

COURT OF APPEALS NO. 70515-6-1  
 IN THE COURT OF APPEALS, DIVISION I  
 OF THE STATE OF WASHINGTON

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LEO MCMILIAN,

Appellant,

v.

KING COUNTY,

Respondent.

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KING COUNTY'S SUR-REPLY  
 RE SUBSTANTIVE DUE PROCESS

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## I. INTRODUCTION

King County submits this sur-reply with leave of the Court.

McMilian argues that the Examiner's decision violated his substantive due process rights. To establish a substantive due process violation McMilian must prove the decision was irrational or arbitrary and capricious, that it fails to serve a legitimate governmental purpose or that it was tainted by improper motive. McMilian makes no such argument, nor would the record support one. His appeal should be denied.

## II. FACTS AND PROCEDURAL HISTORY

In 2002, Leo McMilian bought a legal nonconforming auto wrecking business in a residential zone. Later, he bought an adjacent parcel (the subject parcel). In 2005, McMilian cleared and graded the subject parcel and expanded the wrecking yard onto it.<sup>1</sup>

In July of 2005, following neighborhood complaints, King County contacted McMilian, who then applied to King County for a clearing and grading permit. King County eventually cancelled McMilian's permit and issued a Notice and Order, requiring McMilian to remove the illegal expansion of the nonconforming use wrecking yard use.

McMilian appealed the Notice and Order, but the Examiner denied his appeal. Initially, and again following this Court's remand, the

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<sup>1</sup> May 26, 2009 Report and Decision. CP 24 at ¶7. CP 25 at ¶13.

Examiner found that McMilian had not met his burden of proof. The Examiner concluded that he “. . . did not meet his burden to establish that a valid nonconforming use existed on [the subject] parcel. . .”

### **III. ARGUMENT**

This Court should conclude that McMilian’s substantive due process rights were not violated. Because no legal nonconforming wrecking yard use was established, McMilian has not been deprived of a protected property interest. He cannot prove constitutional error pursuant to the Land Use Petition Act (LUPA), RCW 36.70C.130(1)(f).

#### **A. McMilian cannot prove that the Examiner’s decision violated his substantive due process rights.**

McMilian appeals the Examiner’s land use decision on the record. To prove a substantive due process violation McMilian must show that the decision deprived him of a constitutionally protected property interest, that it was invidious or irrational, that it fails to serve a legitimate governmental purpose, or that it was tainted by improper motive. See i.e. R/L Associates, Inc. v. City of Seattle, 113 Wash.2d 402, 412, 780 P.2d 838 (1989), Cox v. City of Lynnwood, 72 Wash.App 1,9, 863 P.2d 578 (1993), Motley-Motley v. State, 127 Wash.App. 62, 82, 110 P.3d 812 (2005), North Pacifica LLC v. City of Pacifica, 526 F.3d 478,484-486 (9th Cir. 2008), Shanks v. Dressel, 540 F.3d 1082, 1087-1090 (9<sup>th</sup> Cir. 2008).

McMilian erroneously relies on the test applicable to land use *regulations*.

He has not met his burden to prove the examiner's *decision* was error.

**B. Peste v. Mason County does not apply to land use decisions.**

McMilian argues, citing Peste v. Mason County, 133 Wn.App. 456, 136 P.3d 140 (2006), that the Court may decide that a "...regulation is unduly oppressive on the land owner." Reply at 18, quoting id. at 474. Peste does not apply to the challenged land use *decision* here.

In Peste, a trustee appealed a rezone denial, arguing that Mason County's comprehensive plan and development regulations violated substantive due process. The Court addressed the "unduly oppressive" prong of the regulatory test (rejecting outright the other prongs not at issue here). Id. at 462. Balancing the nature of the harm to be avoided, the availability of less drastic measures, the economic loss suffered, and the seriousness of the public problem in light of the Growth Management Act, rejected Peste's constitutional claim. Id. at 476.

McMilian does not argue that a regulation violates his rights, but instead suggests that the County should not enforce its zoning code, or that he should be allowed a partial wrecking yard use of the subject parcel. The Peste analysis does not support his argument.

**C. The Examiner's decision was proper.**

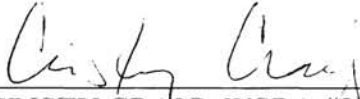
This Court has previously decided, and the County maintains, that substantial evidence supports the conclusion that no wrecking yard existed on the subject parcel in 1958. McMilian v. King County, 161 Wash.App. 581, 604, 255 P.3d 739. Arguably, McMilian has no constitutionally protected property right. See Shanks v. Dressel, *supra*. The challenged decision reflects careful consideration of an extensive record, with no evidence of improper motive. See CP. The governmental interest in zoning enforcement and the principle that legal nonconforming uses conflict with the public interest are well established in Washington. Mercer Island v. Steinmann, 9 Wash.App. 473, 483. 513 P.2d 80, McMilian v. King County, 161 Wash.App. 581, 592, 255 P.3d 739. McMilian's substantive due process rights were not violated.

#### IV. CONCLUSION

McMilian has failed to prove a substantive due process violation. The Examiner's decision should be affirmed.

DATED this 1st day of April, 2014.

DANIEL T. SATTERBERG  
King County Prosecuting Attorney  
Respectfully submitted,

  
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CRISTY CRAIG, WSBA #27451  
Senior Deputy Prosecuting Attorney  
King County Prosecuting Attorney Office

COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION I

LEO MCMILIAN, )  
 ) NO. 70515-6-I  
 Appellant, )  
 )  
 v. ) CERTIFICATE OF  
 ) SERVICE  
 )  
 KING COUNTY, )  
 )  
 Respondent. )  
 \_\_\_\_\_ )

I, Diana Cherberg, hereby certify and declare under penalty of perjury under the laws of the state of Washington as follows:

1. I am a legal secretary employed by King County Prosecutor's Office, am over the age of 18, am not a party to this action and am competent to testify herein.
2. On April 1, 2014, I did cause to be delivered in the manner noted below a true copy of *King County's Sur-Reply Re Substantive Due Process* and this Certificate of Service to:

Jean Jorgensen  
Singleton & Jorgensen, Inc., P.S.  
337 Park Avenue North  
Renton, WA 98057-5716  
Email: jean@singletonjorgensen.com  
**[Sent via Electronic Mail & U.S. Postal Mail]**

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I declare under penalty of perjury under the laws of Washington  
that the foregoing is true and correct.

DATED this 1st day of April, 2014.

DANIEL T. SATTERBERG  
King County Prosecuting Attorney

By:   
Diana Cherberg, Legal Assistant to  
CRISTY CRAIG WSBA #27451  
Senior Deputy Prosecuting Attorney  
Attorneys for Respondent