

COURT OF APPEALS
DIVISION II
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STATE OF WASHINGTON
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Case No. 37468-4-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

ROBERT BONNEVILLE,

Appellant

vs.

PIERCE COUNTY, *et al.*,

Respondents.

BRIEF OF APPELLANT BONNEVILLE

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A. Assignments of Error

1. The lower court erred in failing to reverse the hearing examiner's refusal to grant Appellant Bonneville's Motion for a continuance, to recuse, and to exclude evidence obtained illegally.
2. The lower court erred in failing to reverse the hearing examiner's September 5, 2007 decision.

Issues Pertaining to Assignments of Error.

1. Should a hearing examiner allow a *pro se* litigant a continuance to allow him to prepare for the hearing when there has been no objection by the County? (*Assignment of Error No. 1*)
2. Should the hearing examiner have recused himself after he had objectively manifested in open court that he was prejudiced against Appellant Bonneville? (*Assignment of Error No. 1*)
3. Was the September 5, 2007 decision of the hearing examiner based on evidence obtained in violation of

Bonneville's constitutional rights? (*Assignment of Error No. 2*)

3. Even if the evidence was properly admitted over the constitutional objections, was the hearing examiner's decision is contrary to the evidence and not supported by substantial evidence. (*Assignment of Error 2*)

4. Was the hearing examiner's decision is outside his authority in expanding the legal definition of employees to also include independent contractors in violation of PCC 18A.35.060(D)(5)(a)? (*Assignment of Error 2*)

5. Did the Lower Court fail to apply the law correctly to the facts of the case? (*Assignment of Error 2*)

B. Statement of the Case.

This matter concerns the revocation of a conditional use granted July 1, 2004 allowing the petitioner to continue his long use of his home as an appraisal business. For some 20 years, Petitioner Bonneville has been running a real estate appraisal business from the basement of his

home, which he built himself on one acre of heavily forested, rural land, well shielded from surrounding properties. Administrative Record (hereafter, AR) at 45. Indeed, the hearing examiner found the appraisal business to generally have a very low impact on the surrounding neighborhood and, absent the limited increased traffic that takes place, no one would even know that it was there. AR 48.

On July 1, 2004, Deputy Hearing Examiner Mark E. Hurdelbrink issued a decision granted a Conditional Use Permit permitting petitioner Bonneville to continue his business under certain conditions including, but not limited to, that he have no more than four non-resident employees and utilize no more than 1500 square feet for his activity. As a further condition, he was required to allow the county and its law enforcement officers “unlimited and unfettered access to the property site for inspection and monitoring purposes.” AR 48. This

provision covers the entire property, not just the area used for the appraisal business, but also the residential portion of the home and grounds, and further was without any limitation as to scope, purpose, time, or reasonableness. AR 48.

The appraisal business is a very low impact business, run mostly by mail and email. AR 42. The majority of the time actually spent performing an appraisal consists of traveling to and performing the appraisal at the site of the property being appraised. The time at the “office” consists mostly of computer work obtaining records, doing research, and typing up the report. AR 419, ln. 11-19. Almost all customers are financial institutions or other lenders who do not visit the office, but who communicate by telephone, email, and mail. AR 112, ln. 5-6 and 430, ln.21-25.

C. Argument.

1. **Standard of review.** This is an appeal from

an order dismissing Appellant Bonneville's Land Use Petition entered by the Pierce County Superior Court affirming the administrative decision under LUPA, the Land Use Petition Act, RCW 36.70C. CP 34-35.

In *HJS Dev., Inc. v. Pierce County ex rel. Dep't of Planning & Land Servs.*, 148 Wn.2d 451, 467-68 (2003), the Supreme Court set forth the appropriate standard of review. "When reviewing a superior court's decision on a land use petition, the appellate court stands in the shoes of the superior court." *HJS Dev., Inc.*, 148 Wn.2d at 468. "An appellate court reviews administrative decisions on the record of the administrative tribunal, not of the superior court."

This Court must therefore review the record before the Pierce County hearing examiner and review questions of law *de novo* to determine whether the land use decision was supported by fact and law. See *City of Univ. Place v. McGuire*, 144 Wn.2d 640, 647, 30 P.3d 453 (2001);

Girton v. City of Seattle, 97 Wn. App. 360, 363, 983 P.2d 1135 (1999) (citing *Boundary Review Bd.*, 122 Wn.2d at 672; *Hilltop Terrace Homeowner's Ass'n v. Island County*, 126 Wn.2d 22, 29, 891 P.2d 29 (1995)).

Based on this standard, to obtain relief from the land use decision, Mr. Bonneville must establish the following: (a) The body or officer that made the land use decision engaged in unlawful procedure or failed to follow a prescribed process, unless the error was harmless; (b) The land use decision is an erroneous interpretation of the law, after allowing for such deference as is due the construction of a law by a local jurisdiction with expertise; (c) The land use decision is not supported by evidence that is substantial when viewed in light of the whole record before the court; (d) The land use decision is a clearly erroneous application of the law to the facts; (e) The land use decision is outside the authority or jurisdiction of the body or officer making the decision; or

(f) The land use decision violates the constitutional rights of the party seeking relief. RCW 36.70C.130(1).

a. **The Hearing Examiner refused to grant Bonneville's request for a continuance, to recuse, and to exclude evidence obtained illegally.**

On March 26, 2007, Petitioner Bonneville moved the hearing examiner to continue the hearing, to recuse himself, and to exclude evidence. AR 228-286 (Hearing Ex. 2). This motion was served on the county and was not objected to prior to the hearing. AR 399, ln. 22-25. Without timely objection, it was an abuse of discretion not to have granted Bonneville's motion.

First, the hearing examiner was asked to recuse himself based on his apparent unfair prejudice toward Mr. Bonneville. This appearance of unfair predisposition against Mr. Bonneville first became manifest during the initial hearing on July 1, 2004 when the examiner stated he would condition the permit approval only if Mr.

Bonneville consented to a gross waiver of his constitutional right to be secure in his own home. Moreover, the examiner stated he did not believe Mr. Bonneville would adhere to the conditions of the approval and that he had shown he does not follow directives, even though there is no evidence that Mr. Bonneville has ever failed to follow any directive of any court or administrative tribunal. AR 48. Then, in the decision of September 5, 2007, the hearing examiner found Appellant Bonneville wholly unbelievable and could only support his findings of violations based on his earlier unwritten intent not stated in the July 1, 2004 decision granting the conditional use permit.

While the law may require adherence to a written decision of a tribunal, it does not require the performance of unwritten requirements contained solely in the mind of the hearing examiner. This violates the more basic elements of due process and substantial justice.

Finally, even though the county admitted it had not carried its burden of proving Mr. Bonneville had not lived on the premises, the hearing examiner found he had not! *See* June 14, 2007 transcript of proceedings at pg. 107, ln. 19-21, regarding “Condition No. 7

b. The July 1, 2004 decision was conditioned on an impermissible violation of Mr. Bonneville’s constitutional rights, and was null and void. Even the requirement that Mr. Bonneville obtain an approval of his permit application is void, as it requires him to agree to a wholesale deprivation of his constitutional rights in order to obtain his legal right to continue his appraisal business as he had been conducting it for some 20 years.

Moreover, all evidence and testimony are properly struck as fruit of the poisonous tree. By refusing to decide any of the Bonneville’s constitutional arguments, the decision deprives the petitioner of his constitutionally protected rights, including due process and right to be free

of warrantless searches and seizures that are “unfettered and unlimited” and in effect gave approval for such unlawful conduct. Therefore, Findings of Fact Nos. 1, 5, 6, 7A, 7B, 7C, 7D, 8 and Conclusion of Law 2 found in the September 5, 2007 decision stating that the a preponderance of evidence showed conditions of approval 3, 10, and 11 were violated are all erroneous in that the Deputy Hearing Examiner failed to exclude evidence and documents obtained unlawfully. Petitioner had moved for the exclusion of such evidence, and there was no objection prior to the hearing.

c. The Hearing Examiner’s Order Disregards The Provisions of Article 1, Section 7 Of The Washington Constitution As Well As The Scope Of Consent Provisions Of The Fourth Amendment.

Washington Courts have long recognized that Article 1, Section 7 of the Washington Constitution provides great protections and privacy than does the

Fourth Amendment to the United States Constitution. In *State v. Myrick*, 102 Wash.2d 506, 510-511 (1984) the

Court held:

...under the Washington Constitution the relevant inquiry for determining when a search has occurred is whether the state unreasonably intruded into the defendant's private affairs. Const. Art. 1, section 7 analysis encompasses those legitimate privacy expectations protected by the Fourth Amendment; but is not confined to the subjective privacy expectations of modern citizens who, due to well publicized advances in surveillance technology, are learning to expect diminished privacy in many aspects of their lives. Rather it focuses on those privacy interests which citizens of this state have held, and should be entitled to hold, safe from governmental trespass absent a warrant.

(citations omitted.)

In the present case, the examiner premised his decision on Bonneville's purported consent/invitation communicated during the course of a half day hearing while being cross-examined by the Prosecutor and Hearing Examiner. The hearing examiner focused on an exchange in which the Petitioner said that the County could "absolutely" have access to his property to ensure

that he was complying with the terms and conditions of the permit. The examiner's limited focus is contrary to the appropriate analysis required by the Fourth Amendment for consent to search and further, is contrary to the cases that hold that a county may not condition a permit on a person's giving up his constitutional right to be free of warrantless searches.

In *Florida v. Jimeno*, 500 U.S. 248, 250-251(1991) the United States Supreme Court set forth the required Fourth Amendment analysis for consent to search cases holding:

...we have long approved consensual searches because it is no doubt reasonable for the police to conduct a search once they have been permitted to do so. ... The standard for measuring the scope of a suspect's consent under the Fourth Amendment is that of "objective" reasonableness-what would the typical reasonable person have understood by the exchange between the officer and the suspect?

(citations omitted).

As applied to the facts of this case, this Court is required to consider the entire testimony of Mr. Bonneville on the issue of consent and not just one

portion of one question and answer. Further, that neither the Right of Entry Agreement that Bonneville was required by the Hearing Examiner to execute nor the Right of Entry Agreement actually drafted by Defendants and executed by both parties grants defendants the right to “unlimited and unfettered” access. Considering Bonneville’s testimony as a whole and considering the terms of the Right of Entry Agreement makes it abundantly clear that Bonneville believed, and an objective reasonable person would have believed, that he was consenting to the County setting up a reasonable schedule of inspections, not the “unlimited, unfettered” access to both his bedroom and business that the county later demanded.

When considering the impact of Article 1, Section 7 where the focus is on the reasonableness of the government’s intrusion into Bonneville’s private affairs, it is clear that the government’s conduct impermissibly

intrudes into that private sphere of Bonneville's life. This case is the natural outgrowth of the government's increasing regulation on a person's right to utilize his property as he sees fit. The government determines that it wants to regulate the operation of a business in a home environment so it establishes the Cottage Industry regulations. The next step for the government then is how does it regulate the Cottage Industry? In this case, the government determined that it needed "unfettered and unlimited" access to Bonneville's bedroom and business in order to ensure that Bonneville was complying with the terms and conditions of the permit. This is where the government's actions runs afoul of both the Fourth Amendment and Article 1, Sec. 7. The Court expressed the conundrum very plainly when the Court in its ruling stated words to the effect that, "How else could the county ensure compliance then by being able to inspect Bonneville's bedroom and business without prior

warning.” The constitutionally correct answer to the Court’s query is that the county had every right to present a request to a judge for a search warrant based upon probable cause to believe that Bonneville was not complying with the permit terms and conditions. In fact, the county did exactly that previously and did inspect his property pursuant to a validly issued search warrant.

The Court rejected Bonneville’s contention that his consent was coerced but wholly missed the point and import of the coercion analysis. Bonneville is not contending that he was beaten or abused into consenting. Rather, Bonneville contends that by conditioning his permit on the forbearance of his right to be free of warrantless searches, that consent is “coerced” in that it is not voluntarily and freely given. It has been given because Bonneville knew that he would not be granted a permit absent consent. **This type of consent to administrative inspections has never been approved**

by any Court and there are no cases that would permit such a consent. The law is unanimously to the contrary. *Sokolov v. Village of Freeport*, 420 NE2d 55, 57 (1981); *U.S. v. Chicago, etc., R.R. Co.*, 282 U.S. 311, 328-329 (1931); *Makula v. Village of Schiller Park, Ill.*, 1998 WL 246043 (N.D. Ill.).

In *Ohio v. Finnell*, 115 Ohio App.3rd 583, 589-590 (1996) the Court had occasion to review and apply the decision of the United States Supreme Court in *See v. Seattle*, 387 U.S. 541 (1967) in a context similar to the one here present. In *Finnell*, the Court held:

Administrative entry by the government into premises may only be compelled within the framework of a formal warrant procedure. *See v. Seattle* (1967), 387 U.S. 541, 87 S.Ct. 1737, 18 L.Ed.2d 943. Probable cause to issue an administrative warrant for entry into premises is the subject of a flexible standard of reasonableness given the agency's particular demand for access and the public

need for effective enforcement of the regulation involved.

Id. However, the United States Supreme Court declared:

But the decision to enter and inspect will not be the product of the unreviewed discretion of the enforcement officer. *Id.* Thus, a warrant may be issued to permit authorities to enter commercial premises as long as the public need for effective enforcement of the regulation involved outweighs an owner's expectation of privacy, because under those circumstances, the expectation is no longer "reasonable."

In the case at bar, the ordinances invoke no warrant procedure. The threat of prosecution unless an owner submits to an inspection is not a permissible method to gain entry into commercial premises under *See. If Finnell* has some reasonable expectation of privacy, the procedure set up in the ordinance is impermissible under the Fourth Amendment analysis in *See*, because no warrant procedure is used. While a constitutionally permissible procedure

could be established whereby warrants may be obtained upon proof that the public need for the inspection to preserve the health, safety, and welfare outweighs the owner's expectation of privacy on a case-by-case basis, such a procedure is not under review.

The United States Supreme Court carved out an exception to its holding in *See* and held that an owner's expectation of privacy is "attenuated" in a "closely regulated" industry. *New York v. Burger* (1987), 482 U.S. 691, 107 S.Ct. 2636, 96 L.Ed.2d 601. "Where the owner's privacy interests are weakened and the government interests in regulating particular businesses are concomitantly heightened, a warrantless inspection of commercial premises, if it meets certain criteria, is reasonable within the meaning of the Fourth Amendment." *Burger, supra*.

Justice Blackmun listed three criteria that must be met for the Burger exception to apply. First, a

“substantial” government interest must be demonstrated that informs the regulatory scheme pursuant to which the inspection is made. *See, also, Donovan v. Dewey* (1981), 452 U.S. 594, 101 S.Ct. 2534, 69 L.Ed.2d 262. Second, the inspections without warrants must be necessary to further the regulatory scheme. *See, also, Donovan, supra*. Justice Blackmun cited *Donovan* to illustrate that the requirement to obtain a warrant before inspection might alert mine owners of an impending inspection and the lack of surprise might frustrate the purpose of the regulation. Third, the inspection program must provide a constitutionally adequate substitute for the warrant by advising the owner of the commercial premises that the inspection is being made pursuant to a specific law, that the law has a properly defined scope, and that the law limits the discretion of the inspecting officers.

In this case, all of the bad things referred to in *Finnell* are present whereas none of the limitations or

protections are present. The officer's discretion in this case is clearly unfettered. What occurred here clearly violated Fourth Amendment provisions never mind the much more restrictive provisions of Art. 1, Sec. 7.

The Hearing Examiner in its ruling determined that Bonneville consented to the warrantless searches of his bedroom and business pursuant to an "unfettered and unlimited" grant. In so doing, the hearing examiner failed to apply an analysis required by cases interpreting both the Fourth Amendment and Art. 1, Sec. 7. At the least, the Court is required to undertake the analysis referred to above in order to properly determine the issue of consent. That analysis requires this Court to consider the entire exchange between the Bonneville, the Prosecutor and the Hearing Examiner. When doing so, it is abundantly clear that Bonneville's consent was coerced within the meaning of applicable cases and that the consent was not "unfettered and unlimited" at all. Such a consent is a

clear violation of Art. 1, Sec. 7 and should be rejected.

d. Even if the evidence was properly admitted over the constitutional objections, the Decision is contrary to the evidence and is not supported by substantial evidence. The most egregious error on the part of the hearing examiner was his constant application of his “unwritten intent” in construing the original decision to allow the permit. Where the decision states Mr. Bonneville may use up to 1,500 square feet for business use, and does not limit where the use is to be AR 476, ln. 23, the hearing examiner rules it was not his intent to allow a floating business area. AR 13. Where the July 1, 2004 decision allows for up to four employees, the hearing examiner changes the rules and states it was not his disclosed intent to limit this only to employees, but also to independent contractors and all other workers at the property. *Id.*

i. There is no evidence Bonneville ever

had more than four employees. For the Cottage Industry permit, PCC §18.35.060(D)(5)(a) provides that Bonneville may have no more than four non-resident employees. The Code does not allow the hearing examiner to include independent contractors as employees. Although the term “employee” is not defined in the Code, this Court must presume the drafters intended the word to mean what it does at common law. *In re Brazier Forest Prods., Inc.*, 106 Wn.2d 588, 595, 724 P.2d 970 (1986); *Marquis v. Spokane*, 130 Wn.2d 97, 110, 922 P.2d 43 (1996). The common law distinguishes between employees and independent contractors, based primarily on the degree of control exercised by the employer/principal over the manner of doing the work involved. *Id.*

There is no evidence that there was ever more than four non-resident employees actually working at the subject property, only the grossest speculation based upon

the number of people seen at the property and the number of what the county chooses to construe as “workstations.” Mr. Bonneville had four employees at the time he applied for the permit in 2004 and two at the time of the hearing in 2007. Employees received W-2 forms, AR 422, ln. 17-19, and several independent contractors working out of their own homes using the office as a mail drop received 1099 forms. AR 422, ln. 20; AR 484, ln. 20-25. *See also* Hearing Brief dated June 14, 2007, AR at 367 - 368, where Bonneville states the appraisers who perform services for [Bonneville] all have independent contractors agreements with [Bonneville] rather than employment agreements; [Bonneville] pays no unemployment or workman’s compensation taxes on them; all have separate business licenses; all receive 1099s rather than W-2s; all maintain offices elsewhere; all pay their own expenses and provide their own tools of the trade... none of which is reimbursed. ... all are paid on a

fee split basis rather than hourly or by salary.

[Bonneville] has no right to control either the means of their work or the final outcome of their work.

The only evidence relevant to this issue is the testimony of county employee Ms. Geeson who testified she asked several people at the property whether they worked for Bonneville, and they stated they did. AR 528. Ms. Geeson admits she did not inquire as to whether they were employees actually working at the property or independent contractors (or other persons) picking up mail, or merely visiting.

ii. Bonneville never used more than 1,500 square feet of space. Just as there is no evidence as to the number of employees working at the subject property, there is no evidence that Mr. Bonneville exceeded 1,500 square feet of space. First, with only two employees, it is not possible to use more than 1,500 square feet.

On each of the three inspections by the county, the areas used for the business were set up exactly as described in the floor plan submitted in the application for the permit by Bonneville to the county, which did not exceed 1,500 square feet. AR 359. At the hearing, the county witness produced a plan previously rejected and not accurately showing the actual use. It should be note the county witness never actually measured the areas purported to be shown on her plan. The county witness says she counted 15 workstations, but never saw any of them in use! And an “employee box with a bunch of names on it,” as the hearing examiner describes it, does not indicate anything more than a mail pick-up box for the independent contractors working off site. Again, there is no evidence that any county witness saw any employee actually working at the property. Instead, the county and the hearing examiner has required the Bonneville to prove a negative, to prove there were not more than four

employees or that he did not use more than 1,500 square feet of space.

Mr. Bonneville testified he assumed he could use a total of 1,500 square feet, described by the county as a “floating 1,500). This is a reasonable interpretation of the July 1, 2004 decision. But even if it is not, he didn’t violate this restriction.

iii. Bonneville applied for the permit and supplied everything requested.

The county makes much of the fact that although Mr. Bonneville did apply for a permit, the county did not actually issue one, and therefore he has violated the July 1, 2004 decision. The evidence is uncontested that Mr. Bonneville did everything he was asked to obtain the permit. He filed the application August 31, 2004. AR 223. The county chose not to issue it. Under PCC §18.100, the county, not the Bonneville, was under the mandatory duty to issue the final notice of decision within 120 days.

Issuance was wholly in the hands of the county. There is no evidence in the record below as to why the permit was not issued. There is no evidence in the record below as to what the county alleges Bonneville failed to provide in order to obtain the permit. Finally, it is clear the county believed the permit had already been issued. AR 55 (“the landowner has voluntarily applied [for the permit] ... and after due consideration, Pierce County has granted said approval”).

iv. Bonneville did live on the premises.

The county admitted in closing it had not met its burden of proof regarding the allegation Mr. Bonneville had not be living at the subject property. June 14, 2007 transcript at pg. 107, ln. 19-21, regarding “Condition No. 7, I will admit that we've not proved that part of our case that he is living on the property or not living on the property. I won't even argue that one.” Nevertheless, the hearing examiner found against Mr. Bonneville, without

any competent evidence to support this finding. This also demonstrates the prejudicial animus of the hearing examiner against Mr. Bonneville.

E. CONCLUSION

Mr. Bonneville was not engaged in some noxious or disruptive enterprise. His appraisal business was quiet and went practically unnoticed. As long as he complied with the requirements of the Pierce County Code, he was entitled to a conditional use permit. He should not have had to go cap-in-hand, genuflect to some prince or potentate, and barter his constitutional birthright in order to continue his business. The requirements of the July 1, 2004 Decision were out of bounds and unconstitutional.

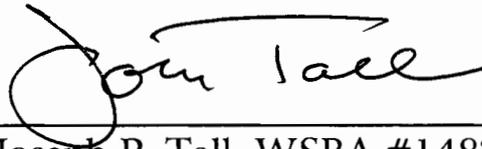
Applying the elements of RCW 36.70C.130(1), the September 5, 2007 decision should be vacated because (a) **the hearing examiner engaged in unlawful procedure** in failing to continue the hearing or recuse himself; (b) **The land use decision is an erroneous interpretation**

of the law, in that the Pierce County Code limits the number of employees, not independent contractors who may work for Bonneville; (c) **The land use decision is not supported by evidence that is substantial**, both in that all of the County's evidence was obtained illegally and does not support the assertions of the revocation complaint; (d) **The land use decision is a clearly erroneous application of the law to the facts**; in that the hearing examiner failed to distinguish between the legal definition of employees and independent contractors; (e) **The land use decision is outside the authority or jurisdiction of the officer making the decision**, in that he did not have the power to impose restrictions not specified by the Pierce County Code; and last, but not least, (f) **The land use decision violates the constitutional rights of the party seeking relief**, in that the hearing examiner subjected Appellant Bonneville to submit to a gross violation of his constitutional rights to

privacy, to be safe and secure in his property, and not to have his home violated with warrantless searches.

They can only be grounds now for vacation and reversal of the September 5, 2007 decision.

Respectfully submitted this 29th day of May, 2008.

A handwritten signature in cursive script that reads "Joseph P. Tall". The signature is written in black ink and is positioned above a horizontal line.

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

COURT OF APPEALS
DIVISION II

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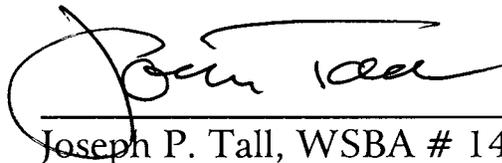
STATE OF WASHINGTON
BY _____
DEPUTY

DECLARATION OF SERVICE

1. The undersigned certifies, declares and affirms that on May 29, 2008, he mailed, postage prepaid, a true copy of the foregoing Designation of Clerk's papers to the Respondents'/Respondents' attorney Jill Guernsey, Deputy Prosecuting Attorney, at the Pierce County Prosecuting Attorney's Office, 955 Tacoma Avenue South, Suite 301, Tacoma, WA 98402-2160.

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

DATED this 29th day of May, 2008 at Seattle, Washington.



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