's declaration
24 that was filed, in paragraph 5 he states that consent was not
25 given verbally or in writing to the defendants to have

1 unfettered access to his home and business. I would argue
2 that any order from an administrative judge allowing the
3 access to the business portion does not give rise to right to
4 go into the residential areas of the home, and although
5 there's an allegation by the county that there was consent,
6 my client disputes that. He also says that when they had
7 asked for the consent and he denied it, they simply came in.
8 He said that he merely went along for the ride.

9 Obviously accompanying the inspector who came in does
10 not evidence his consent to go into, for example, the
11 bedrooms, the bathrooms, the closets, et cetera. There is
12 certainly on that issue a genuine issue of material fact. If
13 that is true, then his claims regarding the unconstitutional
14 search of the property would have merit, and the case should
15 go forward. Thank you.

16 THE COURT: Specifically on that issue, please.

17 MR. WILLIAMS: The declarations from the two, the
18 three people who were involved, the two county employees and
19 the deputy sheriff --

20 THE COURT: I can't weigh one against the other. So
21 what I need to hear from you is whether or not this does
22 constitute a material fact --

23 MR. WILLIAMS: I agree.

24 THE COURT: -- based on something other than my
25 weighing one person's declaration against another person's

1 declaration, if you can help me out there.

2 MR. WILLIAMS: Yes, Your Honor. The consent to
3 search this house was granted by the hearings examiner, was
4 agreed to by Mr. Bonneville in his order that he signed
5 allowing consent. It was a central condition to the granting
6 of the permit. He even provided his own handwritten or
7 prepared consent to search and never appealed the hearings
8 examiner decision allowing the consent to search, so they
9 were all there on the property legally to search as ordered
10 by the hearings examiner.

11 THE COURT: Can you address the scope of that
12 consent?

13 MR. WILLIAMS: Because it's a home occupation and
14 because in the cottage industry permit he was only allowed to
15 use a certain percentage of that home for the business, and
16 he was also required to live on the premises as part of the
17 condition, the scope of that search is the entire premises to
18 ensure compliance with all of that permit. They're allowed
19 to search everything. That's what the hearings examiner
20 ordered. So his -- any sort of objection to them coming in
21 is completely in violation of that thing, of that order by
22 the hearings examiner, and even if we accept as true his
23 stated response, "You may not come search," they did not
24 violate his rights based on the order by the hearings
25 examiner based on the order allowing the consent, based upon

1 his own verbal statements in the hearing before the hearings
2 examiner that they're free to come any time and search any
3 part of his home. We quoted all of those sections of his
4 testimony before the hearings examiner in our motion.

5 MR. TALL: Your Honor, may I reply to that?

6 THE COURT: No. I reviewed this record and the
7 motion, the response. Actually, the argument hasn't exactly
8 followed the brief of the defendants, but let me try to
9 address a few things here. The first question that was
10 raised by the County and the other defendants is whether the
11 plaintiff is required to exhaust his administrative appeals
12 before this lawsuit would be allowed. In part yes and in
13 part no. If he's claiming and if he can base a case on
14 unconstitutional action of government, then the question of
15 whether the acts were unconstitutional need a forum
16 somewhere. It was clear from my reading of the record that
17 the hearing examiner was not going to touch anything that had
18 the word constitution anywhere near it. There needs to be
19 some sort of a forum. So I don't think Mr. Bonneville is
20 excluded from filing a lawsuit simply because he had this
21 administrative LUPA appeal going for purposes of damages. It
22 seems to me that the entire case turns on whether or not this
23 search that I believe was in November --

24 MR. WILLIAMS: November of 2006.

25 THE COURT: -- was unconstitutional or if there's

1 even a question of fact as to whether the search was
2 unconstitutional. Mr. Bonneville cites numerous criminal
3 cases. He doesn't address a fact pattern that is similar to
4 his fact pattern, which is this: Mr. Bonneville suggested
5 these types of inspections on his own. In reading through
6 the transcript that was given to me by the State, the
7 plaintiff continues to use the words "absolutely" when asked
8 if he understands what he's saying and whether or not the
9 County can come in and verify whether he's complying with the
10 terms of the Cottage Industry. So he suggests this as a
11 condition. He suggests that the County is welcome to come in
12 through the building, and they can verify what's being used
13 for business space and what's not. I don't know how they
14 would do that without walking through the whole building, and
15 he said he would allow the County staff on the property any
16 time they wanted to check it out absolutely.

17 Then as I read the record, Mr. Hetter, who's
18 Mr. Bonneville's prior attorney, notarizes the consent to
19 search. I thought the consent to search was drafted by
20 either Mr. Bonneville or Mr. Hetter.

21 MR. WILLIAMS: He drafted a second one. That one
22 ended up not being used. That one is attached as exhibit --
23 let's see. I think it's exhibit -- I'll have to find it --
24 9.

25 THE COURT: Mr. Bonneville attempts to create an

1 issue of fact by saying, "Well, these consents were coerced,
2 but there is nothing in the record that suggests that. I
3 find that his consent was not coerced. It appears that
4 Mr. Bonneville was afforded due process to some extent
5 regarding anything that happened at the hearing where the
6 Cottage Industry permit was granted. He would have had to
7 have appealed in order to have preserved his objections to
8 those conditions. And it appears as though he was afforded
9 due process at the revocation hearing.

10 I know that he was in here arguing about the standard
11 of proof. That's already decided. That's res judicata. And
12 once I find that the searches are not unconstitutional and I
13 don't think there's any question of fact but that they are
14 constitutional, everything else in this lawsuit upon which
15 that rests then falls, and I'm going to grant Pierce County's
16 motion for summary judgment regarding the Plaintiff's claim.

17 There, obviously, can be no conspiracy. I'm not sure
18 where that gets us actually on the issue of immunity, or if I
19 even need to decide that at this point. There was no
20 argument today regarding the defendants' claim for malicious
21 prosecution

22 MR. WILLIAMS: I don't know that we waived that,
23 Your Honor. We haven't brought that forward today.

24 THE COURT: Then I won't make an order on that this
25 minute.

1 THE CLERK: Do we need to set a future date because
2 this means there's no future date on this?

3 THE COURT: What remains is the County's
4 counterclaim. We'll need to set future dates for that.

5 MR. TALL: Your Honor, may I ask a question? Did I
6 understand you to say that there remains one claim for
7 malicious prosecution that's not being dismissed by this
8 motion?

9 THE COURT: Well, I don't know if there's one claim,
10 but there certainly was one section in defendant's briefs. I
11 believe there's a counterclaim filed. I don't know whom all
12 have filed it. The defendants may have increased since this
13 was filed.

14 MR. TALL: I only mention that because in this
15 proposed order it says all claims of plaintiff are hereby
16 dismissed with prejudice.

17 THE COURT: That would be correct. It's the
18 defendant's claim that survives. The record should also be
19 clear that I did consider Mr. Bonneville's claims regarding
20 his version of the facts which he claims transpired in
21 November of 2006, and I am making my decision considering
22 that those in fact are the facts, and I still find there to
23 be no issue.

24 MR. WILLIAMS: Thank you, Your Honor.

25 THE COURT: Thank you. Has there ever been a trial

1 scheduled?

2 MR. WILLIAMS: Not that I know of, Your Honor. If
3 we decide to proceed by that, it will be by motion and
4 relatively soon.

5 THE COURT: We should still follow the rule.

6 MR. WILLIAMS: Sure.

7 THE COURT: It started out as the case was basically
8 an injunction. So we were treating it as such at that point.
9 At this point we should at least get it on --

10 THE CLERK: Do you just want an amended case
11 schedule that sets trial, pretrial?

12 THE COURT: I think expedited. It's not had one.
13 Everyone should have an opportunity to do whatever they need
14 to do.

15 THE CLERK: Sure. May 14th, 2008.

16

17 (Excerpt concluded.)

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1 IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

2 IN AND FOR THE County OF PIERCE

3
4
5 ROBERT BONNEVILLE,

6 Plaintiff,

7 v.

8 PIERCE COUNTY, ET AL.,

9 Defendant.

)
)
) Superior Court
) No. 06-2-14268-9
)
)
)

COPY

10
11
12 REPORTER'S CERTIFICATE

13
14
15 STATE OF WASHINGTON)
16) ss
17 County OF PIERCE)

18 I, Suzanne L. Trimble, Official Court Reporter in the
19 State of Washington, County of Pierce, do hereby certify that
20 the forgoing transcript is a full, true, and accurate
21 transcript of the proceedings and testimony taken in the
22 matter of the above-entitled cause.

23 Dated this 25th day of February, 2007.

24 
25 SUZANNE L. TRIMBLE, CCR
Official Court Reporter
CCR #2173

September 5, 2007

Pierce County
Planning and Land Services
2401 South 35th Street
Tacoma, WA 98409

**RE: Revocation of Conditional Use Permit:
Case No.: CP20-03 (The Waldmeister LP)**

Dear Applicant:

Transmitted herewith is the Report and Decision of the Hearing Examiner regarding your request for the above-entitled matter.

Very truly yours,

**MARK E. HURDELBRINK
Deputy Hearing Examiner**

MEH/dd

cc: Parties of Record
PIERCE COUNTY PLANNING AND LAND SERVICES
PIERCE COUNTY CODE ENFORCEMENT
PIERCE COUNTY DEVELOPMENT ENGINEERING DEPARTMENT
PIERCE COUNTY PUBLIC WORKS AND UTILITIES DEPARTMENT
TACOMA-PIERCE COUNTY HEALTH DEPARTMENT
FIRE PREVENTION BUREAU
PIERCE COUNTY PARKS AND RECREATION
PIERCE COUNTY COUNCIL
PIERCE COUNTY RESOURCE MANAGEMENT

OFFICE OF THE HEARING EXAMINER

PIERCE COUNTY

REPORT AND DECISION

CASE NO.: REVOCATION OF CONDITIONAL USE PERMIT:
Case No. CP20-03 (The Waldmeister LP)

APPLICANT: Pierce County
Planning & Land Services
2401 South 35th Street
Tacoma, WA 98409

OWNER: The Waldmeister LP
Attn: Robert Bonneville
PO Box 346
Wauna, WA 98395

SUMMARY OF REQUEST:

On July 1, 2004, the Pierce County Hearing Examiner issued a decision approving Conditional Use Permit, Case No. CP20-03, subject to a number of conditions. The approval allowed The Waldmeister LP, (Robert Bonneville) to operate a Cottage Industry II at 8820 – 149th Street NW. Pierce County is seeking revocation of the permit as three conditions have been violated and there is a continued pattern of noncompliance.

SUMMARY OF DECISION:

Conditional Use Permit No. CP20-03 is revoked.

PUBLIC HEARING:

After reviewing Planning and Land Services Report and examining available information on file with the application, the Examiner conducted a public hearing on the request as follows:

The hearing commenced on April 15, 2007.

Parties wishing to testify were sworn in by the Examiner.

The following exhibits were submitted and made a part of the record as follows:

- EXHIBIT "1" - Planning and Land Services Staff Report and Attachments
- EXHIBIT "2" - March 26, 2007 Mr. Bonneville's Brief
- EXHIBIT "3" - Order
- EXHIBIT "4" - Fax to Mr. Bonneville
- EXHIBIT "5" - Master Application March 3, 2004
- EXHIBIT "6" - Enlarged copy of Ex. 2 of Mr. Bonneville's Memorandum
- EXHIBIT "7" - Order Denying Court
- EXHIBIT "8" - Hearing Brief
- EXHIBIT "9" - Mansuer Case
- EXHIBIT "10" - Chart
- EXHIBIT "11" - March 23, 2007 Letter
- EXHIBIT "12" - Floor Plan February 12, 2004
- EXHIBIT "13" - PC Code and App. A
- EXHIBIT "14" - Transcripts from April 13, 2007 proceeding
- EXHIBIT "15" - Ordinance 2004-58s
- EXHIBIT "16" - Photos of Site (Pictures of Ex. 6)
- EXHIBIT "17" - Motion and Statement of Domestic Violence
- EXHIBIT "18" - Cause for Petition February 16, 1988
- EXHIBIT "19" - Business Locations Address
- EXHIBIT "20" - Original Search Warrant (Criminal Case)
- EXHIBIT "21" - Dept. of Revenue (Waldmeister Trust)
- EXHIBIT "22" - Prop Information (Bruckwiesen)

Appearing was ROBERT BONNEVILLE who wanted to put on the record several objections to the hearing. First, he requested that the Hearing Examiner recuse himself from hearing this matter which was denied. He also wanted to put on the record that there was no opposition to his Motion Requesting Suppression of all evidence obtained from unconstitutional searches. He also objected to any testimony from Pierce County employees or agents that relate to anything observed in the three (3) searches of his home.

He also objected to there being a hearing on anything other than Condition No. 10 because Pierce County failed to give him constitutional notice and failed to provide public notice. He wanted to be allowed to prepare an adequate defense on adequate notice. He requested a continuance of the hearing.

Appearing was JILL GUERNSEY who is a Deputy Prosecuting Attorney for Pierce County. She agrees that there was no written response but wanted to make full arguments on the issue. Respondent was in Superior Court. Mr. Bonneville wanted this hearing stayed pending any outcome of that case. The issue was denied by the Court. Various Exhibits were entered into the record. The Hearing Examiner does not have authority to rule on constitutional issues. The objection to testimony is also a constitutional argument. A letter dated March 23, 2007 was faxed to Mr. Bonneville, which was titled Amended Revocation of Conditional Use Permit, which provided notice.

Reappearing was ROBERT BONNEVILLE who stated that he did not receive the Amended Revocation letter. He still does not think this provided him adequate notice and it was not advertised the way it was suppose to be advertised.

Reappearing was JILL GUERNSEY who stated that there is no requirement that the letter be published in the newspaper. Mr. Bonneville already had a continuance in this hearing and there is no reason to continue it further.

Reappearing was ROBERT BONNEVILLE who stated that he did get a Staff Report, but he doesn't think it provided him with constitutional notice.

The Hearing Examiner denied the requests of Robert Bonneville.

Appearing was MARCIA GREESON who is a Project Manager with Pierce County. This matter was heard before the Examiner three (3) years ago. Since that time several things have happened. There is a correction in the revocation letter that was discussed. On July 1, 2004 a Decision was issued approving a home occupation / cottage industry for Mr. Ellwanger-Bonneville. There were certain conditions that needed to be adhered to by Mr. Bonneville. These related, among other things, to a limitation of four (4) employees, 1,500 square feet and allowing County staff unlimited access to be able to see if Conditions are satisfied. The County has gone out three (3) different times within the three (3) years. The Examiner has authority to revoke a Conditional Use Permit if the Conditions of Approval are not satisfied. Mr. Bonneville has violated numerous Conditions. First was Condition No. 3, which said that he must apply for permits necessary within sixty (60) days of the final Decision. Failure to obtain those permits would automatically cause the approval to be null and void. A building application was filed within the time frame. The applicant did nothing with this permit and the application expired on August 31, 2005. The applicant failed to address the Health Department concerns, which include the request a floor plan of the entire building, be provided. Mr. Bonneville also violated Condition No. 7 in the original Decision. That Condition required that the business owner must live on the site for the continued activity of the business. A former employee contacted County staff and stated that Mr. Bonneville was not living on the site. Mr. Bonneville also violated Condition No. 10 of the original Decision in that in the Decision it stated that the proposed use shall not exceed 1,500 square feet. It actually limited the maximum to four (4) non-residential employees. During each of the visits it was clear that other areas of the home were being used for business but were not on the submitted floor plan. There were also more than four (4) individuals who identified themselves as employees. Staff estimated between 7 and 12 people were on the premises. Condition No. 11 was also violated which states that the applicant shall allow Pierce County staff to monitor the site. On each of the three (3) visits Mr. Bonneville did not allow immediate access. Mr. Bonneville was very argumentative at each of the site visits. It is noted that there were more than four (4) employees, and as many as 15 workstations were observed. County staff has received phone calls from neighbors with concerns about this business. This happened as recently as yesterday.

Reappearing was ROBERT BONNEVILLE who stated that he did all that he was required to do under Condition No. 3. He submitted an application. Planning and Land Services has to rule on that application within 120 days. There wasn't anything else that he had to do. The fact that the County did not act on the application was not his fault. He never received a request from anyone for more information. The floor plan is correct. In reference to area 5, it is upstairs and is on the floor plan. Everything was done appropriately by him. He believes that if the County wanted more information they should have contacted him. The County had a site visit on May 3, 2005. This was a normal site visit. He was polite. There was no problem with that inspection. They toured each area and found that everything was appropriate. Area 5 is part of the upstairs. He took the County representatives upstairs which were private areas. Area 5 is included in the original calculations. He was referring to a map. Questions were asked from both County representatives and the Hearing Examiner about this site plan. He indicated that there was an agreed floor plan. It was revised several times after discussions with County staff.

Reappearing was JILL GUERNSEY who stated that the only floor plan that staff agreed to is located within the original packet and is marked as Exhibit 1G.

Reappearing was ROBERT BONNEVILLE who stated that it is clear that 1G is not the correct floor plan because it does not even include the upper floor. Area 5 is on the upper floor. There would be no mention of Area 5 unless an upper floor was part of the floor plans. He submitted calculations several times between several plans in 2005 when everything was agreed upon. Area 5 has never been used as a business area as part of the 1,438 square feet. This area is used for his significant other's father. He does not believe he violated Condition No. 7 regarding unlimited access. He has never lived anywhere else for any duration of time for 25 years. Unlimited access is a violation of his constitutional rights. He has never violated any space requirements. The floor plans have never changed for all three (3) visits. He has had less and less space for his business and less and less employees since 2005. He discussed the employee situation. There have not been more than four (4) non-residential employees ever. He has two (2) full time employees. There are appraisers that come to his house, but they are not employees. They share things, come to pick up files, assignments, etc. Patricia Prokop and her daughter are sometimes at his place. They are not employees. Calculation of employees does not count when a customer or client comes in. The second search by the County was more like a police raid. A police car came in and screeched across the driveway. He blocked off the driveway. Everyone was afraid of what was going on. There were eight (8) people there including himself. Patricia was there. She is his significant other. She lives next door and is an appraiser. She does maintain a workstation in his house. She is not an employee. Lisa was also there and she is an independent contractor. She had a person driving her named Ditch who has tattoos all over him. He is not an appraiser. He doesn't understand how the County keeps saying that there was between 7 and 14 people there. Why can't they count the number of people? He can count. There is Sarah who is an employee and Shannon who is an employee. Lisa is not an employee. She has an office somewhere else. Patricia is not an employee. She is her own appraiser. Colleen was there who is her daughter. She is a 16 year-old high school student. She is not an

employee. Her friend was there also. She is not an employee. The real issue is what constitutes an employee.

Reappearing was JILL GUERNSEY who asked questions of Robert Bonneville. Mr. Bonneville acknowledged a copy of the master application. He looked through it. He acknowledged that he signed the application under penalty of perjury. He acknowledged four (4) employees. He requested four (4) employees. The specifics of this application were discussed. He acknowledged that he wanted to operate an appraisal business from his home. There was some discussion about traffic and Mr. Bonneville's answer to that. Mr. Bonneville acknowledged several other statements made within the application that were correct. He acknowledged that this was done under penalty of perjury. The right of entry agreement was discussed. He acknowledged signing this agreement. He stated that there would be four (4) employees. He described within the document which areas would be used for the business. The specific floor plan within the master application was discussed further. He acknowledged that three (3) particular areas were all that he requested be designated as business areas within the application. The original Decision was discussed. Questions were asked regarding the original conditions relating to the Decision granting the Conditional Use Permit. He applied for the appropriate permits. He did not receive any requests for additional information. He acknowledged that he did not obtain a permit. He believes that he did everything that he was required to do. He insisted that he has lived on the property and abided by the hours of limitations stated in the Decision. He also believes that he satisfied the maximum square footage for the business and the limitation on employees. He did have a problem with the unlimited access condition. He described some of the inspections, including the second inspection which he described as a raid. He described the officer. He said he worked with Ms. Greeson about a floor plan for the business and the structure. They came to an agreement. Mr. Bonneville discussed where he has lived. There were discussions about what he testified about at the prior hearing. This is about his living arrangements and why they lived in Bellevue for a time. He stated that the 1,500 feet is the maximum this particular area can vary. He is not locked in on particular areas.

Appearing was LISA BONNER who was asked questions by Robert Bonneville. She testified that she is an independent contractor for Robert Bonneville. She types reports for him. She described the second inspection because she was present. She was at the business with a friend named Ditch who is not an employee. Someone told her that someone was peeking through the window. It happened to be Mr. Luppino. He was in a bulletproof vest. It was an extremely scary event. Everyone was in a panic. She is an independent contractor and has a separate building on her property for her business. She has her own business license. She did feel intimidated at the inspection that took place. She had to go see a counselor. Since then the cleaning lady hasn't come back. Jill Guernsey asked several questions. She thought that Mr. Luppino was wearing a bulletproof vest. A police officer was armed, but he did not draw his weapon.

Appearing was MARK LUPPINO who is code enforcement officer with Pierce County. He was asked questions by Robert Bonneville. He acknowledged that he did not measure the

house. He was then asked questions by Jill Guernsey. He was not wearing a bulletproof vest. He stated that there were 10 to 12 people there. There were 15 workstations. This was all on the downstairs level. He did go upstairs and saw areas that could potentially be work areas, but Mr. Bonneville said that this was for his own personal use. Mr. Bonneville would not initially let them onto the property. He described what he saw. Robert Bonneville specifically stated that he would not agree to let them on the property.

Appearing was KOLENE SNIDER who was asked questions by Robert Bonneville. She saw someone outside the window talking on the phone. She is a student. She did feel cornered. She does not like being asked these questions. She felt intimidated. She was not an employee nor was her friend.

Appearing was PATRICIA PROCOP who was asked questions by Robert Bonneville. She lives east of his house. She has her own business. She does maintain a desk in his office. She is Mr. Bonneville's significant other. She was present at the inspection. She also was very intimidated. It was like something out of the TV show "Cops". It certainly could affect the business. She talked about the previous person called Hillary. She was a previous employee who got in a car accident and wanted to work under the table. She became very defiant towards you when you do not agree. She said that she would get back at you.

Appearing was HARRY ROENGER. He lives close to Robert Bonneville. There hasn't been a lot of traffic in this area. He walks by Robert Bonneville's place. There are very few cars there. On average there is maybe four (4) cars. He is around almost every day. On the weekends he doesn't see any cars there. He is Robert Bonneville's brother-in-law.

Appearing was JEANNIE WOODWARD who was asked questions by Robert Bonneville. She is his sister. She owns property in this area also. She sees three (3) to four (4) cars parked at his property on the weekdays and on the weekends. The upstairs is not used for business.

Appearing was CAROL OWEN who owns property on the backside of Mr. Bonneville's property. She had some questions about the business impact on surrounding areas. She is concerned that this area would be rezoned.

Appearing was MARCIA GREESON who is the County Planner for this project. She was asked questions by Robert Bonneville. She was present at all three (3) of the inspections. She did not measure the house when she came out for the inspection. She relies on floor plans and site plans that are submitted. She saw particular people at the inspections. She saw a Billy, Kevin, a blonde woman, a person who identified themselves as his daughter, Shanna, Patricia, Sarah, Lisa and another girl on the side of the road. She described specifically what she observed at the inspection. A woman who answered the door stated she would give to get her boss who she identified as Patricia. Another girl came out and said she was an employee.

The hearing was continued and then reconvened on June 14, 2007.

Reappearing was JILL GUERNSEY who submitted an Exhibit. It was an Order Denying Mr. Bonneville's request to Enjoin and Stay this hearing.

Reappearing was ROBERT BONNEVILLE who submitted a Hearing Brief as an Exhibit. He cited the Mansour case in support of his position regarding the standard of proof.

Reappearing was JILL GUERNSEY who argued that the Mansour case is not applicable to the facts in this case. The Hearing Examiner in this case is a fact finder. In the Mansour case the King County Board of Appeals was acting in appellate capacity so, therefore, there was standard of proof issues. The Department has just requested revocation of permit. An Exhibit contrasting the Mansour case versus this particular situation was submitted. The Hearing Examiner has to find by a preponderance of evidence that it is appropriate to revoke the permit. She went through the standards of review and where certain Decisions are appealed. Mr. Bonneville is incorrect in his analysis. The preponderance of the evidence standard is the appropriate standard. The March 23, 2007 letter from Ms. Greeson to Mr. Bonneville and was also marked as an Exhibit.

Reappearing was ROBERT BONNEVILLE who stated that the substantial evidence standard of proof cited in the Pierce County Code is entirely inadequate for a trier of fact. The Mansour case is applicable.

Appearing was CAROL OWEN who did testify at the last hearing. She was in Mr. Bonneville's house yesterday. There were three (3) cars in the yard and three (3) people in the house. Upon questioning by Mr. Bonneville she agreed that this was not a staged situation. She just happened to go by there.

Appearing was SANDI ARNDT who only knows Robert Bonneville by the name Mr. Ellwinger. Her property abuts against his property. They go back a long ways. She has lived in this area since 1993. She first found out about the business in 1999 when someone was climbing up her tree. This person said there was going to be a business on the property. After that she noticed cars coming and going. There is 50 feet of property from her patio to his property. She reported the business to appropriate agencies. Mr. Ellwinger has threatened her in the past. Neighbors are scared to testify against Mr. Ellwinger. He takes what he wants. She doesn't want to hear the noise from his business. She feels threatened. The rest of the neighbors also feel threatened. She has tried to document the threats. Upon questioning by Mr. Bonneville she stated that she has lived on the property for almost 15 years. She has met him twice. She only made one (1) phone call to the County. She discussed more threats to her life. Mr. Bonneville has had continuing problems with not having permits.

Reappearing was MARCIA GREESON who was asked questions by Mr. Bonneville. She stated that she had received approximately five (5) calls per day regarding complaints on his property. There were probably five (5) different people who called at different times and complained about the cars coming and going. She described what she saw on the first visit

after the Decision was issued. She went out the first time on May 12, 2005. There appeared to be too many vehicles and too much space was being taken in the building for business use. There also appeared to be someone working upstairs and an employee standing outside. She was not going to pursue it at that point but wanted to check back. She described areas that were being used. She did this on Exhibit "6". The areas between areas 3 and 4 have always been used for business areas. There were desks and computers used in that area. Another floor plan was examined. The area she was describing was one large area. She did not go upstairs on the first visit. The person working upstairs was a younger man. She did ask to look in different areas. She did not go upstairs. She didn't see anyone under desks, but there could have been people under there. Her second visit wasn't until the next year in November. It was a routine follow up. The police did come with her. She received a report that they were hiding under desks. She toured the entire house. She believes that Mr. Bonneville has been very belligerent and argumentative in the past and thought that it was appropriate to have a police escort. She went to the door initially. Mr. Bonneville initially told her that she could not come in and that it was unconstitutional. Upon questioning by Jill Guernsey, she stated that she was never allowed to go in immediately when she went for a site visit. She went through Exhibit "12" which was the floor plan. She went through the calculations. There were three (3) specific business areas. Ms. Greeson did see copiers, paper and office supplies along the entryway which was not part of the calculations. Business area 2 was being used on all three (3) visits as a business area. The only area that may not have been used was proposed business area 3. On the first visit it appeared that an area upstairs was being used for business purposes. The second visit it appeared not to be being used as a business area.

Reappearing was PATRICIA PROKOP. Exhibit "6" was entered. In May 2005 her father was living upstairs. There wasn't business being conducted there. Area 3 is not used for business. It is just a hallway. She discussed the dog groomer's business. Their business has more effect on the community than his. She has her own computers at her office. She is only an independent contractor and uses some of the research facilities that Mr. Bonneville has. She is not an employee.

Reappearing was MARK LUPPINO who stated that the disk of the pictures he took failed. He only had two (2) pictures. One of the pictures is of an employee box with a bunch of names on it. He did not recall if he toured the whole house on the first visit. On the second visit they were concerned because they heard that people could possibly run out the back door if they came to visit. He and the Deputy separated. He described where he was in relation to the Deputy. They did tour the entire upstairs and downstairs together. The license plate numbers were marked down. He stated that the majority of the downstairs was being used for business purposes. He described the right of entry agreement. If they are told to leave by a property owner, then they leave. He is not aware of any Section that states he must advise them that they can deny entry. He did not advise Mr. Bonneville of that right. He did not see anybody hiding under desks, but they could have been. Upon questioning by Jill Guernsey, he stated that he wears jeans to inspections. He does have a Pierce County shirt that says Code Enforcement. Sometimes he wears a vest. He was

wearing the same vest today that he wore at the inspections. He went over some of his previous testimony. He reiterated that he stated there were 10 to 12 people at the site. On the second visit there were approximately 15 workstations. He discussed some of the problems they have had with entering the residence. The first one he told them they had to wait. On the third visit he did not let Ms. Greeson in. He became very argumentative. He believed that they were violating his rights. Upon questioning by Robert Bonneville, he stated again that 10 to 12 people were at the residence.

Appearing was DEPUTY DAN WELICK who was asked questions by Robert Bonneville. He was present at the site visit and was armed. He did enter the building the first time he went out there. He was given a tour by Mr. Bonneville. He did question one (1) female at the site visit. He did not screech his tires. He wore the same clothes that he was wearing today. He parked his vehicle in back of Mr. Luppino's. He did not flash his lights or put on his sirens. He did not arrest or threaten to arrest anyone. On the first visit he thought Mr. Bonneville was trying to intimidate Ms. Greeson. He became less confrontational after he saw him. Mr. Luppino and himself were going to leave because he would not let them in the house, but he did come out and agreed to let them come in and inspect. There was about a five (5) minute lag from the time Ms. Greeson asked to go in the house to when they were finally allowed in the house. On the second visit he pulled in to the driveway the same way he did before. Mr. Bonneville argued with Mr. Luppino. They started leaving again. Mr. Bonneville came running out of the house again and asked them to please come in. On his first visit there were several cars. There were approximately six (6) cars located in the vicinity. He thought there were approximately 7 or 8 people working at the residence. There were more workstations than people. There were 15 workstations in the downstairs area. There were also two upstairs but it appeared they were not being used. Upon questioning by Robert Bonneville he explained again that Mr. Bonneville was not cooperative. He stated that they had no right to go on his property. There were 7 or 8 people working. Four (4) had left the residence.

Reappearing was ROBERT BONNEVILLE who admitted pictures into the record. Jerry Sugar testified about those pictures.

Reappearing was JILL GUERNSEY who admitted a couple more Exhibits into the record. A Protection Order filing indicated that Mr. Bonneville had a different address in 1987. This contradicts his living in the same residence for 25 years. There also was admitted a compilation of businesses that list Robert Bonneville's address as their business address. Several other Exhibits were entered. She gave closing statements. She believes that the Conditions were violated pursuant to the March 23, 2007 amended letter from Marcia Greeson. Condition No. 3 stated that the applicant must apply for necessary permits. Failure to obtain the permits will cause the approval to automatically be null and void. Mr. Bonneville himself testified that he applied for the permits, but he did not obtain them. He is experienced. He knows what to do. The County did not prove Condition No. 7. Condition No. 10 was also proved. It stated that the workarea shall not exceed 1500 square feet. It should be limited to four (4) nonresidents and employees. Ms. Greeson testified that she did not agree to Exhibit No. 6. She only testified about Exhibit No. 12.

She also testified that Mr. Bonneville exceeded the square footage because he used more than what she approved on Exhibit No. 12. He also exceeded the employee limitation. The intent of the Decision was for there to be a limit of four (4) workers at the site. There has been discussion about independent contractors and employees. There was 15 workstations. Condition No. 11 was also violated. He did not allow unlimited access. He was intimidating. He should have appealed the Decision if he had any problems with it. Mr. Bonneville insists that this 1500 square feet limitation is floating.

Reappearing was ROBERT BONEVILLE who gave his closing statements. He believes they agreed to a configuration outlined in Exhibit 6. He could easily consolidate down to 1000 square feet. These continued workstations don't make employees. They don't have excessive floor space. He does not believe that his credibility is at issue. He believes the County representatives have misstated what is going on. He believes it is manufactured evidence. The evidence just isn't before the Examiner. He believes that he did apply for all the permits. He never got any communication from County staff about permits. The right-of-entry agreement also wasn't violated. It violates his constitutional rights. He does not believe he violated any Conditions.

No one spoke further in this matter and the Examiner took the matter under advisement.

The hearing was concluded at 4:30 p.m.

NOTE: A complete record of this hearing is available in the office of Pierce County Planning and Land Services.

FINDINGS, CONCLUSIONS AND DECISION:

FINDINGS:

1. The Hearing Examiner has admitted documentary evidence into the record, heard testimony, viewed the property, and taken this matter under advisement.
2. Notice of this request was advertised in accordance with Chapter 1.22 of the Pierce County Code. Notice of the date and time of hearing was published two (2) weeks prior to the hearing in the official County newspaper. Property owners within 300 feet of the site and parties of record from the past hearing were sent written notice.
3. On July 1, 2004 a Decision approving a Conditional Use Permit, subject to conditions was issued by the Hearing Examiner. No appeals of the Decision were filed. The approval allowed The Waldmeister LP (Robert Bonneville) to operate a Cottage Industry II appraisal business at 8820 149th Street NW. The County is now seeking revocation of the permit alleging that Robert Bonneville violated several Conditions of Approval.

4. The County may bring a request to revoke a Conditional Use Permit based upon violations of Conditions of Approval. In this case, the Hearing Examiner maintained jurisdiction over this case for a period of three (3) years to ensure that all Conditions of Approval were satisfied. Condition No. 13 specifically provided that if the applicant did not adhere to the Conditions of Approval, then the Conditional Use Permit would be subject to revocation directly by the Hearing Examiner.
5. Robert Bonneville argued that the standard of proof for this revocation proceeding was inappropriate and the proceeding should be dismissed. This Examiner does not find that there is an improper standard of proof with regard to revocation of Conditional Use Permits. The Examiner must find by a preponderance of evidence that the Conditions contained within the original Decision were violated prior to revoking the Conditional Use Permit. The Mansour case does not apply to this proceeding. The Hearing Examiner is the fact finder in this case.
6. Robert Bonneville also brought up Constitutional arguments that are beyond the jurisdiction of the Hearing Examiner. Robert Bonneville's argument regarding inadequate notice is without merit. All notice requirements were satisfied and Mr. Bonneville himself was provided ample notice.
7. The County outlined its arguments in a March 23, 2007, Amended Revocation Letter. An analysis of each of the alleged violations are hereby made as follows:

A. *Condition No. 3 of the original decision states that: The applicant must apply for necessary permits within 60 days of the final Hearing Examiner's Decision approving a Conditional Use Permit (CUP) for a Cottage Industry II. Failure to obtain appropriate permits to reach conformance with conditions and/or regulations shall cause all approvals granted herein to become automatically null and void.*

Although Mr. Bonneville did apply for necessary permits within 60 days of the final Decision, no approvals were ever granted. Mr. Bonneville blames County officials for not doing their jobs in a timely fashion, but he presented no evidence showing that he diligently attempted to obtain appropriate permits. Therefore, he violated Condition No. 3.

B. *Condition No. 7 of the original decision states that the business owner must live on the site for the continued activity of the business. If the business owner moves off the site, the business must be moved from the current residential site to another approved site or be closed.*

The preponderance of the evidence did not show that Mr. Bonneville has not lived on the property, and thus he complied with Condition 7.

- C. *Condition No. 10 of the original decision states that the proposed Cottage Industry II shall not exceed 1,500 square feet (including accessory buildings) and shall be limited to four non-residence employees.*

There was a lot of testimony about this particular issue. Mr. Bonneville testified that he believed that a particular site plan was approved by the County for this business use. This was admitted into evidence as Exhibit No. 6. None of the County employees agreed that this was an approved site plan and Exhibit 6 had never been part of the record in the past. Exhibit No. 12 is the previously submitted site plan which shows what areas would be used for business use. The testimony from Marcia Greeson was particularly compelling. She stated that on at least one of her visits the entry way, proposed business area no. 1, proposed business area no. 2, and business area no. 3 (as noted on Exhibit No. 12) were being used for business. She counted 15 workstations. The square footage used for business purposes exceeded 1,500 square feet. It was not the intent of the Hearing Examiner to allow this to be a floating business area. It is also clear from the testimony that there are more than four (4) nonresidential workers on site. There was a lot of testimony about the distinction between employees versus independent contractors, but the intent of the Decision was to only allow four (4) nonresidential workers. There were in excess of that number during at least one of the site visits. There were at least 15 workstations present at the business. Mr. Luppino saw an employee box with a bunch of names on it. Therefore, a preponderance of the evidence shows that the applicant violated Condition 10 both by having more than four employees and exceeding the square footage limitation.

- D. *Condition No. 11 of the original decision states that the applicant shall allow Pierce County Staff to monitor the site to make sure that all conditions of approval are being adhered to. A right-of-entry agreement shall be signed by the applicant allowing staff unlimited and unfettered access to the site for inspection and monitoring purposes.*

Mr. Bonneville made constitutional arguments regarding the legality of this Condition. However, the original Decision was not appealed. Mr. Bonneville is therefore required to abide by the conditions contained within the original Decision. This condition was imposed because there was a question about whether or not the Conditions would be satisfied by him. His abusive and hostile behavior is a violation of the agreement. He would not let the individuals on to the site without causing problems, and therefore, violated Condition 11.

8. The Examiner finds that the credibility of the witnesses was paramount in making this Decision. The Examiner did not find Robert Bonneville credible.

CONCLUSIONS:

1. The Hearing Examiner has jurisdiction to consider and decide the issues presented by this request.
2. A preponderance of the Evidence showed that Conditions of Approval No. 3, 10 and 11 were violated. Therefore, the Conditional Use Permit is revoked.

DECISION:

Conditional Use Permit No. CP20-03 is hereby revoked for violations of conditions of approval.

ORDERED this _____ day of September, 2007.

MARK E. HURDELBRINK
Deputy Hearing Examiner

TRANSMITTED this day _____ of September, 2007 to the following:

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Tacoma, WA 98409

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OTHERS:

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PIERCE COUNTY PLANNING AND LAND SERVICES
PIERCE COUNTY BUILDING DIVISION
PIERCE COUNTY DEVELOPMENT ENGINEERING DEPARTMENT
PIERCE COUNTY PUBLIC WORKS AND UTILITIES DEPARTMENT
TACOMA-PIERCE COUNTY HEALTH DEPARTMENT
FIRE PREVENTION BUREAU
PIERCE COUNTY PARKS AND RECREATION
PIERCE COUNTY COUNCIL
PIERCE COUNTY RESOURCE MANAGEMENT

**CASE NO: Revocation of Conditional Use Permit: Case
No. CP20-03 (The Waldmeister LP)**

NOTICE

1. **RECONSIDERATION:** Any aggrieved party or person affected by the decision of the Examiner may file with the Department of Planning and Land Services a written request for reconsideration including appropriate filing fees within seven (7) working days in accordance with the requirements set forth in Section 1.22.130 of the Pierce County Code.

2. **APPEAL OF EXAMINER'S DECISION:** The final decision by the Examiner may be appealed in accordance with Ch. 36.70C RCW.

NOTE: In an effort to avoid confusion at the time of filing a request for reconsideration, please attach this page to the request for reconsideration.