

# THE RIGHTS OF DEFENDANT-OWNERS UNDER ZERO-TOLERANCE ANTI-DOPING HORSE RACING REGULATIONS AS EXPLAINED IN *PIERCE V. TEXAS RACING COMMISSION*

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## I. INTRODUCTION

Doping in horse racing is a growing area of concern and regulation. Tough policies, including so-called “zero-tolerance policies,” provide a framework for regulating the horse racing industry. Such fervent regulation raises concerns for people with vested interests in horse racing. Therefore, procedural safeguards are necessary to protect these interests. These protections are incorporated into agency procedures, statutes, judicial review, and constitutional rights. Unfortunately, these procedural safeguards are often inadequate.

In *Pierce v. Texas Racing Commission*,<sup>1</sup> a Defendant-owner, Appellant, was penalized for violation of the anti-doping regulations under the Texas zero-tolerance framework. On review, the Texas Court of Appeals intended to clarify: (1) whether the Texas Racing Commission (hereinafter “Commission”) had reached a justifiable result within the procedural framework created for the agency’s regulation, and (2) whether Appellant’s constitutional rights of due process and equal protection were violated by the Commission. This Comment analyzes statutory and constitutional rights of a defendant-owner in a zero-tolerance anti-doping framework, as interpreted by the Texas Court of Appeals in *Pierce*.

Section II of this Comment presents the legal background relevant to the decision in *Pierce*. Section III provides the procedural history through the agency’s findings and judicial review. Section IV analyzes the competing claims and the rationale of the Texas Court of Appeals in reaching its holding. Section V concludes with the implications of the *Pierce* holding for defendant-owners of racing horses.

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<sup>1</sup> *Pierce v. Texas Racing Comm’n*, 212 S.W.3d 745 (Tex. App. 2006).

## II. LEGAL BACKGROUND

### *A. Texas Administrative Code §§319.361 - 362: Testing of Horses*

Section 319.361 of the Texas Administrative Code supplies the guidelines for horse testing. In *Pierce*, Appellant's racehorse was tested pursuant to the stewards' discretionary authority under (c)(1), as indicated below:

- (a) The stewards shall order specimens collected for testing under this subchapter in accordance with this section.
- (b) A specimen shall be collected from each horse that finishes first in a race.
- (c) In addition to the horse designated under subsection (b) of this section, a specimen may be collected from the following horses:

- (1) a horse that finishes second[.]<sup>2</sup>

After the horses are chosen for sampling, pursuant to Texas Administrative Code Section 319.361, then Section 319.362 provides detailed instructions for "split specimen"<sup>3</sup> testing. Subsections (e) and (f) provide guidance for the probative value of positive test results:

- (e) If the test on the split specimen confirms the findings of the original laboratory, it is a prima facie violation of the applicable provisions of the chapter.
- (f) If the test on the split specimen portion does not substantially confirm the findings of the original laboratory, the stewards may not take disciplinary action regarding the original test results.<sup>4</sup>

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<sup>2</sup> 16 TEX. ADMIN. CODE § 319.361 (2009).

<sup>3</sup> The split specimen method seeks to protect the integrity of the samples against false positives and other discrepancies. See 16 TEX. ADMIN. CODE § 319.362 (2009).

<sup>4</sup> 16 TEX. ADMIN. CODE § 319.362 (e)–(f) (2009).

*B. Texas Revised Civil Statutes Article 179E, “ Texas Racing Act” § 3.16(H)*

The following provision of the Texas Revised Civil Statutes was a key component of the Appellant’s argument:

(h) The licensed trainer of an animal is:

(1) considered by law to be the absolute insurer that no prohibited substance has been administered to the animal; and

(2) responsible for ensuring that no prohibited substance is administered to the animal.<sup>5</sup>

This provision creates a form of strict liability for the trainer of a horse and serves as the basis of Appellant’s argument that only the trainer should be held liable.

*C. Texas Government Code § 2001.058(E):Hearing Conducted by SOAH*

Section 2001.058(e) of the Texas Government Code applies to the Racing Commission’s ability to modify conclusions of law or findings of fact made by the Administrative Law Judge (hereinafter “ALJ”) at the State Office of Administrative Hearings (hereinafter “SOAH”):

(e) A state agency may change a finding of fact or conclusion of law made by the administrative law judge, or may vacate or modify an order issued by the administrative judge, only if the agency determines:

(1) that the administrative law judge did not properly apply or interpret applicable law, agency rules, written policies provided under Subsection (c), or prior administrative decisions;

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<sup>5</sup> TEX. REV. CIV. STAT. ANN. art. 179e, §3.16(h) (Vernon Supp. 2008).

(2) that a prior administrative decision on which the administrative law judge relied is incorrect or should be changed; or

(3) that a technical error in a finding of fact should be changed.

The agency shall state in writing the specific reason and legal basis for a change made under this subsection.<sup>6</sup>

*D. 16 Texas Administrative Code § 307.36: Consideration by the Commission*

The following provision clarifies the general rule for agency discretion to modify an ALJ's conclusions and findings with specific guidelines for the Racing Commission:

- (a) After the deadline for filing exceptions and replies, the proposal for decision will be considered by the Commission at open meeting.
- (b) The Commission may:
  - (1) adopt the proposal for decision, in whole or in part;
  - (2) decline to adopt the proposal for decision, in whole or in part; or
  - (3) remand the proceeding to SOAH and direct the ALJ to give further consideration to the proceeding with or without reopening the hearing.<sup>7</sup>

*E. 16 Texas Administrative Code § 307.67(C), (E): Appeal to the Commission*

The following provisions of Section 307.67 formed the basis for Appellant's constitutional challenge to the practice of shifting the burden of proof on appeal and for the Commission's argument as to whether the purse was Appellant's property right:

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<sup>6</sup> TEX. GOV'T CODE ANN. § 2001.058(e) (Vernon 2008).

<sup>7</sup> 16 TEX. ADMIN. CODE § 307.36 (a)-(b) (2009).

(c) **Hearing Procedure.** A hearing on an appeal from a ruling by the stewards or racing judges is a contested case and shall be conducted by SOAH in accordance with the Rules regarding contested cases. In an appeal, the appellant has the burden to prove that the stewards' or racing judges' decision was clearly in error.

(e) **Effect of Appeal on Purse Payment.** If a ruling that affects the outcome of a race is appealed, the portion of the purse that is involved in the appeal shall be withheld and not distributed. The stewards or racing judges may distribute the portion of the purse that is not involved in or affected by the outcome of the appeal.<sup>8</sup>

#### *F. The 14<sup>th</sup> Amendment of the United States Constitution*

In *Pierce*, Appellant argued that the process used by the Racing Commission violated his rights under the 14<sup>th</sup> Amendment, which reads:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.<sup>9</sup>

This section of the 14<sup>th</sup> Amendment contains the Due Process Clause and the Equal Protection Clause, both of which Appellant claims were violated by the Commission's procedures.

### III. CASE HISTORY

In *Pierce v. Texas Racing Commission*, John Pierce, Appellant, was the owner of a racehorse named Kristy's Gold Star.<sup>10</sup> The filly placed second in a race at Lone Star Park for a \$28,408 purse.<sup>11</sup> After the race, blood and urine samples were taken from the horse<sup>12</sup> pursuant to Texas Administrative Code Section 319.361. "The urine sample tested positive

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<sup>8</sup> 16 TEX. ADMIN. CODE § 307.67(c), (e) (2009).

<sup>9</sup> U.S. CONST. amend. XIV, § 1.

<sup>10</sup> *Pierce v. Texas Racing Comm'n*, 212 S.W.3d 745, 749 (Tex. App. 2006).

<sup>11</sup> *Id.* at 750 n.3.

<sup>12</sup> *Id.* at 749.

for ipratropium, a Class 3 prohibited drug.”<sup>13</sup> The positive result was confirmed by testing the split sample.<sup>14</sup> Ipratropium was medically warranted for bronchitis treatment and was administered 25 hours prior to the race by the treating veterinarian.<sup>15</sup> In general, Ipratropium “has a standard withdrawal time of 24 hours, and is only . . . effective for about six hours.”<sup>16</sup> Despite these attenuating circumstances, the positive testing for ipratropium was a *prima facie* violation pursuant to Section 319.362 of the Texas Administrative Code.<sup>17</sup>

Richard Duhon, the trainer, was notified by the racing stewards of the positive test and of the upcoming hearing to determine the penalty.<sup>18</sup> Whether Pierce, the owner, had notice of the stewards’ hearing was more convoluted. The stewards’ investigative report stated that on June 20, 2002, an investigator with the Commission called Pierce’s office and left a message on his answering machine.<sup>19</sup> The next day, the same investigator called Pierce and notified him of the positive test, of which Pierce had already been informed by the trainer.<sup>20</sup> Pierce confirmed in his testimony that he knew the day and time of the hearing, but chose to attend a scheduled root canal instead.<sup>21</sup> Unaware that a postponement was possible, he did not request that the hearing be postponed.<sup>22</sup> The presiding steward testified that he would have granted a continuance.<sup>23</sup> This testimony on Pierce’s notice was relevant to the Court’s due process analysis.

The trainer attended the “stewards’ hearing, but Pierce did not.”<sup>24</sup> Two days later, the formal ruling was issued, “assess[ing] a fine of \$500 against the trainer[ ] and suspend[ing] his license for 15 days.”<sup>25</sup> In addition, Pierce’s racehorse was declared disqualified and unplaced, and the stewards ordered the purse to be redistributed.<sup>26</sup>

Pierce appealed the ruling unplacing the horse and redistributing the purse.<sup>27</sup> He was granted a hearing before an ALJ at the SOAH.<sup>28</sup> The ALJ issued her Proposal for Decision (hereinafter “PFD”) in which she upheld the stewards’ finding that the rules had been violated. However, the

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<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* at 756.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at 763; 16 TEX. ADMIN. CODE § 319.3(f) (2009); *See* 16 TEX. ADMIN. CODE § 319.362(e) (2009).

<sup>18</sup> *Pierce*, 212 S.W.3d at 749.

<sup>19</sup> *Id.* at 759.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.* at 750.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *See id.*

ALJ recommended, as conclusion of law 11, to decrease Pierce's penalty "based on convincing evidence that the veterinarian administered the ipratropium in a manner that did not affect the race."<sup>29</sup> In conclusion of law 11, the ALJ suggested that the Commission rescind the penalties against Pierce, resulting in retaining the horse as the second-place finisher and distributing the purse accordingly.<sup>30</sup>

"The Commission Staff . . . appealed the PFD to the Commission."<sup>31</sup> After hearing the arguments from both Pierce and the Staff, the "commissioners voted at the hearing to modify the PFD by deleting findings of fact 15-18," which concluded that ipratropium did not enhance the horse's performance.<sup>32</sup> The commissioners ruled that these findings were irrelevant under the Commission's zero-tolerance drug policy.<sup>33</sup> They also voted to overrule conclusion of law 11, the ALJ's penalty suggestion.<sup>34</sup> However, in the final order the commissioners did not modify the conclusions of fact, only conclusion of law 11, upholding stewards' ruling in full.<sup>35</sup>

Pierce then appealed to the Trial Court, and the Judge upheld the Commission's decision. Subsequently, Pierce appealed to the Texas Court of Appeals.<sup>36</sup>

#### IV. COURT'S ANALYSIS

In *Pierce v. Texas Racing Commission*, the Texas Court of Appeals summarized the issues raised by Appellant as follows:

[i]n two issues, Pierce complains that the Commission's order prejudiced his substantial rights and violated his constitutional rights. Within these two issues, Pierce presents . . . specific complaints related to the order: that the Commission erred by (1) modifying conclusion of law 11 from what was recommended by the Administrative Law Judge; (2) punishing Pierce, the owner, more harshly than the trainer was punished; (3) failing to notify Pierce of or make Pierce a party to the initial stewards' hearing;

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<sup>29</sup> *Id.* at 750.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.* at 750.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* at 750-51.

[and] (4) improperly shifting the burden of proof to Pierce at the State Office of Administrative Hearings . . . .<sup>37</sup>

This Comment addresses each of Appellant's complaints, including the applicable statutory and constitutional components.

#### *A. Holding*

The Texas Court of Appeals affirmed the Trial Court's order upholding the penalties of the Texas Racing Commission and rejected each of Appellant's arguments. Ultimately, the Court held that Pierce received all of the process due a defendant-owner and that the penalties, disqualification of the horse, and redistribution of the purse should stand as imposed by the Commission.<sup>38</sup>

#### *B. Standard of Review*

Notably, the Texas Court of Appeals applied the substantial evidence review to the Commission's order. The Court explained:

[u]nder this standard, we presume that the Commission's findings, inferences, conclusions, and decisions are supported by substantial evidence, and the burden of proving otherwise rests on the appellant. The Commission's order may be reversed only if a party's substantial rights have been prejudiced because the administrative decisions (1) violate a constitutional or statutory provision, (2) exceed the agency's authority, (3) were made through unlawful procedure, (4) are affected by another error of law, (5) are not reasonably supported by substantial evidence when considering the reliable and probative evidence in the record as a whole, or (6) are arbitrary or capricious or characterized by an abuse of discretion.<sup>39</sup>

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<sup>37</sup> *Id.* at 749. The fifth issue raised by Appellant was that various provisions of the Commission's rules were unconstitutional. *Id.* That issue is beyond the scope of this Comment.

<sup>38</sup> *See id.* at 764.

<sup>39</sup> *Id.* at 751 (citations omitted).

*(1) Modification of Conclusion of Law 11*

The Court labeled the challenge to conclusion of law 11 “the crux of Pierce’s appeal.”<sup>40</sup> The ALJ’s conclusion of law 11 determined that Pierce’s horse should not be disqualified from the second-place finish, and the purse should not be redistributed because the violation did not affect the outcome of the race. The Commission ruled contrary to the ALJ.<sup>41</sup> Pierce asserted that the Commission’s modification of this conclusion “was arbitrary and capricious, characterized by an abuse of discretion, made through unlawful procedure, affected by other error of law, in violation of the Commission’s statutory authority, and not supported by substantial evidence.”<sup>42</sup> The Court disposed of these claims primarily relying on its interpretation of the ALJ’s role in the hearings process. The Court applied Texas Government Code Section 2001.058(e) and concluded that the Commission complied with the requirements by expressly stating the basis for modification: the ALJ’s conclusion was inconsistent with the Commission’s precedent in enforcing the zero-tolerance policy.<sup>43</sup>

The Court further reasoned that under the broad power granted to the Commission by the legislature in the Texas Racing Act, the Commission had discretion to determine the appropriate penalty.<sup>44</sup> A steward from the Commission presented testimony and evidence at the SOAH showing that Class 1, 2 or 3 violations (here Class 3), were routinely penalized by loss of purse.<sup>45</sup> Because the ALJ relied on the harmlessness of the violation, which is considered irrelevant to a violation under the zero-tolerance policy, the Court reasoned that it was not arbitrary or capricious for the Commission to modify conclusion of law 11. Thus, the Court found that Pierce’s statutory challenge to the modification of conclusion of law 11 was overcome by the Commission’s zero-tolerance policy and discretion in administering penalties.<sup>46</sup>

Next, Pierce argued that, by modifying conclusion of law 11, the Commission “violated his constitutional rights of due process and equal protection by denying him the right to an independent Trier-of-fact.”<sup>47</sup> The Court disagreed, citing the “neutral” status of an ALJ as administrative magistrate and emphasizing that modification or rejection of an ALJ’s findings by the Commission does not affect this status.<sup>48</sup>

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<sup>40</sup> *Id.*

<sup>41</sup> *See id.* at 750.

<sup>42</sup> *Id.* at 751.

<sup>43</sup> *See id.* at 752.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.* at 753.

<sup>46</sup> *See id.*

<sup>47</sup> *Id.* at 755.

<sup>48</sup> *Id.*

(2) *Failure to Punish Owner and Trainer Consistently*

Pierce complained that the discrepancy in treatment between him, the owner, and the trainer, who received a \$500 fine and a 15-day suspension, was "arbitrary and capricious."<sup>49</sup> In support of his argument, Pierce referred to the statutory provision declaring a trainer an "absolute insurer" that the horse had not been administered drugs in violation of the Act.<sup>50</sup> The Court held that, as with the modification discussed above, the discrepancy was not arbitrary and capricious because it was both consistent with precedent and within the Commission's discretion.<sup>51</sup>

Pierce further argued that his constitutional rights of due process and equal protection were violated by the discrepancy in punishment. The Court reviewed this question of law de novo.<sup>52</sup> Rational basis review was applied to the distinction, so that the discrepancy "was constitutionally permitted so long as the decision was rationally related to a legitimate state interest."<sup>53</sup> Because the legitimate state purpose was the deterrence of doping in horse racing, which promoted the health of the animals and the integrity of the sport, the Court found no constitutional violation.<sup>54</sup>

(3) *Failure To Provide Notice To Pierce Or Make Him A Party To Hearing*

Pierce's challenge to the failure to provide notice or make him a party to the stewards' hearing was a constitutional claim of violating his due process rights, so the Court reviewed the issue de novo.<sup>55</sup> "In determining whether a procedural due process violation has occurred, [the court applies] a two-part analysis: (1) whether the claimant has a property interest that is entitled to procedural due process protection; and (2) if so, what process is due."<sup>56</sup>

In addressing the first part of the two-part test, the Court agreed with the Commission that pursuant to the Act Pierce had no property right in the purse until the Commission cleared the race for payment and "because the ability for an owner to participate in racing is not a right but, instead, a highly regulated privilege."<sup>57</sup> Although the determination that the purse was not a property right was dispositive of the issue, the Court

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<sup>49</sup> *Id.* at 756.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.* at 757.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> *Id.* at 758.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

concluded that notice in this case was sufficient. The Court addressed the second part of the test summarily, by referring to the rule that evidence of an actual notice of a hearing “may defeat the party’s claims on appeal for due process violations.”<sup>58</sup> Despite Pierce’s argument that he was not made a party to the stewards’ hearing, the Court found that since Pierce had “actual notice of the hearing and an opportunity to appear and defend his interests, his due process rights were not violated by the stewards’ failure to provide him written notice of or formally make him a party to the initial hearing.”<sup>59</sup>

#### *(4) Shifting Burden of Proof To Pierce At The SOAH Hearing*

Pierce argued that the application of § 307.67(c) of the Texas Administrative Code resulted in a violation of his constitutional right of due process by shifting the burden of proof to him at the SOAH hearing.<sup>60</sup> The Court stated that “[i]n administrative proceedings, due process requires that parties be accorded a full and fair hearing on disputed fact issues.”<sup>61</sup> However, the Court explained its conclusion that Pierce had actual notice of the hearing was dispositive of this issue because the procedure was fair and because “the statute says nothing about an exception for non-participating parties.”<sup>62</sup>

### V. IMPLICATIONS OF THE CASE

*Pierce v. Texas Racing Commission* demonstrates that racehorse owners face a heavy burden when placed in the position of defendants in administrative and judicial proceedings on doping violations. The administrative proceedings are marked by a strict adherence to the zero-tolerance policy, even when the infraction is merely technical. All parties, including the Commission, accepted the ALJ’s factual finding that the drug was administered well outside the normal window for effectiveness and even beyond the period where it would normally have been reflected in the testing. The most problematic aspect of the Court’s review was the strict approach that it took to Appellant’s statutory and constitutional arguments.

Appellant’s chief statutory argument was that the agency’s record lacked substantial evidence to support its action. The Court’s standard for substantial evidence was virtually determinative of this argument. The Court *presumed* that the agency’s decisions were supported by substantial

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<sup>58</sup> *Id.*

<sup>59</sup> *Id.* at 759.

<sup>60</sup> *Id.* at 760.

<sup>61</sup> *Id.* at 760–761.

<sup>62</sup> *Id.* at 761.

evidence, and placed the burden on the Appellant to rebut the presumption. The complex history of this standard shows that it was derived from a very deferential presumption statutorily granted to one agency, the Railroad Commission, but since adopted to review actions of all agencies.<sup>63</sup> It is apparent that this is a heavy burden on the appellant.

The most troubling aspect of the Court's analysis of Appellant's constitutional issues was the ease with which it disposed of Pierce's due process claim. The Court accepted the Commission's assertion that Appellant had no property interest in the purse because it was never distributed to him. It is established law that due process property interests are created by state law.<sup>64</sup> This type of proceeding, and particularly the Commission's argument, demonstrates just how circular the argument becomes if interpreted literally. The argument made by the Commission, and accepted by the Texas Court of Appeals - that there can be no property interest because the state directly controls the property - raises many concerns about the nature of property. The Court's reasoning suggests that property right flows from the state. While the full debate is beyond the scope of this Comment, it suffices to say that this concept of property is in direct contrast to philosophical views of property, dating back to the writings of John Locke who implied that property is an intrinsic human right that does not stem from the government.<sup>65</sup> Here, the acceptance that property came from the government led the Court to conclude that Appellant was not deprived of a property right without due process of law because the state government, which controlled the purse via the Commission, did not grant him a property right by releasing the purse.

The Court's conclusion that due process was not violated by the initial stewards' hearing procedure is also troubling. The Court's analysis was limited to concluding that Pierce had notice and an opportunity to respond. By doing this, the Court avoided the question on the nature and timeliness of the notice. Appellant was clearly aware that the hearing was taking place. It is far less clear that he had actual notice that his rights were being adjudicated. Unfortunately, the Court ignored Appellant's argument that his rights could not be affected by the hearing, due to the statutory declaration of the horse's trainer to be the full insurer of compliance with doping policies. Instead, the Court took a highly technical and dismissive approach to the adequacy of the notice. As a result, Appellant was faced with a heavy burden stemming from a hearing that, unbeknownst to him, could affect his rights.

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<sup>63</sup> See *Alamo Express, Inc. v. Union City Transfer*, 309 S.W.2d 815, 823-24 (Tex. 1958).

<sup>64</sup> *Bd. of Regents v. Roth*, 408 U.S. 546, 577 (1972).

<sup>65</sup> See JAMES TULLY, *A DISCOURSE ON PROPERTY: JOHN LOCKE AND HIS ADVERSARIES* 104 (1980).

## VI. CONCLUSION

*Pierce v. Texas Racing Commission* demonstrates to racehorse owners the practical consequences of a strictly enforced zero-tolerance doping policy, which arises as a result of great judicial deference to a state agency that controls the disputed purse. Presumptions against the owner on appeal and a view of property favoring the state severely limit the owner's chances of a favorable legal outcome. Specifically, *Pierce* illustrates that owners must be vigilant about protecting their rights, either by avoiding violations altogether, or by getting involved in the earliest stages of the proceedings.

