

64868-3

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NO. 64868-3-I

WASHINGTON STATE COURT OF APPEALS
DIVISION ONE

KING COUNTY,

Appellant,

v.

LEO McMILIAN,

Respondent.

APPELLANT'S OPENING BRIEF

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I. INTRODUCTION

This case illustrates the essential purpose of zoning law, which is to prevent conflicting land uses on neighboring parcels. In this case respondent Leo McMilian bought a small legal nonconforming wrecking yard in a residential area at the same time as a new housing development was being developed two parcels to the south. Between the wrecking yard and the subdivision was a vacant parcel, which was completely overgrown. The vacant parcel created a sight and sound barrier between the subdivision and the wrecking yard. The vacant parcel had never been under the same ownership as the wrecking yard.

Unbeknownst to the new home owners in the subdivision McMilian purchased the vacant parcel. About a year after the construction in the subdivision was complete, and without obtaining required permits, McMilian stripped all vegetation from the vacant parcel. McMilian then expanded wrecking yard operations to completely cover it.

Not surprisingly the new home owners complained that the expanded wrecking yard violated the King County zoning code. The King County Department of Development and Environmental Services (DDES) agreed, and issued a Notice and Order requiring wrecking yard use of the subject parcel to cease.

McMilian appealed the Notice and Order, claiming a legal nonconforming use. DDES responded that no legal nonconforming use had been established on the subject parcel, that any wrecking yard use of the subject parcel was a trespass, and that to the extent that any legal nonconforming wrecking yard use was established on the subject parcel it had been abandoned and/or illegally expanded.

The King County Hearing Examiner upheld the Notice and Order. The Examiner held, as an issue of first impression in Washington, that a legal nonconforming use cannot be established by a trespasser. Because the Examiner's decision on the trespass issue resolved the case the Examiner did not reach any of DDES' additional theories.

McMilian appealed the Examiner's decision to the Superior Court. The Superior Court judge, Judge Fleck, disagreed with the Examiner's analysis on the trespass issue, and without reference to applicable Code language found that the clearing on site was "routine maintenance" which did not require a permit. Judge Fleck reversed the Examiner's decision. Her Order made no reference to King County's arguments regarding abandonment and illegal expansion.

Judge Fleck's decision should be reversed. This Court should conclude that disfavored legal nonconforming use status may not be established by illegal users such as trespassers, who have no right to use

the property at issue. This Court should also conclude that McMilian did not meet his burden to prove that a substantial wrecking yard use was legally established and continuously maintained on the subject parcel since prior to 1958. In the alternative this Court should conclude that any legal nonconforming wrecking yard use of the subject parcel was vastly illegally expanded. Finally, this Court should reject Judge Fleck's conclusion that the clearing on site did not require a permit. Under the plain language of the King County Code the "routine maintenance" exception only applies to certain specified activities, not including any industrial use.

II. ASSIGNMENTS OF ERROR

1. The Superior Court erred in entering Finding of Fact and Conclusion of Law 1.1 of the Order Reversing Hearing Examiner's Decision, and by concluding that Respondent McMilian met his burden to prove that the subject parcel has been used as a storage yard in conjunction with the wrecking yard parcel immediately to the north since prior to 1958.
2. The Superior Court erred in entering Finding of Fact and Conclusion of Law 1.2 of the Order Reversing Hearing Examiner's Decision, and by concluding that the Hearing Examiner's reasoning was based on a finding that the right to

maintain a nonconforming use depends upon the ownership of land.

3. The Superior Court erred in entering Findings of Fact and Conclusions of Law 1.3 and 1.4 of the Order Reversing Hearing Examiner's Decision, and by reversing the Examiner's decision that the subject parcel does not benefit from a non-conforming use.

4. The Superior Court erred in entering Finding of Fact and Conclusion of Law 1.5 of the Order Reversing Hearing Examiner's Decision, and by reversing the Examiner's decision that the clearing and grading on the subject parcel required a permit.

5. The Superior Court erred in entering Finding of Fact and Conclusion of Law 1.6 of the Order Reversing Hearing Examiner's Decision, and by reversing the Examiner's finding of fact that McMilian performed clearing and grading on the subject parcel in excess of permit thresholds.

6. The Superior Court erred in entering Finding of Fact and Conclusion of Law 1.7 of the Order Reversing Hearing Examiner's Decision and by concluding that clearing on the

subject parcel qualified for a "routine maintenance" permit exemption under King County Code §16.82.051(B).

7. The Superior Court erred by entering its January 13, 2010 Order reversing the King County Hearing Examiner's Decision upholding DDES Notice and Order # E05G0103.

8. The Superior Court erred by failing to uphold the Examiner's nonconforming use decision based upon the alternate ground that McMilian failed to meet his burden to prove that a wrecking yard use of the subject parcel predated adoption of the current zoning code in 1958 and was continuously maintained since that time.

9. The Superior Court erred by failing to uphold the Examiner's decision based upon the alternate ground that any legal nonconforming use established on the subject property was abandoned.

10. The Superior Court erred by failing to uphold the Examiner's decision based upon the alternate ground that McMilian illegally expanded and intensified any legal nonconforming use established on the subject property.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. MAY A TRESPASSER ESTABLISH A LEGAL NONCONFORMING USE?
 - a. DOES THE PLAIN LANGUAGE OF THE KING COUNTY CODE ALLOW AN ILLEGAL USER TO ESTABLISH A NONCONFORMING USE?
 - b. SHOULD THIS COURT EXTEND LEGAL NONCONFORMING USE PROTECTION TO TRESPASSERS?
2. DID McMILIAN FAIL TO MEET ANY ELEMENT OF HIS BURDEN TO PROVE THE EXISTENCE OF A NONCONFORMING USE ON THE SUBJECT PARCEL?
 - a. DID McMILIAN FAIL TO PROVE A LAWFUL USE?
 - b. DID McMILIAN FAIL TO PROVE THAT A WRECKING YARD USE EXISTED ON THE SUBJECT PARCEL IN 1958?
 - c. DID McMILIAN FAIL TO MEET HIS BURDEN TO PROVE THAT ANY WRECKING YARD USE OF THE SUBJECT PARCEL WAS CONTINUOUSLY MAINTAINED FROM 1958 TO THE PRESENT?
 - d. DID McMILIAN FAIL TO MEET HIS BURDEN TO PROVE THAT ANY LEGAL NONCONFORMING USE WAS NOT ABANDONED?
3. DID McMILIAN ILLEGALLY INTENSIFY ANY LEGALLY ESTABLISHED NONCONFORMING USE?

4. **DID THE EXAMINER CORRECTLY CONCLUDE THAT THE CLEARING ON THE SUBJECT PARCEL REQUIRED A PERMIT?**
- a. **WAS THE EXAMINER'S FINDING THAT McMILIAN CLEARED MORE THAN 7000 SQUARE FEET OF VEGETATION FROM THE SUBJECT PARCEL SUPPORTED BY SUBSTANTIAL EVIDENCE IN THE RECORD THAT MORE THAN 43,560 SQUARE FEET OF VEGETATION WAS CLEARED?**
- b. **DID THE EXAMINER CORRECTLY CONCLUDE THAT CLEARING ON THE SUBJECT PARCEL WAS NOT PERMIT EXEMPT "ROUTINE MAINTENANCE" BECAUSE INDUSTRIAL USES ARE NOT COVERED BY THE EXEMPTION UNDER THE PLAIN LANGUAGE OF THE KING COUNTY CODE?**

III. STATEMENT OF THE CASE

In July of 2005 Respondent Leo McMilian applied to the King County Department of Development and Environmental Services (DDES) for a clearing and grading permit to legalize clearing and grading work he had already completed. Clerk's Papers (CP) 35. On June 6, 2007 DDES cancelled McMilian's permit application after a lengthy investigation. CP 36. The basis for the cancellation was that the purpose of the clearing and grading was to allow a wrecking yard use, which the 1.9 acre subject property (parcel number 332104-9038) is not zoned for.

On September 11, 2007 DDES issued a Notice and Order alleging that violations of the King County Code (KCC) existed on the subject

property. CP 35. The Notice and Order cited McMilian for operation of an auto wrecking business from a residential site, clearing and grading of over 7,000 square feet without required permits, and construction of a fence over 6 feet in height without a permit. Id. McMilian appealed to the King County Hearing Examiner (the Examiner). Id.

The Examiner considered McMilian's evidentiary appeal in October of 2008. Complainant neighbors, DDES staff, McMilian and members of his staff testified.

Neighbor Paul Skalicky testified regarding his observations of the condition of the subject parcel before, during and after the clearing and grading at issue, and the impacts of the current conditions on his ability to enjoy his home. CP 1043 - 1073.

Neighbor Mark Heintz also testified regarding his observations of the site conditions before, during and after the clearing and grading at issue and the impact of the current conditions on his ability to enjoy his home. CP 997 - 1018.

DDES Site Development Specialist Robert Manns testified regarding his investigation of the clearing and grading violation, and his observations of the site before and after the clearing and grading at issue. CP 750 - 779. Manns testified that 1.7 acres of the 1.9 acre site was cleared and that there are 43,560 square feet in an acre. CP 771. Manns

also testified that there are exceptions to the clearing and grading permit requirements, but that none of them, including a routine maintenance exception, applied to this case. CP 779.

DDES Director of Land Use Services Randy Sandin testified regarding his investigation of legal nonconforming uses on the subject parcel and his conclusion that there was insufficient evidence to prove the existence of a legal nonconforming use. CP 780 - 810.

Tim Pennington testified that he used to work for McMilian. CP 1023. Pennington testified regarding his work clearing the "vacant lot," the purpose of the work, and the condition of the subject parcel before, during, and after the clearing project. CP 1022 - 1039.

Richie Horan testified regarding going to the wrecking yard parcel as a child, his later dealings with the wrecking yard when he operated a body shop, and his eventual purchase of the wrecking yard parcel in 1977. Horan described his use of the subject parcel, its condition in 1977, and his eventual dealings with McMilian. CP 811 - 848. Horan also testified with regard to the comparative intensity of his use. CP 840 - 842.

Trooper Suzanne Padgett is wrecking yard inspector. Padgett testified with regard to her limited observations of the subject parcel over the last ten or so years. CP 848 - 857.

Leo McMilian testified regarding his purchase, observations and activities on the subject parcel. CP 939 - 990. He also confirmed the intensity of his wrecking yard use.¹ CP 989.

The Examiner issued his Report and Decision on May 26, 2009. CP 108 - 116, attached as Appendix A. The Examiner upheld the Notice and Order. He found as follows:

4. An auto wrecking business has long been conducted on the property directly abutting to the north, under a series of ownerships. During prior ownerships, some spillover of the auto wrecking operation occurred on the subject property, which was not owned by the prior ownerships of the auto wrecking business (it was purchased by [McMilian] after [the] purchase of the main Astro Auto Wrecking site abutting to the north). The spillover consisted of storage of some wrecked and dismantled cars and numerous junk auto parts and tires. The property was not utilized in active auto wrecking operations as was the main operation to the north.
5. No express permission was granted by the owners of the subject property to the prior operators of the auto wrecking business to the north to utilize the subject property for auto wrecking/auto storage purposes or any other related activity. Neither was eviction commenced.
6. A prior owner of the adjacent property, Richie Horan, testified that he was never asked to discontinue use of the property in the spillover auto wrecking/auto storage activity. He considered purchasing the subject property but never did, and speculated whether there was a possibility of adverse possession by his usage, though no adverse possession claim was ever made or asserted.

¹ Additional witness testimony was not transcribed.

7. Upon their purchase of the subject property, the McMilians in or around 2005 commenced clearing of the subject property of its significant overstory and underbrush vegetation and removal of a substantial amount of auto parts, tires, a few vehicles, etc. The tree cover was so substantial that the vehicles, auto parts, etc., were not visible (at least not discernible) from aerial photographs taken prior to the time of clearing.
8. In clearing the property of vegetation, approximately 1.7 acres, or the vast majority, of the 1.9 acre property was cleared.
9. With some exceptions where the threshold is zero, not applicable here, clearing of vegetation in excess of 7,000 square feet of area must be conducted under the auspices of a clearing and grading permit. [KCC 16.82.051].
10. No clearing and grading permit was obtained for the clearing activity.

...

13. After the clearing and grading activity was performed onsite, the Astro Auto Wrecking business expanded substantially onto the subject site, utilizing essentially its entirety for storage of and processing of wrecked vehicles, in some areas stacking them vertically, utilizing typical wrecking yard equipment for stacking, hauling and moving wrecked vehicles and auto parts. The subject property is utilized essentially as an equal component of the previously established auto wrecking yard abutting to the north, as one whole operation. The subject property is accordingly no longer simply a spillover site for informal and minor storage and indeed dumping of parts and vehicles.

CP 110 - 111, App. A at pages 3-4.

The Examiner concluded that "[t]he subject property does not benefit from a nonconforming use right to an auto wrecking yard or an auto storage yard." Id. at 112. He reasoned:

Particularly given the context of nonconforming uses being disfavored in the law, and of the allowance of nonconforming uses to continue chiefly in order to respect private property rights [State ex rel. Miller v. Cain, 40 Wn.2d 216 at 221, 242P.2d 505 (1952)], the requirement that there be a lawful establishment of the nonconforming use must logically include that it had been established under due property ownership or permission, i.e., not merely by trespass, criminal or not. Mere silent acquiescence (as asserted) by lack of expression of a demand to vacate is insufficient to accord Mr. Horan a possessory or permission claim which would support a conclusion of legal nonconforming rights. It belies common sense to conclude that a person who operates a land use on property not owned by that person, without permission to operate such use, and without adverse possession, has established a lawfully operated use and a property right which must then be accorded disfavored nonconforming use status.

Id. (citations in original). The Examiner upheld all of the violations as alleged in the DDES Notice and Order.

IV. ARGUMENT

The Examiner's Decision should be reinstated. This Court should adopt the Examiner's reasoning that a trespasser may not establish a legal nonconforming use. The Examiner's Report and Decision should also be affirmed on the ground that McMilian failed to meet his burden to prove that a legal nonconforming use exists on the subject parcel. Finally, the

Examiner's findings also establish that McMilian illegally expanded any legal wrecking yard use of the parcel.

STANDARD OF REVIEW

In this case McMilian appealed the King County Hearing Examiner's final decision on a land use matter, therefore review is governed by the Land Use Petition Act (LUPA), RCW 36.70C *et seq.* The Court of Appeals stands in the shoes of the superior court and reviews the hearing examiner's action de novo on the basis of the administrative record. King County v. State Boundary Review Bd., 122 Wash.2d 648, 672, 860 P.2d 1024 (1993), RCW 36.70C.130(1).

Under LUPA the reviewing court may only grant relief if the party seeking reversal of the Examiner's decision meets certain standards. Here McMilian is challenging the Examiner's decision, so he bears the burden.

For legal issues McMilian's burden is to establish that "...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." RCW 36.70C.130(1)(b). Errors of law are reviewed de novo. Hilltop Terrace Homeowner's Ass'n v. Island County, 126 Wash.2d 22, 29, 891 P.2d 29 (1995).

For challenged findings of fact McMilian must prove that insufficient evidence in the record supports the decision. RCW

36.70C.130(c). King County prevailed before the King County Hearing Examiner, therefore the facts and inferences must be reviewed in the light most favorable to King County. State ex rel. Lige & Wm. B. Dickson Co. v. County of Pierce, 65 Wash.App. 614, 618, 829 P.2d 217 (Div.2, 1992)(citing Fisher Properties, Inc. v. Arden-Mayfair, Inc., 115 Wash.2d 364, 369-70, 798 P.2d 799 (1990)), review denied, 120 Wash.2d 1008, 841 P.2d 47 (1992).

If the challenge is to the application of the law to the facts McMilian must prove that the Hearing Examiner's decision was clearly erroneous. First Pioneer Trading Co., Inc. v. Pierce County, 146 Wash.App. 606, 613, 191 P.3d 928, 931 (Wash.App. Div. 2,2008) citing City of Univ. Place v. McGuire, 144 Wash.2d 640, 647, 30 P.3d 453 (2001), and RCW 36.70C.130(d). A decision is clearly erroneous if "...after reviewing the record as a whole the reviewing court is left with the definite and firm conviction that a mistake has been made." Thornton Creek Legal Defense Fund v. City of Seattle, 113 Wash.App. 34, 52 P.3d 522 (Div. 1, 2002).

This Court should affirm the Examiner's decision. The Examiner's findings are well supported by the agency hearing record, and his legal decision is entitled to substantial deference. McMilian cannot meet his burden to establish error under LUPA.

1. **A TRESPASSER MAY NOT ESTABLISH A LEGAL NONCONFORMING USE.**

A nonconforming use is a use which lawfully existed prior to the enactment of a zoning ordinance, and which is maintained after the effective date of the ordinance, although it does not comply with the zoning restrictions applicable to the district in which it is situated. Rhod-A-Zalea & 35th, Inc. v. Snohomish County, 136 Wash.2d 1, 6, 959 P.2d 1024, 1027 (1998) citing 1 Robert M. Anderson, American Law of Zoning § 6.01 (Kenneth H. Young ed., 4th ed.1996). In this case the Examiner concluded that no legal nonconforming use was established because any wrecking yard use of the subject property was a trespass. CP 112, App. A at page 5. The Examiner's decision is entitled to deference. RCW 36.70C.130(1)(b). McMilian has the burden to prove that the Examiner's decision was an erroneous interpretation of the law. Id. This Court should conclude that he failed to meet that burden.

a. **THE PLAIN LANGUAGE OF THE KING COUNTY CODE REQUIRES LAND USES TO CONFORM TO STATE REGULATIONS, THEREFORE A TRESPASSER CANNOT ESTABLISH A NONCONFORMING USE IN KING COUNTY.**

In Washington, local governments are free to preserve, limit or terminate nonconforming uses subject only to the broad limits of applicable enabling acts and the constitution. Rhod-A-Zalea & 35th, Inc.

v. Snohomish County, 136 Wash.2d at 8. King County has adopted local regulations defining and limiting nonconforming uses.

In King County a nonconformance is defined as ". . . any use . . . established in conformance with King County rules and regulations at the time of establishment that no longer conforms to the range of uses permitted in the site's current zone . . .". KCC 21A.06.800². A use is "established" when it ". . . has been in continuous operation for a period exceeding 60 days. . ." KCC 21A.08.010. Under KCC 21A.08.010 ". . . [a]ll applicable requirements of [the King County Code], or other applicable state or federal requirements, shall govern a use located in unincorporated King County." Id. Thus, under the plain language of KCC 21A.08.010 a use must be in continuous operation for more than 60 days and comply with all county, state and federal regulations before it can be "established."

Here the Examiner determined that ". . . the requirement that there be a lawful establishment of the nonconforming use must logically include that it had been established under due property ownership or permission, i.e., not merely by trespass, criminal or not." CP 112, App. A at page 5. That reasoning is consistent with the Code's requirement that state regulations apply to uses in King County.

² All King County Code sections cited herein are attached at appendix D.

Washington law contains specific regulations and common law prohibitions on trespassing. RCW 4.16.080 (three year statute of limitations on trespassing claims), RCW 4.24.630 (treble damages based upon wrongful entry on property of another), RCW 9A.52.080 (criminal trespass), RCW 64.12 et seq (waste and trespass), and see i.e. Bradley v. American Smelting and Refining Co., 104 Wash.2d 677, 709 P.2d 782 (1985) (actionable invasion of a possessor's interest in the exclusive possession of land is a trespass). Because trespassing is illegal in Washington the Examiner's conclusion that a trespasser cannot establish a legal nonconforming use is correct under the King County Code.

Because state regulations apply to uses under KCC 21A.08.010 McMilian cannot meet his burden to prove that a wrecking yard use was legally established under the Code. The Examiner's decision was a correct application of the King County Code and should be upheld.

**b. THIS COURT SHOULD DECLINE TO
EXTEND LEGAL NONCONFORMING USE
RIGHTS TO TRESPASSERS IN
WASHINGTON.**

Nonconforming uses are not favored in Washington, and may be extinguished, either after a period of nonuse or a reasonable amortization period allowing the owner to recoup on investment. Rhod-A-Zalea & 35th Inc. v. Snohomish County, 136 Wn.2d at 8. “The ultimate purpose of

zoning ordinances is to confine certain classes of buildings and uses to certain localities. The continued existence of those which are nonconforming is inconsistent with that object. . .” Id. at 7, citing State ex rel. Miller v. Cain, 40 Wash.2d 216, 221, 242 P.2d 505 (1952).

Nonconforming uses are inconsistent with important public interests. Rhod-A-Zalea & 35th, Inc. v. Snohomish County, 136 Wn.2d at 7.

The reasons for the nonconforming use doctrine are substantively important. The purpose of the right is to allow an otherwise lawful but now nonconforming use to continue so as to avoid deprivation of property without due process. Christianson v. Snohomish Health Dist., 133 Wash.2d 647, 677, 946 P.2d 768, 782 (1997). Zoning ordinances which immediately abolish existing nonconforming uses are unconstitutional insofar as they deprive individuals of vested rights without due process of law. State v. Thomasson, 61 Wash.2d 425, 428, 378 P.2d 441, 443 (1963), citing United States Constitution, amendment 14, § 1, State ex Modern Lbr. & Millwork Co. v. MacDuff, 161 Wash. 600, 297 P. 733 (1931), State ex rel. Warner v. Hayes Investment Corp., 13 Wash.2d 306, 125 P.2d 262 (1942). Due process prevents the abrupt termination of what one had been doing lawfully, but does not extend beyond that purpose. Meridian Minerals Co. v. King County, 61 Wash.App. 195, 212, 810 P.2d

31, 40 (1991), citing Baxter v. Preston, 115 Idaho 607, 768 P.2d 1340 (1989).

Unlike a property owner or a lease holder trespassers do not enter property under the color of right. Young v. Ferguson, 106 Wash.2d 658, 724 P.2d 991 (1986). Because a trespasser has no right to use of the property, constitutional due process concerns do not apply. This Court should conclude that the public interest in enforcement of zoning regulations outweighs any interest the trespasser might have in continuing a use after a change in applicable zoning. This Court should not extend legal nonconforming use protection to those who enter property without permission of the owner.

2. **McMILIAN FAILED TO MEET HIS BURDEN TO PROVE A LAWFUL WRECKING YARD USE EXISTED ON THE SUBJECT PARCEL FROM 1958 UNTIL THE PRESENT.**

In this case the Examiner reasoned that "[i]t belies common sense to conclude that a person who operates a land use on property not owned by that person, without permission to operate such use, and without adverse possession, has established a lawfully operated use . . .". The Examiner's conclusion that McMilian did not prove a lawful use of the subject property was correct and should be affirmed. However, the County also argued to the Examiner that McMilian failed to meet any

element of his burden to prove a nonconforming wrecking yard use. This court may affirm the Examiner's Decision if it finds that any additional element of McMilian's burden was not proved.

One who asserts a prior legal nonconforming use bears the initial burden to prove that (1) the use existed before the county enacted the zoning ordinance; (2) the use was lawful at the time; and (3) the use was never abandoned or discontinued for over a year. First Pioneer Trading Co., Inc. v. Pierce County, 146 Wash.App. 606, 614, 191 P.3d 928 (Wash.App. Div. 2, 2008). The pleadings and proof in this case support the conclusion that McMilian failed to prove any of those elements.

Where a judgment or order is correct, it will not be reversed merely because the trial court gave the wrong reason for its rendition. Pannell v. Thompson, 91 Wash.2d 591, 603, 589 P.2d 1235 (1979), Cheney v. Mountlake Terrace, 87 Wash.2d 338, 552 P.2d 184 (1976), Ertman v. City of Olympia, 95 Wash.2d 105, 108, 621 P.2d 724, 726 (1980). "A judgment will be affirmed on any ground within the pleadings and proof." Tropiano v. City of Tacoma, 105 Wash.2d 873, 876-877, 718 P.2d 801, 802 (1986), citing Ertman v. City of Olympia, at 877.

Arguments raised at trial are properly before the Court of Appeals.

Tropiano v. City of Tacoma, 105 Wash.2d at 876-877

a. McMILIAN FAILED TO ESTABLISH A LAWFUL USE.

McMilian had the burden before the Examiner to prove the "existence of a legal, preexisting use." First Pioneer Trading Co., Inc. v. Pierce County, 146 Wash.App. at 617. The Examiner's decision is consistent with previous Washington authority regarding establishment of "lawful" uses and appellate decisions from other states rejecting a trespasser's use as not lawful. It should be affirmed.

In First Pioneer Trading Co., Inc. v. Pierce County, Court of Appeals, Division Two considered a legal establishment issue. First Pioneer operated an indoor steel fabrication business and maintained various outdoor structures and commercial industrial vehicles. Id. at 608. Pierce County alleged that First Pioneer's use violated a 1988 zoning ordinance. Id. at 610. First Pioneer appealed, claiming a legal nonconforming use. Id.

First Pioneer presented a series of receipts for material received, as well as invoices, utility bills, and other business records in support of its claims. Id. In response Pierce County established that no permits of any kind had been obtained, that the owner never informed the County he used the residentially-zoned land for commercial purposes, and that he did not pay taxes on the property until the mid-1990s. Id. A neighbor presented

aerial photographs from the County assessor's office, showing no buildings present on the property in 1985. Id. at 610-611.

In part because of the lack of permits the hearing examiner determined that ". . . First Pioneer had failed to establish that [it] was lawfully using the subject site as a manufacturing site. . ." before the Pierce County Code changed. Id. at 611-612. The Superior Court affirmed. First Pioneer appealed again, arguing that it had provided "considerable evidence" and that the examiner had misapplied the applicable burdens of proof. Id.

Division Two disagreed. The court noted:

the aerial photographs show no activity on the property other than a residence and a storage shed in 1991, in stark contrast to First Pioneer's contention that it had operated a metal fabrication business outside on the property's grounds since 1985. The 1991 photograph, which the County took three years after requiring permits for industrial activity, shows the unlikelihood of First Pioneer's claim that it operated a significant metal fabrication business on the property for five to six years before 1998, when the County passed the ordinance requiring industrial use permits.

Id. at 615.

Regarding First Pioneer's arguments that the examiner improperly relied on the issue of missing permits the court reasoned:

the hearing examiner found that First Pioneer failed to "demonstrate that [its] use of the site was lawful at the time the Pierce County Code changed and therefore [it] is not entitled to a nonconforming use classification." Also, as

the hearing examiner noted, First Pioneer submitted “no records of any type, such as tax records, business licenses, or any other formal records indicating that the site was used to conduct a business. *The property tax records indicate it was conducted as a residential use and not as a commercial use.*”

Id. at 617 (emphasis in original). The court concluded "First Pioneer failed to show that its industrial use of the property was legal at any time, before or after the County required permits for metal fabrication." Id. (distinguishing Van Sant v. City of Everett, 69 Wash.App. 641, 849 P.2d 1276 (Div. 1, 1993)).

Other state courts considering trespass specifically have come to similar conclusions. For instance in Cizek v. Concerned Citizens of Eagle River Valley, Inc. the Alaska Supreme Court concluded that proponents of an airstrip had not proved a continuous legal use where the users lacked permission to use the strip. 49 P.3d 228 (2002). The airstrip was constructed in the 1960s and used sporadically between 1984 and 1995. The strip became nonconforming in 1984.

The parcel owners argued that occasional use of the airstrip between 1985 and 1995 was sufficient to preserve the nonconformity. Id. at 232. The Alaska Supreme Court disagreed. The Court reasoned:

McElhany and Evans were the only pilots that may have used the airstrip at least yearly between 1984 and 1995-the Cizeks concede this. And it is also a reasonable inference

from the evidence in the record that **their use was at best unauthorized and may have been trespass.**

Id. at 232 (emphasis added). The Cizek court concluded "the highly intermittent, unauthorized use by McElhany and Evans did not suffice to continue the nonconforming use." Id.

A Delaware court came to a similar conclusion in Minquadale Civic Association v. Kline, 42 Del.Ch. 378, 212 A.2d 811 (1965). In Kline local residents alleged that a trucking business was illegally operated in a residential zone. Kline responded that his use was legal nonconforming. Id. at 379, 383.

Eighteen out of Kline's twenty-two lots were previously owned by Nora Baker. Id. at 381. Nora's son, Franklin Baker, had run a trucking business on the remaining six lots, and had used his mother's adjoining land for moving trucks and other vehicles into a loading platform, and for parking. Id. at 381-382. Kline took over Franklin Baker's parcels in 1953, and continued to use Nora Baker's parcels without her permission. Id. The area was zoned residential in 1954. Id. Kline purchased Nora Baker's parcels in 1955.

The court concluded that Kline was not entitled to a legal nonconforming use on the former Nora Baker property. The court reasoned:

... it would appear that defendant has no legal right to use the former Mrs. Nora Baker premises for a commercial purpose such as trucking. Defendant did not own these lots when the Zoning Code was enacted and therefore may not successfully claim that a non-conforming use existed at that time. **In other words, the use made by Mr. Kline of Mrs. Baker's lands from the time he acquired the garage property constituted a trespass.**

Id. at 384. (emphasis added).

Finally in Mallet v. Loux, a New Jersey trial court convicted Loux of storing boats in a residentially zoned lot for business purposes. 76 N.J.Super. 409, 184 A.2d 755 (1962). Loux' boatyard occupied two parcels. Loux had an undisputed legal nonconforming use on the "Wagner" parcel but not the "Fawcett" parcel. Id. at 411. Both parcels were zoned residential in 1950. Loux acquired the Fawcett parcel in 1953. The Loux court found that Loux was a trespasser on the Fawcett parcel at the critical time and could not establish a use as nonconforming. Id. at 411.

The court reasoned:

The record discloses no right or interest in Wagner with regard to any of the Fawcett property, and lots 46-52 in particular. Wagner was neither the owner of those lots in 1948-50-the Fawcetts were-nor a lessee of the Fawcetts. Defendant testified that he know of no arrangement between Wagner and the Fawcetts for the storage of boats; indeed, . . .[he]. . . had no arrangements with the Fawcetts after he took over Wagner's boatyard operation in October 1953 under the contract of purchase and sale. The farthest defendant would go in his testimony was to say that the

Fawcetts did not object to His [sic] use of their property for boat storage. . . . **Whoever may have stored boats on lots 46-52 between July 28, 1948 and December 13, 1950 had a status no higher than that of a trespasser.**

Id. at 412-14 (emphasis added). The Loux Court noted "here is no convincing proof as to exactly on which of these lots boats may have been placed, when they were stored, and by whom they were put there. If boats were stored, the users were at best trespassers, the use intermittent, and the time of such use indefinite." Id. at 413. The Court concluded "any use that may have been made of lots 46-52 during 1948-1950 was not lawful in its inception-let alone actively and constantly maintained. N.J.S.A. does not lend protection to such a use, founded as it is on trespass."³

This Court should uphold the Examiner's decision and follow the reasoning of the First Pioneer, Cizek, Kline, and Loux courts. Here, like in each of those cases no permission was ever given for wrecking yard use of the subject parcel. CP 110, App. A at page 3. Like in Loux there is no

³ Pennsylvania follows a contrary rule that ownership is irrelevant as long as the use was legal under the zoning code when established. See i.e. Fayette County v. Cossell, 60 Pa.Cmwlth. 202 (1981). The Fayette court reasoned that zoning regulations "concern the physical use to which the land is put," and are "not concerned with method of ownership of property." Id. citing Sears Roebuck and Co. v. Power, 390 Pa. 206, 134 A.2d 659 (1957). Pennsylvania nonconforming use analysis also requires consideration of other factors such as due diligence in attempting to comply with the law, good faith throughout the proceedings, the expenditure of substantial unrecoverable funds, and the insufficiency of evidence to prove that individual property rights or the public health, safety, and welfare would be adversely affected by the use. American Law of Zoning and Planning, 5th ed., Patricia Salkin and Robert M. Anderson § 12:8, Thompson Reuters, 2010.

convincing proof as to exactly where on the subject parcel auto wreckage may have been placed, when it was stored, and by whom it was put there. The Examiner found only that "some spillover of the auto wrecking operation occurred on the subject property". CP 110. Like in First Pioneer, the alleged use was not visible on aerial photographs and no permits, business licenses, or any other formal records indicate a legal use of the parcel and tax records indicate a historic residential use. See Sandin Letter, at CP 91. In light of the absence of documentation and because no permission was ever given for wrecking yard use of the subject parcel the Examiner correctly concluded that McMilian failed to meet his burden to prove a lawful use. That decision should be affirmed.

**b. McMILIAN FAILED TO PROVE A
SUBSTANTIAL WRECKING YARD USE OF
THE SUBJECT PARCEL IN 1958.**

A nonconforming use is defined in terms of the property's lawful use established and maintained at the time the zoning was imposed. Meridian Minerals Co. v. King County, 61 Wash.App. 195, 207, 810 P.2d 31 (1991), Miller v. City of Bainbridge Island, 111 Wash.App. 152, 164, 43 P.3d 1250, 1255 (Wash.App. Div. 2,2002). McMilian failed to prove any wrecking yard use of the subject parcel in 1958 when it was zoned residential.

Helene Mecklenberg owned the wrecking yard to the north of the subject property "... from 957 until 1968." CP 105, Mecklenberg affidavit attached as Appendix B. Mecklenberg's declaration states "I operated an auto wrecking yard and automobile storage facility *within a fenced perimeter* . ." Id. (emphasis added). Mecklenberg's claim is consistent with a 1960 aerial photograph, which shows a very clear line of demarcation between the wrecking yard parcel and the forested subject property. CP 94-95, attached at Appendix C. In the aerial photograph cars can be seen neatly lined up on the wrecking yard's shared border with the subject parcel. See id.

No other piece of evidence speaks specifically to the critical time frame. Because the evidence does not show wrecking yard use of the subject parcel in 1958 McMilian cannot meet his burden of proof.

c. McMILIAN FAILED TO PROVE THAT A WRECKING YARD USE OF THE SUBJECT PARCEL WAS CONTINUOUSLY MAINTAINED FROM 1958 TO THE PRESENT.

Richie Horan testified that he purchased the wrecking yard parcel in 1977. CP 812. The seller would not warrant the boundary lines so Horan had it surveyed. CP 812-813. The survey revealed that the wrecking yard "bulged" on all sides at that time. CP 813. However, the record is silent regarding use of the parcel between Mecklenberg's

purchase in 1957 and Horan's purchase in 1977. The Examiner's decision should also be upheld on the basis that McMilian failed to prove a continuous use.

d. **McMILIAN DID NOT PROVE A LACK OF INTENT TO ABANDON.**

King County also argued to the Examiner that any wrecking yard use of the subject parcel was abandoned. The Examiner's decision should also be upheld on that basis.

When an ordinance establishes a set time beyond which a nonconforming use cannot remain unused without being forfeited, the burden shifts back to the owner to prove lack of intent to abandon. "If the ordinance references a time frame ... a rebuttable presumption arises that the land occupier has intended to abandon the nonconforming use." Skamania County v. Woodall, 104 Wash.App. 525, 540-41, 16 P.3d 701, review denied, 144 Wash.2d 1021, 34 P.3d 1232 (2001), Andrew v. King County, 21 Wash.App. 566, 572, 586 P.2d 509 (1978) (the cessation of a use for the period prescribed by the zoning code is prima facie evidence of an intent to abandon the nonconforming use).

Under the King County Code a nonconforming use which has been discontinued may be reestablished if ". . . [t]he use has not been discontinued for more than twelve months prior to its re-establishment."

KCC 21A.32.045(B). If discontinued for more than twelve months the legal nonconforming use is forfeited. KCC 21A.32.025

Here the evidence established that any wrecking yard use of the parcel was abandoned. Manns, Heintz and Skalicky all testified that the subject parcel was densely vegetated and described "20-30 foot trees" and a "wooded lot" prior to the clearing McMilian performed. CP 758-759, 999-1000, 1049-1053. Heintz and Skalicky testified that no auto wreckage was visible on site. CP 1008-1009, 1050-1053. Tim Pennington testified that the whole parcel was covered with trees and brush and that the auto wreckage he found on site was "99 percent" covered in brush and trees. CP 1038-1039.

Heintz moved into the subdivision immediately to the south of the subject parcel in December of 2003. CP 1010. He testified that the greenbelt came down in 2005 and that he lived in his house for approximately a year and half before the greenbelt was removed. CP 1003, 1010. Thus, the evidence shows that the wrecking yard use was abandoned for more than a twelve month period.

Under the Code if a use is discontinued for more than twelve months the applicant must provide documentation that demonstrates that there was no intent to abandon the use. KCC 21A.32.045(C)(2).

Documentation may include, but is not limited to, requests for approvals

necessary to reestablish the use submitted within twelve months after the use was discontinued. Id. In this case no such documentation exists. See CP. A statement from the property owner is not sufficient. KCC 21A.32.045(C)(2). This Court should uphold the Examiner's decision on the basis that McMilian failed to meet his burden to prove that wrecking yard use was not abandoned.

3. **McMILIAN ILLEGALLY INTENSIFIED ANY LEGAL WRECKING YARD USE.**

The Examiner's decision should also be upheld on the ground that McMilian illegally intensified any protected use. King County also presented this issue to the Examiner, and it is supported by the evidentiary record and the Examiner's Findings.

A nonconforming use is defined in terms of the use at the time the zoning code was established. See Meridian Minerals Co. v. King County, 61 Wash.App. at 208. Although intensification of a legal nonconforming use is allowed, the nature and character of the nonconforming use cannot be changed. Id., Keller v. City of Bellingham, 92 Wash.2d 726, 600 P.2d 1276 (1979).

"When an increase in volume or intensity of use is of such magnitude as to effect a fundamental change in a nonconforming use, courts may find the change to be proscribed by the ordinance." Meridian

Minerals Co. v. King County, 61 Wash.App. at 210. The nature and character of the use must be unchanged and "substantially the same facilities" must be used. Id. In King County only up to 10% expansion of nonconforming building square footage, impervious surface, parking or building height is allowed without a permit. KCC § 21A.32.065.

In this case the evidence clearly showed more than a ten percent increase in use of the parcel and that substantially different facilities are being used. Horan, McMilian's immediate predecessor, testified that he took in a range of 200 to 400 cars **per year** in the entire business. CP 840. McMilian told Horan that he has the capacity to take in **400 cars per week**. CP 840. McMilian admitted that he hauls between 50 to 100 cars per week, that he "may have" reached 400 cars in a week" and that 400 cars is a "little bit" of an exaggeration. CP 989.

When Horan wanted to place a car on the subject parcel he used large four by four trucks to drive over whatever vegetation was there. CP 816, 844. McMilian admitted that he could not run his business at current levels using logging equipment like Horan. CP 989.

The Examiner found that:

After the clearing and grading activity was performed onsite, the Astro Auto Wrecking business expanded substantially onto the subject site, utilizing essentially its entirety for storage of and processing of wrecked vehicles, in some areas stacking them vertically, utilizing typical

wrecking yard equipment for stacking, hauling and moving wrecked vehicles and auto parts. The subject property is utilized essentially as an equal component of the previously established auto wrecking yard abutting to the north, as one whole operation. The subject property is accordingly no longer simply a spillover site for informal and minor storage and indeed dumping of parts and vehicles.

CP 111, App. A at page 4.

Based upon the evidence presented to the Examiner and his findings this Court should conclude that a fundamental change in the nature and character of the use of the subject parcel has occurred. The Examiner's decision should be upheld on the basis that McMilian illegally intensified the use of the subject parcel.

4. THE CLEARING ON THE SUBJECT PARCEL REQUIRED A PERMIT.

Under the King County Code a permit is required for all clearing and grading unless a specific exception applies. KCC § 16.82.050. The Hearing Examiner correctly concluded that no exception applies in this case.

a. SUBSTANTIAL EVIDENCE SUPPORTS THE EXAMINER'S FINDING THAT McMILIAN CLEARED MORE THAN 7000 SQUARE FEET OF VEGETATION FROM THE SUBJECT PARCEL.

Substantial evidence exists where there is “a sufficient quantity of evidence to persuade a fair-minded person of the truth or correctness of the order.” City of Redmond v. Cent. Puget Sound Growth Mgmt.

Hearings Bd., 136 Wash.2d 38, 46, 959 P.2d 1091 (1998). To meet the substantial evidence standard, "there must be a sufficient quantity of evidence in the record to persuade a reasonable person that the declared premise is true." Young v. Pierce County, 120 Wash.App. at 186-187.

In this case the Examiner found that prior to the clearing on site "the tree cover was so substantial that the vehicles, auto parts, etc., were not visible (at least not easily discernible) from aerial photographs taken prior to the time of clearing" and that "[i]n clearing the property of vegetation, approximately 1.7 acres, or the vast majority, of the 1.9-acre property was cleared." CP 110, App. A. at page 3.

The Examiner's findings were supported by aerial photographs of the changing site conditions and the testimony of Robert Manns. See CP 53-61, App. E. Manns testified that there are 43,560 square feet in an acre, and that most of the 1.9 acre parcel was cleared. CP 771. No evidence to the contrary was presented. See CP. This Court should conclude that the evidence presented to the Examiner was sufficient to support the conclusion that at least 7,000 square feet of area was cleared. The Examiner's finding should be reinstated.

b. **THE EXAMINER CORRECTLY
CONCLUDED THAT CLEARING ON THE
SUBJECT PARCEL WAS NOT PERMIT
EXEMPT "ROUTINE MAINTENANCE"
UNDER THE KING COUNTY CODE.**

KCC § 16.82.050 states that "a person shall not do any clearing or grading without first having obtained a clearing and grading permit issued by the department" unless "specifically exempted under KCC. 16.82.051." At KCC 16.82.051(B) a table sets forth all exemptions from KCC 16.82.050's permit requirement. See App. D. No exemption applies to wrecking yard uses.

Under KCC 16.82.051(B) maintenance of a lawn, landscaping and gardening for personal consumption are exempt from the permit requirement. Additionally, under certain conditions no permit is required for clearing and grading that is part of the "normal and routine maintenance" of roadways, bridges, public parks, golf courses, and graveyards. KCC 16.82.051(C)(13). No exemption exists for "routine maintenance" of a wrecking yard, or any other industrial use.

In this case no evidence indicates that the clearing at issue involved maintenance of lawn, landscaping or gardening for personal consumption or normal and routine maintenance of roadways, bridges, public parks, golf courses or graveyards. See CP. Therefore the Superior Court's finding at 1.7 that "King County failed to establish that the

clearing on the subject parcel constituted anything other than routine maintenance for a wrecking yard operation" is simply irrelevant under the Code. The Examiner's decision upholding the permit violation should be reinstated.

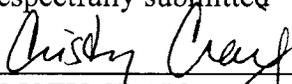
V. CONCLUSION

McMilian did not meet his burden to prove that a legal nonconforming use exists on the subject property. This Court should adopt the Examiner's conclusions that a trespasser cannot establish a legal nonconforming use, and that McMilian failed to meet his burden of proof. Should this Court conclude that McMilian did meet his burden to prove a legal nonconforming use exists on some portion of the subject parcel the Court should conclude that McMilian illegally intensified that use. In the alternative this Court should remand to the Examiner for further consideration of that issue.

DATED this 23rd day of July, 2010.

DANIEL T. SATTERBERG
King County Prosecuting Attorney

Respectfully submitted



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Appendix A

May 26, 2009

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REPORT AND DECISION

SUBJECT: Department of Development and Environmental Services File No. **E05G0103**

LEO & SHERRY McMILIAN
Code Enforcement Appeal

Location: 37300 block of Enchanted Parkway South, in the unincorporated Federal Way area

Appellants: Leo & Sherry McMilian
represented by Susan Rae Sampson
1400 Talbot Road South #400
Renton, Washington 98055-4282
Telephone: (425) 235-4800
Facsimile: (425) 235-4838

King County: Department of Development and Environmental Services (DDES)
represented by Cristy Craig
Prosecuting Attorney
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SUMMARY OF RECOMMENDATIONS/DECISION:

Department's Preliminary Recommendation:	Deny appeal with revised compliance schedule
Department's Final Recommendation:	Deny appeal with revised compliance schedule
Examiner's Decision:	Deny appeal with further revised compliance schedule

EXAMINER PROCEEDINGS:

Pre-Hearing Conference:	January 24, 2008
Hearing opened:	May 13, 2008
Hearing continued to:	August 21, 2008
Hearing record closed:	October 31, 2008

KC-00074

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MF-1

Participants at the public hearing and the exhibits offered and entered are listed in the attached minutes. A verbatim recording of the hearing is available in the office of the King County Hearing Examiner.

FINDINGS, CONCLUSIONS & DECISION: Having reviewed the record in this matter, the Examiner now makes and enters the following:

FINDINGS OF FACT:

1. On September 11, 2007, the Department of Development and Environmental Services (DDES) issued a code enforcement Notice and Order to Appellants Leo and Sherry McMilian, finding code violations on an R-4 zoned property located at the 37300 block of Enchanted Parkway South just east of the Federal Way city limits and north of the Pierce county line in the unincorporated Jovita area. The Notice and Order cited the McMilians with three violations of county code:
 - A. Operation of an auto wrecking business from a residential site.
 - B. Cumulative clearing and grading of over 7,000 square feet without required permits, inspections and approvals.
 - C. Construction of a fence over six feet in height without required permits, inspections and approvals.

The Notice and Order required compliance by correction of such violations by cessation of the auto wrecking business and removal of its associated inventory and appurtenances; application commencement for a clearing and grading permit; and application for a permit for the fence (or alternatively, demolition and removal), by November 14, 2007.

2. The McMilians filed an appeal of the subject Notice and Order, making the following claims:
 - A. The operation of the site as an auto wrecking/auto storage yard is a lawful nonconforming use, established pre-dating the zoning code regulations which may now prohibit its operation on the property.
 - B. The finding of the Notice and Order that the Appellants conducted clearing and grading in violation of county code is not supported by evidence, nor that the McMilians are responsible for its having been conducted.
 - C. The charged fence installation has not been specified as to location or dimensions, whether its location is actually on the property, and whether the fence was constructed by the Appellants.
3. The property is a 1.9-acre parcel located on the west side of Enchanted Parkway South in the Jovita area east of Federal Way. It is a blunt wedge in shape (it would be a rectangle except for its angled frontage on Enchanted Parkway South, which runs north-northwest/south-southeast in the area). Directly abutting to the north is a parcel also owned by the Appellants that is the site of their Astro Auto Wrecking business. Abutting to the south is a relatively recently developed detached single-family residential subdivision. To the west lies a creek corridor and wooded areas.

KC-00075

4. An auto wrecking business has long been conducted on the property directly abutting to the north, under a series of ownerships. During prior ownerships, some spillover of the auto wrecking operation occurred onto the subject property, which was not owned by the prior ownerships of the auto wrecking business (it was purchased by Appellants after their purchase of the main Astro Auto Wrecking site abutting to the north). The spillover consisted of storage of some wrecked and dismantled cars and numerous junk auto parts and tires. The property was not utilized in active auto wrecking operations as was the main operation to the north.
5. No express permission was granted by the owners of the subject property to the prior operators of the auto wrecking business to the north to utilize the subject property for auto wrecking/auto storage purposes or any other related activity. Neither was eviction commenced.
6. A prior owner of the adjacent property, Richie Horan, testified that he was never asked to discontinue use of the property in the spillover auto wrecking/auto storage activity. He considered purchasing the subject property but never did, and speculated whether there was a possibility of adverse possession by his usage, though no adverse possession claim was ever made or asserted.
7. Upon their purchase of the subject property, the Appellants in or around 2005 commenced clearing of the subject property of its significant overstory and underbrush vegetation and removal of a substantial amount of auto parts, tires, a few vehicles, etc. The tree cover was so substantial that the vehicles, auto parts, etc., were not visible (at least not easily discernible) from aerial photographs taken prior to the time of clearing.
8. In clearing the property of vegetation, approximately 1.7 acres, or the vast majority, of the 1.9-acre property was cleared.
9. With some exceptions where the threshold is zero, not applicable here, clearing of vegetation in excess of 7,000 square feet of area must be conducted under the auspices of a clearing and grading permit.¹ [KCC 16.82.051]
10. No clearing and grading permit was obtained for the clearing activity.
11. A substantial amount of earthwork was also conducted on the property, during/after the clearing, including topping of a knob promontory by removing its upper six to seven feet of elevation, with the excess material, the spoils, pushed southerly to create fill along the southern boundary directly abutting adjacent properties, to a depth in places of approximately eight feet. Other grading conducted was to bench the property with more uniform surfaces, creating a flat upper portion on the Enchanted Parkway South frontage and then descending with a uniform bank to a lower flat bench area. Credible calculations conducted by DDES staff demonstrate that the grading project encompassed the movement of approximately 400 cubic yards of material, excavation exceeding five feet in depth and fill exceeding three feet in depth, all of which are thresholds beyond which a grading permit is required (outside of critical areas, within which there is a zero threshold; critical area issues are not raised in the subject enforcement action).²

¹ In the county's permit structure, a clearing and grading permit is a combined activity permit that is utilized for either or both clearing and/or grading activity.

² DDES testified that its inspection observations led it to conclude that a substantial portion of the subject property had been graded by being stripped to bare earth with substantial cuts and fills to create the benching effect noted above. The Examiner finds the DDES grading witness and his work credible: his lengthy relevant work experience and demonstration of a sound methodology and persuasive conclusions based on simple mathematics, which have not been shown to be in error, are persuasive. The preponderance of the evidence in the record supports DDES' findings regarding the amounts of clearing and grading having

12. No grading permit was obtained for the subject grading activity. However, the pertinent finding of violation in the Notice and Order (violation no. 2) is stated as “cumulative clearing and grading of over 7,000 square feet.” The 7,000 square foot threshold, as noted above, pertains to clearing activity; it has no direct relevance to grading permit requirements and thresholds (there is no square foot surface area threshold for grading *per se*; the thresholds are volume and depth-related). Accordingly, grading issues shall be disregarded in the disposition of the subject appeal.
13. After the clearing and grading activity was performed onsite, the Astro Auto Wrecking business expanded substantially onto the subject site, utilizing essentially its entirety for storage of and processing of wrecked vehicles, in some areas stacking them vertically, utilizing typical wrecking yard equipment for stacking, hauling and moving wrecked vehicles and auto parts. The subject property is utilized essentially as an equal component of the previously established auto wrecking yard abutting to the north, as one whole operation. The subject property is accordingly no longer simply a spillover site for informal and minor storage and indeed dumping of parts and vehicles.
14. The fence in question is one along the property’s Enchanted Parkway South frontage. It was erected since 2005 (after the Appellants’ purchase) and is contended by the Appellants to be necessary to be eight feet in height due to State of Washington auto wrecking license regulations as a sight-obscuring measure. There is no introduction into the record, and none apparent to the Examiner, of any indication of preemption of county building permit and fence height regulations by state law and/or administrative rule.

CONCLUSIONS:

1. Nonconforming uses are disfavored in the law. [*Andrew v. King Cy.*, 21 Wn.App. 566 at 570, 586 P.2d 509 (1978)] The burden of proving the existence of a prior nonconforming use is on the party making the claim. [*North/South Airpark v. Haagen*, 87 Wn.App 765 at 772, 942 P.2d 1068 (1997)] A claimant must make a compelling case that a nonconforming use has been lawfully established and maintained in order for it to be recognized. Here, Appellants contend that a prior owner of the main Astro Wrecking parcel abutting to the north, Richie Horan, had a sufficient possessory interest in the subject property to lawfully establish what is now contended to be a nonconforming use. In particular, they contend that Mr. Horan had permission, “or at least acquiescence,” to use the parcel and that “he felt he very well may have had a claim for adverse possession.” But no adverse possession claim was ever made, and indeed Mr. Horan acknowledges “that there was a question about whether I could have claimed it.”
2. The assertion by Appellants that Mr. Horan also exhibited hostility in his use of the property (hostility being one of the legs of the four-legged stool upon which adverse possession must stand) is belied by the record. Mr. Horan’s testimony is that, “I had been offered to purchase, you know, to purchase . . . again. And I didn’t proceed. Nobody had ever asked me to move off of it. There was a question about whether I could have claimed it. And so the issue was just kind of set aside. . . .” His stance on the property hardly exhibits hostility in possession. In addition, Mr. Horan in his testimony exhibited a great deal of sensitivity about the issue of his wrecking/storage operation “bulging” over onto the subject property. This also demonstrates a

been conducted on the subject property.

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lack of hostility and attempted possession.³ Neither is there exhibited any express permission for Mr. Horan to utilize the site. Particularly given the context of nonconforming uses being disfavored in the law, and of the allowance of nonconforming uses to continue chiefly in order to respect private property rights [*State ex rel. Miller v. Cain*, 40 Wn.2d 216 at 221, 242 P.2d 505 (1952)], the requirement that there be a lawful establishment of the nonconforming use must logically include that it had been established under due property ownership or permission, *i.e.*, not merely by trespass, criminal or not. Mere silent acquiescence (as asserted) by lack of expression of a demand to vacate is insufficient to accord Mr. Horan a possessory or permission claim which would support a conclusion of legal nonconforming rights. It belies common sense to conclude that a person who operates a land use on property not owned by that person, without permission to operate such use, and without adverse possession, has established a lawfully operated use and a property right which must then be accorded disfavored nonconforming use status.

3. The subject property does not benefit from a nonconforming use right to an auto wrecking yard or an auto storage yard.
4. Absent the possession of a nonconforming right to such uses, such uses may only be operated on the property if they conform to the zoning code applicable upon the improvement of the site in 2005 and commencement (perhaps recommencement, but only if under lawful circumstances) of auto wrecking/auto storage operations.
5. The property is zoned R-4, a residential zone in which auto wrecking and auto storage uses are not permitted.⁴ (As the uses in this instance involve operations which are exterior of structures for the vast majority, they cannot qualify as home occupation uses.) Accordingly, they are not lawful uses in the R-4 zone as operated. [KCC 21A.08.060 and 21A.30.080]
6. As the charge of basic zoning violation by operation of a use not permitted in the R-4 classification in the Notice and Order is correct, it is sustained. The appeal is denied in such regard.
7. Given the failure of Appellants to prove a fundamental nonconforming use right to an auto wrecking/auto storage yard on the property, the secondary issues as to whether a nonconforming use was abandoned and/or discontinued, on the other side of the coin, whether it may be intensified from that asserted to have previously existed, are moot and need not be decided here for disposition of the appeal.
8. As the vegetation clearing conducted on the property exceeded 7,000 square feet of land area, it was required to be conducted under a clearing permit (or the clearing component of a clearing and grading permit, as DDES administers the county regulations in such regard). No such permit was obtained. Accordingly, the charge of violation by failure to obtain a permit for the clearing activity conducted on the property is sustained and the appeal denied in such regard.
9. Earthwork conducted on the property consisted of excavation in excess of five feet in depth, fill in excess of three feet in depth and earth movement in excess of 100 cubic yards, by any of such

³ The forgoing assessment of the lack of hostility in Mr. Horan's utilization of the property is in no way to be construed as adjudicating any claim of adverse possession. Aside from the fact that no such claim has been made, insofar as the record indicates, the Examiner is without authority to adjudicate a claim of adverse possession. That would have to be brought in a court of general jurisdiction, the Superior Court.

⁴ There is no dispute of their current impermissibility and impermissibility since prior to the Appellants' purchase of the two properties.

measures the grading conducted on the property was required by the county grading code, Chapter 16.82 KCC, to be done under a grading permit. As noted previously, no specific grading violation is asserted by the Notice and Order, however.

10. The subject clearing and grading was conducted after purchase of the property by the Appellants. As property owners, they are therefore responsible parties for any violations which may accrue from such activity. That holds regardless of the actual operators of equipment and/or engagement of contractors to perform the actual work.
11. The presence of the recently erected eight foot high fence on the property perimeter is not substantially disputed. The fence height in building setback areas the R-4 zone is limited to six feet. The charge of violation of the zoning code is therefore sustained as cited in the Notice and Order. The fact that an eight foot high fence is required under state law for the type of use in question under state licensure and/or other regulations is immaterial to whether or not a county permit and/or variance is required for a fence exceeding six feet in height. There is no state preemption in this regard. A county permit and/or variance is required for the fence.
12. The Appellants request that the Examiner direct the issuance of the required permits, the clearing/grading permit and the fence permit, with an implication that the county would be obligated to issue such permits forthwith. Permit administration is under DDES's administrative authority. In adjudicating the appeal of the Notice and Order, the Examiner only has authority to *implement a reasonable, effective and pertinent compliance schedule if the Notice and Order is sustained*. The compliance required is for the Appellants to *obtain* permits. Actual issuance of the permits necessary to be *obtained* is a matter left to the permit application, review and approval process established under the administrative offices of DDES. Should there be an impermissible hangup of such permits, presumably there are remedies available to pursue outside of this Notice and Order proceeding.
13. In summary, the charges of violation in the Notice and Order are shown to be correct and are therefore sustained. The use of the subject property as an auto wrecking/auto storage yard is unlawful and must be required to be ceased. The clearing work conducted on the property was required to be conducted under a clearing and grading permit, and no such permit was obtained. Lastly, the fence erected on the property is required to be under the auspices of a permit given its height. The compliance schedule below shall require cessation of the auto wrecking/auto storage yard and the obtainment of the necessary permits. (The Notice and Order compliance schedule is adjusted to reflect the time taken up by the appeal process.)

DECISION:

The appeal is DENIED and the Notice and Order is sustained, provided that the compliance schedule is revised as stated in the following order.

ORDER:

1. Schedule a clearing and grading permit review meeting with DDES *by no later than June 26, 2009*, to review any permit revision/supplementation requirements given the requirement that the auto wrecking/auto storage use be ceased on the subject property.
2. Submit any necessary revisions/supplementations to the clearing and grading permit application to DDES *by no later than July 26, 2009*. After submittal, all pertinent timeframes and stated deadlines for the submittal of additional information, response comments, supplementary

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submittals, etc., if any, shall be diligently observed by the Appellants through to permit issuance and obtainment and final inspection approval.

3. *By no later than June 26, 2009*, a complete permit application (including for a variance if necessary) shall be submitted for the over-height fence constructed on the property. After submittal, all pertinent timeframes and stated deadlines for the submittal of additional information, response comments, supplementary submittals, etc., if any, shall be diligently observed by the Appellants through to permit issuance and obtainment and final inspection approval. Alternatively, the fence shall be removed *by no later than August 26, 2009*.
4. The auto wrecking/auto storage yard use on the subject property shall cease in the following manner: Commencing immediately, no inoperable, wrecked, junk, salvage, etc., vehicles and parts shall be imported onto the subject property. Once a wrecked vehicle or part is removed from the property, it shall not return to the property. All inoperable, wrecked, junk, salvage, etc., vehicles and parts shall be removed from the subject property *by no later than July 26, 2009*.
5. DDES is authorized to grant deadline extensions for any of the above requirements if warranted, in DDES's sole judgment, by circumstances beyond the Appellant's diligent effort and control. DDES is also authorized to grant extensions for seasonal and/or weather reasons (potential for erosion, other environmental damage considerations, etc.).
6. No fines or penalties shall be assessed by DDES against the McMilians and/or the property if the above compliance requirements deadlines are complied with in full (noting the possibility of deadline extension pursuant to the above allowances). However, if the above compliance requirements and deadlines are not complied with in full, DDES may impose penalties as authorized by county code retroactive to the date of this decision.

ORDERED May 26, 2009.



Peter T. Donahue
King County Hearing Examiner

NOTICE OF RIGHT TO APPEAL

Pursuant to Chapter 20.24, King County Code, the King County Council has directed that the Examiner make the final decision on behalf of the County regarding code enforcement appeals. The Examiner's decision shall be final and conclusive unless proceedings for review of the decision are properly commenced in Superior Court within twenty-one (21) days of issuance of the Examiner's decision. (The Land Use Petition Act defines the date on which a land use decision is issued by the Hearing Examiner as three days after a written decision is mailed.)

MINUTES OF THE MAY 13 AND AUGUST 21, 2008, PUBLIC HEARING ON DEPARTMENT OF DEVELOPMENT AND ENVIRONMENTAL SERVICES FILE NO. E05G0103

Peter T. Donahue was the Hearing Examiner in this matter. Participating in the hearing were Cristy Craig and Al Tijerina, representing the Department; Susan Rae Sampson representing the Appellants; and Paul Skolisky, Mark Heintz, Chris Heintz, Robert Manns, Randy Sandin, Timothy Pennington,

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Richie Horan, Suzanne Paget, Bruce S. MacVeigh and Leo McMilian.

The following Exhibits were offered and entered into the record on May 13, 2008:

- Exhibit No. 1 DDES staff report to the Hearing Examiner for E05G0103
 Exhibit No. 2 Copy of the Notice & Order issued September 11, 2007
 Exhibit No. 3 Copy of the Notice and Statement of Appeal received October 5, 2007
 Exhibit No. 4 Copies of codes cited in the Notice & Order
 Exhibit No. 5a Aerial photo of subject property and surrounding area taken June 23, 1960
 Exhibit No. 5b Aerial photo of subject property and surrounding area taken May 18, 1970
 Exhibit No. 5c Aerial photo of subject property and surrounding area taken 1996
 Exhibit No. 5d Aerial photo of subject property and surrounding area taken 2000
 Exhibit No. 5e Aerial photo of subject property and surrounding area taken 2002
 Exhibit No. 5f Aerial photo of subject property and surrounding area taken 2005
 Exhibit No. 5g Aerial photo of subject property and surrounding area taken 2007
 Exhibit No. 5h Photograph of subject property depicting condition of section of subject property where subject clearing and grading took place
 Exhibit No. 5i Photograph of subject property depicting condition of boundary between adjacent parcel and section of subject property where subject clearing and grading took place
 Exhibit No. 5j Photograph of subject property depicting cars located on section of subject property where subject clearing and grading took place
 Exhibit No. 5k Photograph of subject property depicting cars located on section of subject property where subject clearing and grading took place
 Exhibit No. 5l Photograph of subject property depicting condition of boundary between adjacent parcel and section of subject property where subject clearing and grading took place
 Exhibit No. 5m Photograph of subject property looking north area from area where subject clearing and grading took place, taken by Al Tijerina on June 9, 2005
 Exhibit No. 5n Photograph of subject property looking north area from area where subject clearing and grading took place, taken by Al Tijerina on June 9, 2005
 Exhibit No. 5o Photograph of subject property depicting interior of property post clearing/grading, taken by Al Tijerina on June 9, 2005
 Exhibit No. 5p Photograph of subject property looking southwest from interior, depicting condition of property post clearing/grading, taken by Al Tijerina on June 9, 2005
 Exhibit No. 5q Photograph of subject property, looking south from interior, post clearing/grading, taken by Al Tijerina on June 9, 2005
 Exhibit No. 5r Photograph of subject property depicting fence on south border of subject parcel, taken by Al Tijerina on June 20, 2007
 Exhibit No. 5s Duplicate of 5r
 Exhibit No. 5t Photograph of subject property depicting fence surrounding auto wrecking business, taken by Al Tijerina on June 20, 2007
 Exhibit No. 5u Photograph of subject property depicting storage containers
 Exhibit No. 5v Photograph of subject property depicting vehicles and vehicle parts
 Exhibit No. 5w Photograph of subject property depicting vehicles and vehicle parts
 Exhibit No. 5x Photograph of subject property depicting wall constructed with concrete blocks
 Exhibit No. 5y Photograph of subject property depicting tire heap
 Exhibit No. 6 Drawing of subject property post clearing and grading on April 8, 2005, drawn by DDES Site Development Specialist Robert Manns
 Exhibit No. 7 *Not submitted*
 Exhibit No. 8 King County memo from Bryan Glynn to Jim Buck re: Ritchie A. Horan dated

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March 31, 1983 (entered into the record on August 21, 2008)

Exhibit No. 9 *Not submitted*

Exhibit No. 10 *Not submitted*

Exhibit No. 11 Archived tax records for the parcel 3321049038 (entered into the record on August 21, 2008)

Exhibit No. 12 *Not submitted*

Exhibit No. 13 Case notes dated March 31, 2005 (entered into the record on August 21, 2008)

Exhibit No. 14 Vendor Activity – Summary Report for Astro Auto Wrecking dated February 13, 2008 (entered into the record on August 21, 2008)

Exhibit No. 15 *Not submitted*

Exhibit No. 16 *Not submitted*

Exhibit No. 17a Affidavit of Helene Mecklenburg, signed November 9, 1978

Exhibit No. 17b Affidavit of A. Richard Hilton, signed July 15, 2005

Exhibit No. 17c Affidavit of James W. Hutchens, signed July 18, 2005

Exhibit No. 17d Affidavit of Harry Horan, signed July 22, 2005

Exhibit No. 17e Affidavit of Bert M. Willard, signed July 21, 2005

Exhibit No. 18 Declaration of John C. Powers, signed May 12, 2008 (entered into the record on August 21, 2008)

Exhibit No. 19 *Not submitted*

Exhibit No. 20 Letter to Bruce S. MacVeigh, Appellant's engineer, from Randy Sandin of DDES regarding clearing and grading permit application, dated January 26, 2007

Exhibit No. 21 Aerial photograph of subject property taken June 23, 1960

PTD:gao
E05G0103 RPT

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Appendix B

Tax Parcel 332104-9005
(exist. wrecking yard)

1 AFFIDAVIT CONCERNING REAL ESTATE IN KING COUNTY, CONCERNING LAND USE IN HISTORY
2 STATE OF WASHINGTON)
3 County of King) ss.

4 Mrs Helene Mecklenburg, BEING FIRST DULY SWORN UPON OATH DEPOSES AND SAYS:

5 That I am of legal age and have lived in King County, State of Washington, for
6 _____ years; that I am familiar with the real property known as 37307 Kit Corner
7 Road, in Federal Way, King County, Washington, whose legal description is:

8 The North 1/2 of the Southwest 1/4 of the Northeast 1/4 of Section 33,
9 Township 21 North, Range 4, East W.M., lying west of Secondary State Highway
10 No. 5D, EXCEPT the North 260 feet thereof, in King County, Washington;

11 that I, together with my ~~wife~~/husband was the owner of that real estate described
12 above herein from 1957 until 1968, at which time I sold it to Jerry Busenius; that
13 during my ownership of that land, with particular attention to the period of time
14 prior to and during the year 1959, I operated an auto wrecking yard and automobile
15 storage facility within a fenced perimeter, under permits granted on a periodic
16 basis by the appropriate government authorities, including King County authorities,
17 which permits finally became permanent after a probationary term period whose
18 length and duration I do not now recall;

19 That I recall of my own knowledge that the land was used as an auto wrecking yard
20 and storage facility until the present date, and that said use continued from my
21 ownership and continually during my ownership, until the present date; that I sold
22 the land to Jerry Busenius for his use and business under which I operated the
23 auto wrecking yard and storage facility, and he continued the same use.

24 Further I do not say at this time, but am willing to testify under oath to the
25 above, should the same be necessary.

26 Helene Mecklenburg
27 Helene Mecklenburg, Signed under Oath and
the Penalties of Perjury, 9th November, 1978

SUBSCRIBED AND SWORN TO BEFORE ME this 9th day of November, 1978.

WILLIAM J. GREGG, NOTARY PUBLIC in and for
the State of Washington, residing at Renton

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Exhibit No. 17a
Item No. Cos 60103
Received 8-21-08
King County Hearing Examiner

Appendix C



Exhibit No. 2-1
Item No. EOS60103
Received 5/13/08
King County Hearing Examiner

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AERO-METRIC

Walker Division

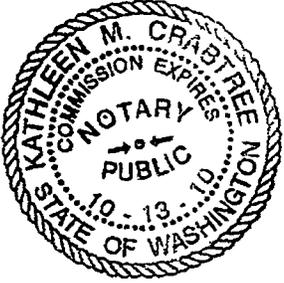
I certify that this is a true and correct portion of an aerial photograph taken in 1960. This photograph was made from a negative on file in the office of Aero-Metric: Walker Division.

Date of Photography: 6/23/60
Negative Scale: 1"=1000 feet
Enlargement Scale: 1"=100 feet
Negative Numbers: KC-60, 20-59
Work Order Number: 37491

Raylene G. Todd
Raylene G. Todd, Photographic Lab Supervisor

Notorized on this day 22 in the month of May
and year of 20 07

Kathleen M. Crabtree
residing in Renton County of King.
My notary expires 10-13-2010



THIS PHOTOGRAPH CANNOT BE COPIED, SCANNED OR REPRODUCED IN ANY FORM WITHOUT WRITTEN PERMISSION OF:
Aero-Metric: Walker Division
12652 Interurban Ave. S
Seattle, WA 98168
(206) 244-2300

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Appendix D

21A.06.780 Motor vehicle and bicycle manufacturing. Motor vehicle and bicycle manufacturing: fabricating or assembling complete passenger automobiles, trucks, commercial cars and buses, motorcycles, and bicycles, including only uses located in SIC Industry Group Nos.:

- A. 371-Motor Vehicles and Motor Vehicle Equipment; and
- B. 375-Motorcycles, Bicycles, and Parts. (Ord. 10870 § 196, 1993).

21A.06.782 Mulch. Mulch: any material such as leaves, bark, straw left loose and applied to the soil surface to reduce evaporation. (Ord. 11210 § 29, 1994).

21A.06.785 Municipal water production. Municipal water production: the collection and processing of surface water through means of dams or other methods of impoundment for municipal water systems. (Ord. 11157 § 7, 1993; Ord. 10870 § 197, 1993).

21A.06.790 Native vegetation. Native vegetation: plant species indigenous to the Puget Sound region that reasonably could be expected to naturally occur on the site. (Ord. 15051 § 79, 2004; Ord. 10870 § 198, 1993).

21A.06.795 Naturalized species. Naturalized species: non-native species of vegetation that are adaptable to the climatic conditions of the coastal region of the Pacific Northwest. (Ord. 10870 § 199, 1993).

21A.06.797 Net buildable area. Net buildable area: the "site area" less the following areas:

- A. Areas within a project site that are required to be dedicated for public rights-of-way in excess of sixty feet in width;
- B. Critical areas and their buffers to the extent they are required by K.C.C. chapter 21A.24 to remain undeveloped;
- C. Areas required for storm water control facilities other than facilities that are completely underground, including, but not limited to, retention or detention ponds, biofiltration swales and setbacks from such ponds and swales;
- D. Areas required to be dedicated or reserved as on-site recreation areas;
- E. Regional utility corridors; and
- F. Other areas, excluding setbacks, required to remain undeveloped. (Ord. 15051 § 80, 2004; Ord. 11798 § 3, 1995; Ord. 11555 § 2, 1994).

21A.06.800 Nonconformance. Nonconformance: any use, improvement or structure established in conformance with King County rules and regulations in effect at the time of establishment that no longer conforms to the range of uses permitted in the site's current zone or to the current development standards of the code due to changes in the code or its application to the subject property. (Ord. 10870 § 200, 1993).

21A.06.805 Nonhydro-electric generation facility. Nonhydro-electric generation facility: an establishment for the generation of electricity by nuclear reaction, burning fossil fuels, or other electricity generation methods. (Ord. 10870 § 201, 1993).

21A.06.810 Non-ionizing electromagnetic radiation ("NIER"). Non-ionizing electromagnetic radiation ("NIER"): electromagnetic radiation of low photon energy unable to cause ionization. (Ord. 10870 § 202, 1993).

21A.06.815 Noxious weed. Noxious weed: a plant species that is highly destructive, competitive or difficult to control by cultural or chemical practices, limited to any plant species listed on the state noxious weed list in chapter 16-750 WAC, regardless of the list's regional designation or classification of the species. (Ord. 15051 § 81, 2004; Ord. 10870 § 203, 1993).

21A.06.817 Off-street required parking lot. Off-street required parking lot; parking facilities constructed to meet the off-street parking requirements of K.C.C. 21A.18 for land uses located on a lot separate from the parking facilities. (Ord. 13022 § 4, 1998).

21A.08.010 Establishment of uses. The use of a property is defined by the activity for which the building or lot is intended, designed, arranged, occupied, or maintained. The use is considered permanently established when that use will or has been in continuous operation for a period exceeding sixty days. A use which will operate for less than sixty days is considered a temporary use, and subject to the requirements of K.C.C. 21A.32 of this title. All applicable requirements of this code, or other applicable state or federal requirements, shall govern a use located in unincorporated King County. (Ord. 10870 § 328, 1993).

21A.08.020 Interpretation of land use tables.

A. The land use tables in this chapter determine whether a specific use is allowed in a zone district. The zone district is located on the vertical column and the specific use is located on the horizontal row of these tables.

B. If no symbol appears in the box at the intersection of the column and the row, the use is not allowed in that district, except for certain temporary uses.

C. If the letter "P" appears in the box at the intersection of the column and the row, the use is allowed in that district subject to the review procedures specified in K.C.C. 21A.42 and the general requirements of the code.

D. If the letter "C" appears in the box at the intersection of the column and the row, the use is allowed subject to the conditional use review procedures specified in K.C.C. 21A.42 and the general requirements of the code.

E. If the letter "S" appears in the box at the intersection of the column and the row, the regional use is permitted subject to the special use permit review procedures specified in K.C.C. 21A.42 and the general requirements of the code.

F. If a number appears in the box at the intersection of the column and the row, the use may be allowed subject to the appropriate review process indicated above, the general requirements of the code and the specific conditions indicated in the development condition with the corresponding number immediately following the land use table.

G. If more than one letter-number combination appears in the box at the intersection of the column and the row, the use is allowed in that zone subject to different sets of limitation or conditions depending on the review process indicated by the letter, the general requirements of the code and the specific conditions indicated in the development condition with the corresponding number immediately following the table.

H. All applicable requirements shall govern a use whether or not they are cross-referenced in a section. (Ord. 10870 § 329, 1993).

16.82.040 Hazards. Whenever the director determines that an existing site, as a result of clearing or grading, excavation, embankment, or fill has become a hazard to life and limb, or endangers property, or adversely affects the safety, use or stability of a public way or drainage channel, the owner of the property upon which the clearing, grading, excavation or fill is located, or other person or agent in control of said property, upon receipt of notice in writing from the director, shall within the period specified therein restore the site affected by such clearing or grading or repair or eliminate such excavation or embankment or fill so as to eliminate the hazard and be in conformance with the requirements of this chapter. (Ord. 9614 § 99, 1990: Ord. 3108 § 3, 1977: Ord. 1488 § 4, 1973).

16.82.050 Clearing and grading permit required - exceptions.

A. An activity physically altering a site, including clearing or grading activities and forest practices, shall be consistent with and meet the standards in this chapter unless preempted under chapter 76.09 RCW.

B. Unless specifically excepted under K.C.C. 16.82.051, a person shall not do any clearing or grading without first having obtained a clearing and grading permit issued by the department or having all clearing and grading reviewed and approved by the department as part of another development proposal. A separate permit shall be required for each site unless the activity is approved to occur on multiple sites under a programmatic permit issued in accordance with K.C.C. 16.82.053.

C. The permits or approvals issued under this chapter shall be required regardless of permits or approvals issued by the county or any other governmental agency and do not preclude the requirement to obtain all other permits or approvals or to comply with the operating standards in sections K.C.C. 16.82.095, 16.82.100, 16.82.105 and 16.82.130. Exceptions from permits under this chapter do not preclude the requirement to obtain other permits or approvals or to comply with the operating standards in K.C.C. 16.82.095, 16.82.100, 16.82.105 and 16.82.130. (Ord. 15053 §2, 2004: Ord. 14259 § 3, 2001: Ord. 12878 § 3, 1997: Ord. 12822 § 2, 1997: Ord. 12020 § 51, 1995: Ord. 12016 § 2, 1995: Ord. 12015 § 2, 1995: Ord. 11896 § 2, 1995: Ord. 11886 § 2, 1995: Ord. 11618 § 4, 1994: 11536 § 1, 1994: 11393 § 1, 1994: Ord. 11016 § 14, 1993: Ord. 10152 § 1, 1991: Ord. 9614 § 100, 1990: Ord. 7990 § 20, 1987: Ord. 3108 § 4, 1977: Ord. 1488 § 6, 1973).

16.82.051 Clearing and grading permit exceptions.

A. For the purposes of this section, the definitions in K.C.C. chapter 21A.06 apply to the activities described in this section.

B. The following activities are excepted from the requirement of obtaining a clearing or grading permit before undertaking forest practices or clearing or grading activities, as long as those activities conducted in critical areas are in compliance with the standards in this chapter and in K.C.C. chapter 21A.24. In cases where an activity may be included in more than one activity category, the most-specific description of the activity shall govern whether a permit is required. For activities involving more than one critical area, compliance with the conditions applicable to each critical area is required. Clearing and grading permits are required when a cell in this table is empty and for activities not listed on the table.

KEY
 "NP" in a cell means no permit required if conditions are met.
 A number in a cell means the Numbered condition in subsection C. applies.
 "Wildlife area and network" column applies to both Wildlife Habitat Conservation Area and Wildlife Habitat Network

OUTCROCK	AREAS	COAL MINE	EROSION	FLOOD HAZARD	CHANNEL MIGRATION	LANDSLIDE	AND SLOPE	SEISMIC HAZARD	VOLCANIC HAZARD	STEEP SLOPE	HAZARDOUS	CRITICAL AREA	RECHARGE AREA	WETLANDS	AQUATIC AREA	AND BUFFER	WILDLIFE AREA	AND NETWORK
----------	-------	-----------	---------	--------------	-------------------	-----------	-----------	----------------	-----------------	-------------	-----------	---------------	---------------	----------	--------------	------------	---------------	-------------

ACTIVITY																		
Grading and Clearing																		
Grading	NP 1, 2	NP 1, 2	NP 1, 2					NP 1, 2	NP 1, 2			NP 1, 2						
Clearing	NP 3 NP 24	NP 3	NP 3	NP 3				NP 3	NP 3			NP 3	NP 4 NP 23	NP 4 NP 23				
Covering of garbage	NP 5																	
Emergency tree removal	NP 6																	
Removal of noxious weeds	NP																	
Removal of invasive vegetation	NP 7			NP 7	NP 7			NP 7	NP 8									
Non conversion Class I, II, III, IV-S forest practice	NP 9																	
Emergency action	NP 10																	
Roads																		
Grading within the roadway	NP 11						NP 11											
Clearing within the roadway	NP	NP 12																
Maintenance of driveway or private access road	NP 13																	
Maintenance of bridge or culvert	NP 13, 14, 15																	
Construction of farm field access drive	NP 16																	
Maintenance of farm field access drive	NP 17																	

Utilities													
Construction or maintenance of utility corridors or facility within the right-of-way	NP 18	NP 19	NP 19	NP 19	NP 19	NP 19	NP 19	NP 19	NP 19	NP 18	NP 19	NP 19	NP 19
Construction or maintenance of utility corridors or facility outside of the right-of-way	NP 1, 2, 3		NP 1, 2, 3				NP 1, 2, 3	NP 1, 2, 3		NP 1, 2, 3			
Maintenance of existing surface water conveyance system	NP 11	NP 11	NP 11	NP 11	NP 11	NP 11	NP 11	NP 11	NP 11	NP 11	NP 11	NP 11	NP 11
Maintenance of existing surface water flow control and surface water quality treatment facility	NP 11	NP 11	NP 11	NP 11	NP 11	NP 11	NP 11	NP 11	NP 11	NP 11	NP 11	NP 11	NP 11
Maintenance or repair of flood protection facility	NP 20	NP 20	NP 20	NP 20	NP 20	NP 20	NP 20	NP 20	NP 20	NP 20	NP 20	NP 20	NP 20
Maintenance or repair of existing instream structure	NP	NP	NP	NP	NP	NP	NP	NP	NP	NP	NP 11	NP 11	NP
Recreation areas													
Maintenance of outdoor public park facility, trail or publicly improved recreation area	NP 13	NP 13	NP 13	NP 13	NP 13	NP 13	NP 13	NP 13	NP 13	NP 13	NP 13	NP 13	NP 13
Habitat and science projects													
Habitat restoration or enhancement project	NP	NP 21	NP 21	NP 21	NP 21	NP 21	NP 21	NP 21	NP 21	NP	NP 21	NP 21	NP 21
Drilling and testing for critical areas report	NP 1, 2	NP 1, 2	NP 1, 2	NP 22	NP 22	NP 22	NP 1, 2	NP 1, 2	NP 22	NP 1, 2	NP 22	NP 22	NP 22
Agriculture													
Horticulture activity including tilling, discing, planting, seeding, harvesting, preparing soil, rotating crops and related activity	NP	NP	NP	NP	NP	NP	NP	NP	NP	NP	NP	NP	NP
Grazing livestock	NP	NP	NP	NP	NP	NP	NP	NP	NP	NP	NP	NP	NP
Construction and maintenance of livestock manure storage facility	NP 16	NP 16	NP 16	NP 16	NP 16		NP 16	NP 16		NP 16	NP 16	NP 16	
Maintenance of agricultural drainage	NP 15	NP 15	NP 15	NP 15	NP 15	NP 15	NP 15	NP 15	NP 15	NP 15	NP 15	NP 15	NP 15
Maintenance of farm pond, fish pond, livestock watering pond	NP 15	NP 15	NP 15	NP 15	NP 15	NP 15	NP 15	NP 15	NP 15	NP 15	NP 15	NP 15	NP 15

Other													
Excavation of cemetery grave in established and approved cemetery	NP	NP	NP	NP	NP	NP	NP	NP	NP	NP	NP	NP	NP
Maintenance of cemetery grave	NP	NP 13	NP 13	NP	NP 13	NP 13	NP	NP	NP 13	NP	NP 13	NP 13	NP 13
Maintenance of lawn, landscaping and gardening for personal consumption	NP	NP 13	NP 13	NP	NP 13	NP 13	NP	NP	NP 13	NP	NP 13	NP 13	NP 13
Maintenance of golf course	NP 13	NP 13	NP 13	NP 13	NP 13	NP 13	NP	NP	NP 13	NP 13	NP 13	NP 13	NP 13

C. The following conditions apply:

1. Excavation less than five feet in vertical depth, or fill less than three feet in vertical depth that, cumulatively over time, does not involve more than one hundred cubic yards on a single site.
2. Grading that produces less than two thousand square feet of new impervious surface on a single site added after January 1, 2005, or that produces less than two thousand square feet of replaced impervious surface or less than two thousand square feet of new plus replaced impervious surface after October 30, 2008. For purposes of this subsection C.2., "new impervious surface" and "replaced impervious surface" are defined in K.C.C. 9.04.020.
3. Cumulative clearing of less than seven thousand square feet including, but not limited to, collection of firewood and removal of vegetation for fire safety. This exception shall not apply to development proposals:
 - a. regulated as a Class IV forest practice under chapter 76.09 RCW;
 - b. in a critical drainage areas established by administrative rules;
 - c. subject to clearing limits included in property-specific development standards and special district overlays under K.C.C. chapter 21A.38; or
 - d. subject to urban growth area significant tree retention standards under K.C.C. 16.82.156 and 21A.38.230.
4. Cutting firewood for personal use in accordance with a forest management plan or rural stewardship plan approved under K.C.C. Title 21A. For the purpose of this condition, personal use shall not include the sale or other commercial use of the firewood.
5. Limited to material at any solid waste facility operated by King County.
6. Allowed to prevent imminent danger to persons or structures.
7. Cumulative clearing of less than seven thousand square feet annually or conducted in accordance with an approved farm management plan, forest management plan or rural stewardship plan.
8. Cumulative clearing of less than seven thousand square feet and either:
 - a. conducted in accordance with a farm management plan, forest management plan or a rural stewardship plan; or
 - b. limited to removal with hand labor.
9. Class I, II, III or IV forest practices as defined in chapter 76.09 RCW and Title 222 WAC.
10. If done in compliance with K.C.C. 16.82.065.
11. Only when conducted by or at the direction of a government agency in accordance with the regional road maintenance guidelines and K.C.C. 9.04.050, creates less than two thousand square feet of new impervious surface on a single site added after January 1, 2005, and is not within or does not directly discharge to an aquatic area or wetland. For purposes of this subsection C.11., "new impervious surface" is defined in K.C.C. 9.04.020.
12. Limited to clearing conducted by or at the direction of a government agency or by a private utility that does not involve:
 - a. slope stabilization or vegetation removal on slopes; or
 - b. ditches that are used by salmonids.
13. In conjunction with normal and routine maintenance activities, if:
 - a. there is no alteration of a ditch or aquatic area that is used by salmonids;
 - b. the structure, condition or site maintained was constructed or created in accordance with law; and
 - c. the maintenance does not expand the roadway, lawn, landscaping, ditch, culvert or other improved area being maintained.

14. If a culvert is used by salmonids or conveys water used by salmonids and there is no adopted farm management plan, the maintenance is limited to removal of sediment and debris from the culvert and its inlet, invert and outlet and the stabilization of the area within three feet of the culvert where the maintenance disturbed or damaged the bank or bed and does not involve the excavation of a new sediment trap adjacent to the inlet.

15. If used by salmonids, only in compliance with an adopted farm plan in accordance with K.C.C. Title 21A and only if the maintenance activity is inspected by:

- a. The King Conservation District;
- b. King County department of natural resources and parks;
- c. King County department of development and environmental services; or
- d. Washington state Department of Fish and Wildlife.

16. Only if consistent with an adopted farm plan in accordance with K.C.C. Title 21A.

17. Only if:

- a. consistent with a farm plan in accordance with K.C.C. Title 21A; or
- b. conducted in accordance with best management practices in the Natural Resource

Conservation Service Field Office Technical Guide.

18. In accordance with a franchise permit.

19. Only within the roadway in accordance with a franchise permit.

20. When:

- a. conducted by a public agency;
- b. the height of the facility is not increased;
- c. the linear length of the facility is not increased;
- d. the footprint of the facility is not expanded waterward;
- e. done in accordance with the Regional Road Maintenance Guidelines;
- f. done in accordance with the adopted King County Flood Hazard Management Plan and the

Integrated Streambank Protection Guidelines (Washington State Aquatic Habitat Guidelines Program, 2002); and

f. monitoring is conducted for three years following maintenance or repair and an annual report is submitted to the department.

21. Only if:

a. the activity is not part of a mitigation plan associated with another development proposal or is not corrective action associated with a violation; and

b. the activity is sponsored or co-sponsored by a public agency that has natural resource management as its primary function or a federally-recognized tribe, and the activity is limited to:

(1) revegetation of the critical area and its buffer with native vegetation or the removal of noxious weeds or invasive vegetation;

(2) placement of weirs, log controls, spawning gravel, woody debris and other specific salmonid habitat improvements;

(3) hand labor except:

(a) the use of riding mower or light mechanical cultivating equipment and herbicides or biological control methods when prescribed by the King County noxious weed control board for the removal of noxious weeds or invasive vegetation; or

(b) the use of helicopters or cranes if they have no contact with or otherwise disturb the critical area or its buffer.

22. If done with hand equipment and does not involve any clearing.

23. Limited to removal of vegetation for forest fire prevention purposes in accordance with best management practices approved by the King County fire marshal.

24. Limited to the removal of downed trees.

(Ord. 16267 § 3, 2008; Ord. 15053 § 3, 2004).

21A.32.010 Purpose. The purposes of this chapter are to:

- A. Establish the legal status of a nonconformance by creating provisions through which a nonconformance may be maintained, altered, reconstructed, expanded or terminated;
- B. Provide for the temporary establishment of uses that are not otherwise permitted in a zone and to regulate such uses by their scope and period of use; and
- C. Encourage the adaptive re-use of existing public facilities which will continue to serve the community, and to ensure public review of redevelopment plans by allowing:
 1. Temporary re-use of closed public school facilities retained in school district ownership, and the reconversion of a temporary re-use back to a school use;
 2. Permanent re-use of surplus nonresidential facilities (e.g. schools, fire stations, government facilities) not retained in school district ownership; or
 3. Permanent re-use of historic structures listed on the National Register or designated as county landmarks. (Ord. 10870 § 538, 1993).

21A.32.020 Nonconformance - applicability.

- A. With the exception of nonconforming extractive operations identified in K.C.C. 21A.22, all nonconformances shall be subject to the provisions of this chapter.
- B. The provisions of this chapter do not supersede or relieve a property owner from compliance with:
 1. The requirements of the Uniform Building and Fire Codes; or
 2. The provisions of this code beyond the specific nonconformance addressed by this chapter. (Ord. 10870 § 539, 1993).

21A.32.025 Nonconformance - creation, continuation, and forfeiture of nonconformance status. Once created pursuant to K.C.C. 21A.06.800, a nonconformance may be continued in a manner consistent with the provisions of this chapter. However, nonconformance status is forfeited if the nonconformance is discontinued beyond the provisions of K.C.C. 21A.32.045. Once nonconformance status is forfeited, the nonconformance shall not be re-established. (Ord. 13130 § 2, 1998).

21A.32.040 Nonconformance - abatement of illegal use, structure or development. Any use, structure or other site improvement not established in compliance with use and development standards in effect at the time of establishment shall be deemed illegal and shall be discontinued or terminated and subject to removal pursuant to the provisions of K.C.C. Title 23. (Ord. 10870 § 541, 1993).

21A.32.045 Nonconformance - reestablishment of discontinued nonconforming use, or damaged or destroyed nonconforming structure or site improvement. A nonconforming use that has been discontinued or a nonconforming structure or site improvement that has been damaged or destroyed, may be reestablished or reconstructed if:

- A. The nonconforming use, structure, or site improvement which previously existed is not expanded;
- B. A new nonconformance is not created; and
- C.1. The use has not been discontinued for more than twelve months prior to its re-establishment, or the nonconforming structure or site improvement is reconstructed pursuant to a complete permit application submitted to the department within twelve months of the occurrence of damage or destruction; or;
2. If the use has been discontinued for more than twelve months, the applicant provides documentation that demonstrates to the satisfaction of the department that there was no intent to abandon the use. Documentation may include, but is not limited to, requests for approvals necessary to reestablish the use or structure submitted to appropriate county, state and federal agencies within twelve months after the use was discontinued. A statement from the property owner that merely states that there is no intent to abandon is not sufficient documentation without a showing of additional actions taken by the property owner to reestablish the use or structure. (Ord. 16594 § 5, 2009; Ord. 13130 § 3, 1998).

21A.32.055 Nonconformance - modifications to nonconforming use, structure or site improvement. Modifications to a nonconforming use, structure or site improvement may be reviewed and approved by the department pursuant to the code compliance review process of K.C.C. 21A.42.030 provided that:

- A. The modification does not expand any existing nonconformance; and
- B. The modification does not create a new type of nonconformance. (Ord. 15606 § 22, 2006; Ord. 13130 § 4, 1998).

21A.32.065 Nonconformance - expansions of nonconforming uses, structures, or site improvements. A nonconforming use, structure, or site improvement may be expanded as follows:

A. The department may review and approve, pursuant to the code compliance process of K.C.C. 21A.42.030, an expansion of a nonconformance only if:

1. The expansion conforms to all other provisions of this title, except that the extent of the project-wide nonconformance in each of the following may be increased up to ten percent:

- a. building square footage,
- b. impervious surface,
- c. parking, or
- d. building height; and

2. No subsequent expansion of the same nonconformance shall be approved under this subsection if the cumulative amount of such expansion exceeds the percentage prescribed in subsection A.1;

B. A special use permit shall be required for expansions of a nonconformance within a development authorized by an existing special use or unclassified use permit if the expansions are not consistent with subsection A. of this section;

C. A conditional use permit shall be required for expansions of a nonconformance:

- 1. Within a development authorized by an existing planned unit development approval; or
- 2. Not consistent with the provisions of subsections A. and B. of this section; and

D. No expansion shall be approved that would allow for urban growth outside the urban growth area, in conflict with King County Comprehensive Plan rural and natural resource policies and constitute impermissible urban growth outside an urban growth area. (Ord. 15606 § 23, 2006; Ord. 13130 § 5, 1998).

21A.32.075 Nonconformance - required findings. Modifications or expansions approved by the department shall be based on written findings that the proposed:

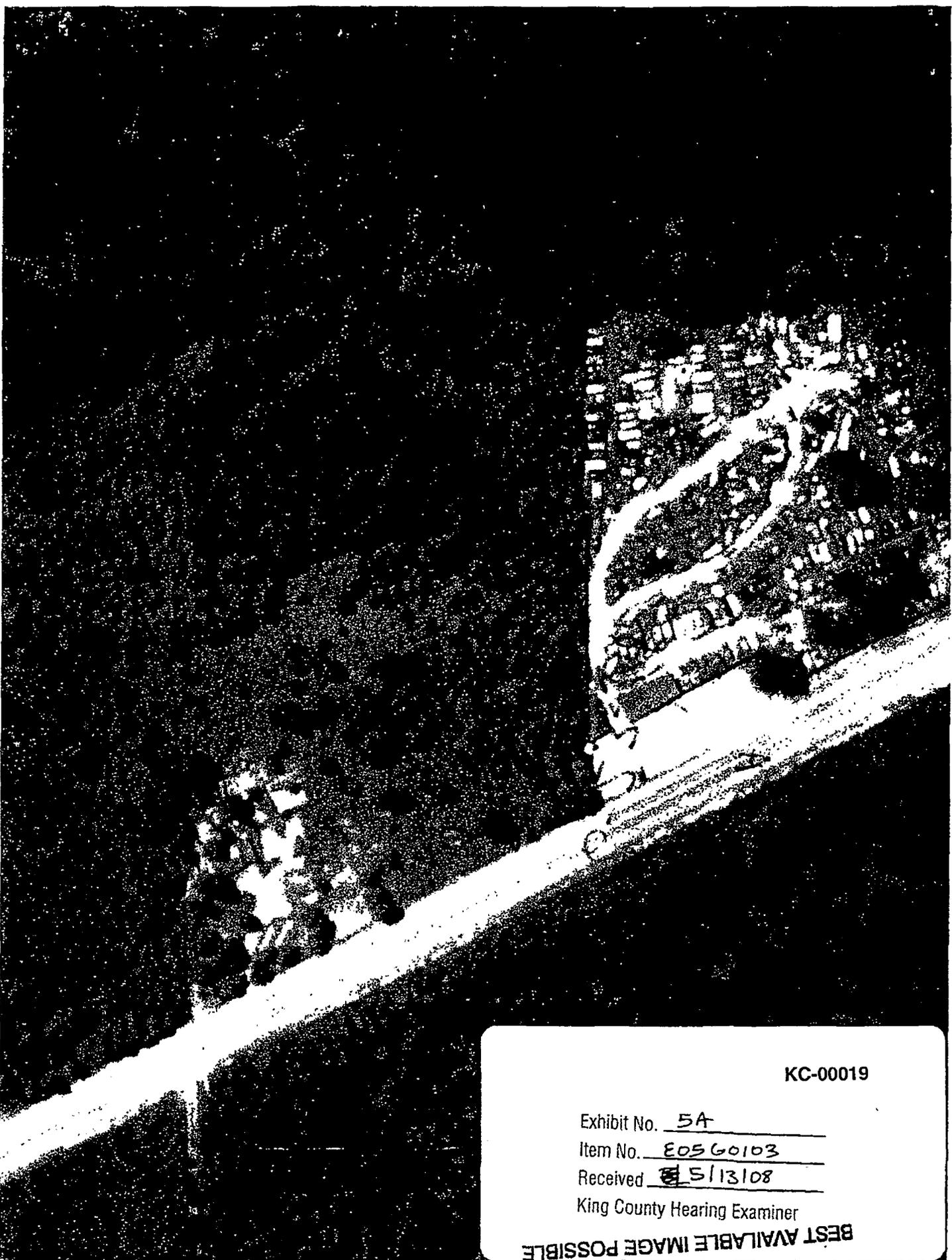
Modification or expansion of a nonconformance located within a development governed by an existing conditional use permit, special use permit, unclassified use permit, or planned unit development shall provide the same level of protection for and compatibility with adjacent land uses as the original land use permit approval. (Ord. 13130 § 6, 1998).

21A.32.085 Nonconformance - residences. Any residence nonconforming relative to use may be expanded, after review and approval through the code compliance process set forth in K.C.C. 21A.42.010, subject to all other applicable codes besides those set forth in this chapter for nonconformances. (Ord. 13130 § 12, 1998).

21A.32.100 Temporary use permits - uses requiring permits. Except as provided by K.C.C. 21A.32.110, a temporary use permit shall be required for:

- A. Uses not otherwise permitted in the zone that can be made compatible for periods of limited duration and/or frequency; or
- B. Limited expansion of any use that is otherwise allowed in the zone but which exceeds the intended scope of the original land use approval. (Ord. 10870 § 547, 1993).

Appendix E



KC-00019

Exhibit No. 5A
Item No. E0560103
Received 5/13/08
King County Hearing Examiner

BEST AVAILABLE IMAGE POSSIBLE

EXHIBIT SA

6-23-60

KC-00020



EXHIBIT 5B

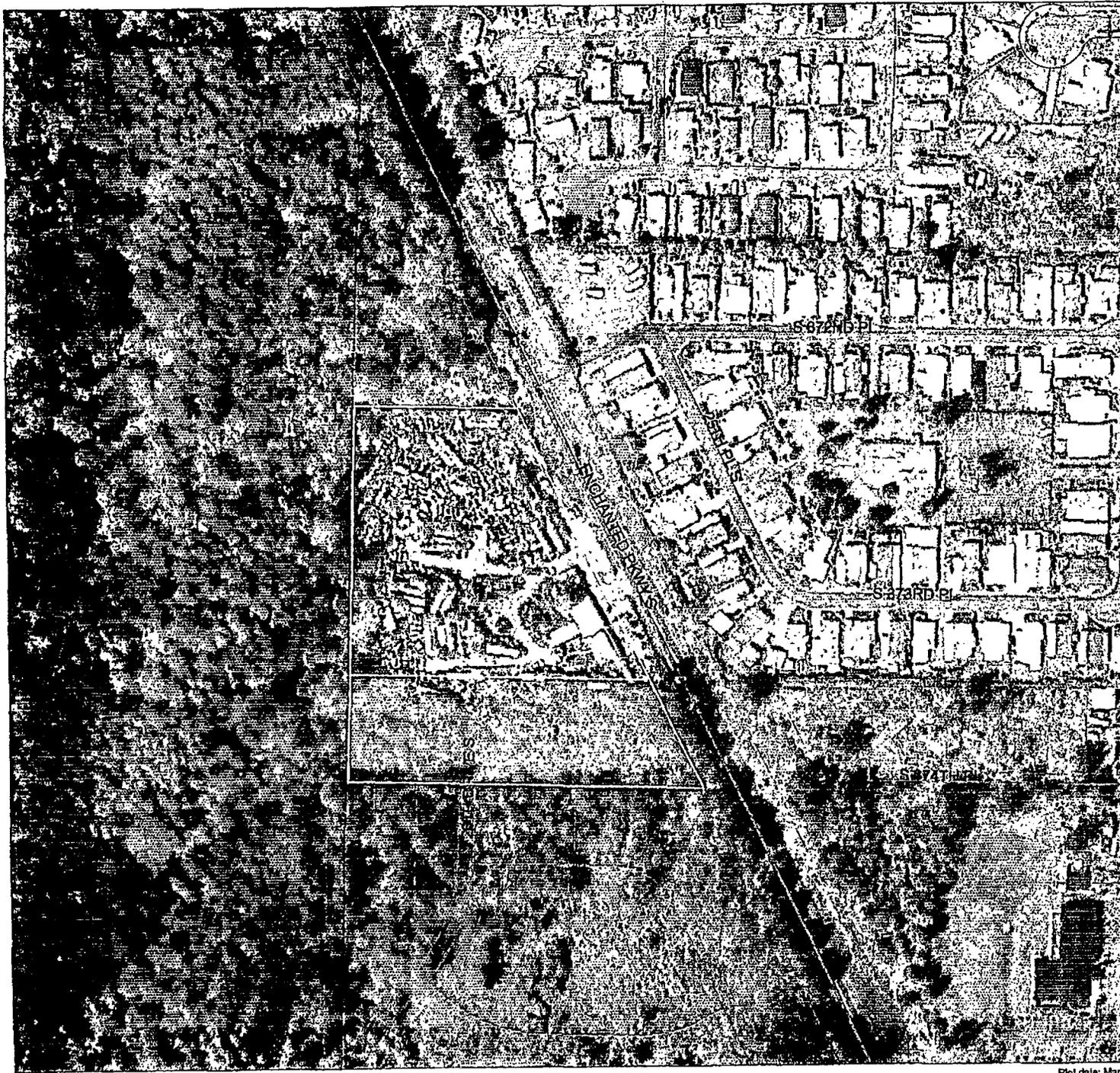
KC-00021

Exhibit No. 5b

Item No. 20560103

Received 5/13/08

King County Hearing Examiner



2000 aerial
332104-90

- Township Lines
- S-T-R
- QSLINES
- SECLINES
- TWPLINES
- Streets
- Water Bodies
- Parcels
- Aerial Photos - 2000
- Aerial Photos - 2002
- Cities

Exhibit No. 5D(1)

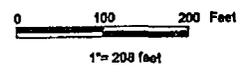
Item No. 805C0103

Received 5/13/08

King County Hearing Examiner

EXHIBIT 5D
Page 57

KC-00023



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KC-00024

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exhibit room



KING COUNTY

E05G0103

2002

Exhibit No. 50
 Item No. E05G0103
 Received 5/13/08

King County Hearing Examiner

KC-00025

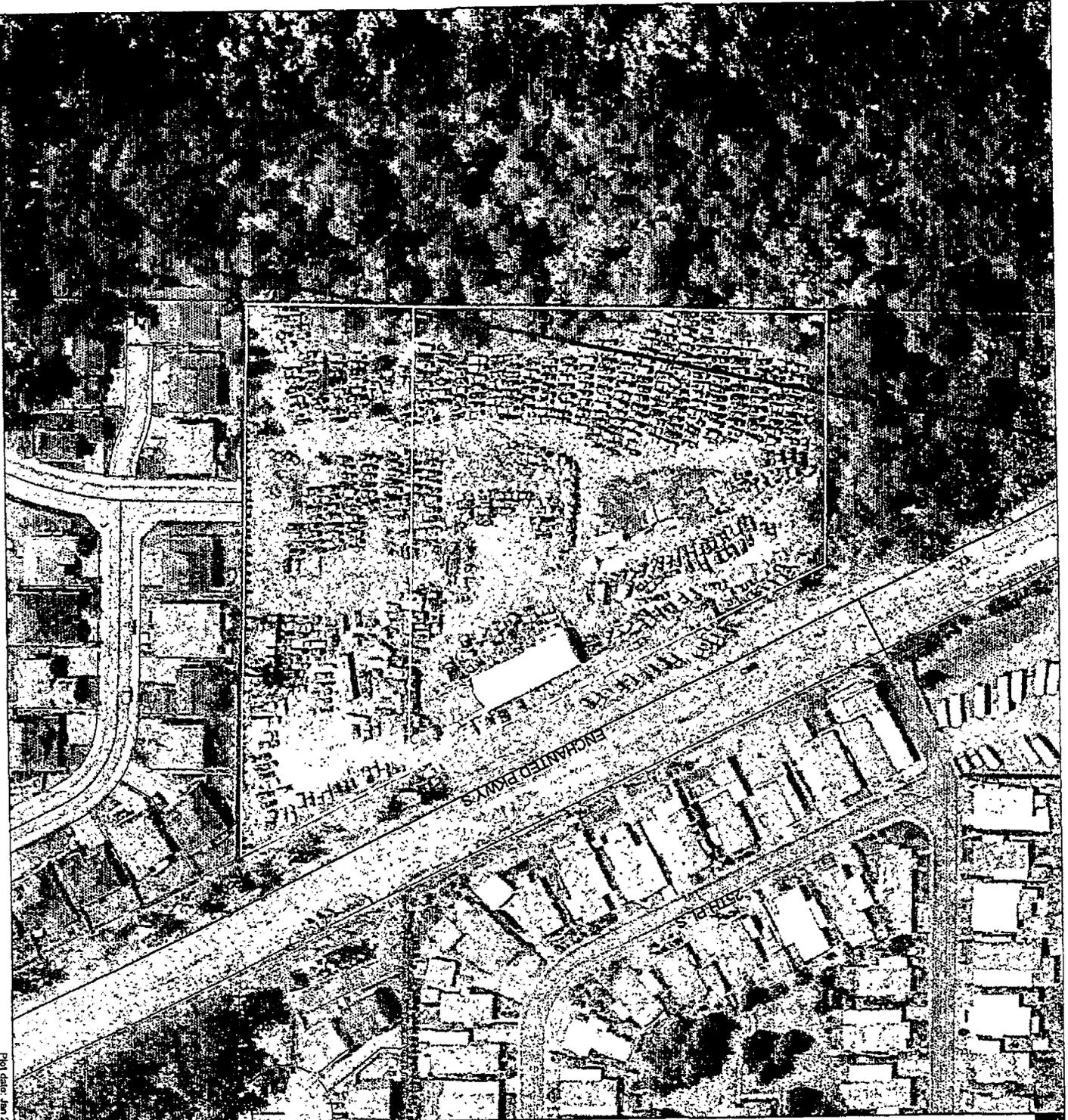
- Fish and Drain Data
- Township Lines
- S-7-R
- OG LINES
- SECLINES
- TMP LINES
- Streets
- S-10 Stream
- 1-2P
- 2S
- 3
- U
- S-10 Wetland (1998)
- Water Bodies
- Parcels
- Aerial Photo - 2002
- FEMA Cross Sections
- FEMA Flooding
- FEMA 100-yr Floodplain
- Creeks



EXHIBIT 50

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KING COUNTY

E05G0103
2005

- Fish and Ditch Data
- Township Lines
- S-T-R
- OSLINES
- SECLINES
- TVPLINES
- Streets
- SMO Stream
- 1
- 2P
- 2S
- 3
- U
- SAO Wetland (1989)
- Water Bodies
- Parcels
- Aerial Photos - 2005
- FEMA Cross Sedents
- FEMA Floodway
- FEMA 100-Yr Floodplain
- Chas



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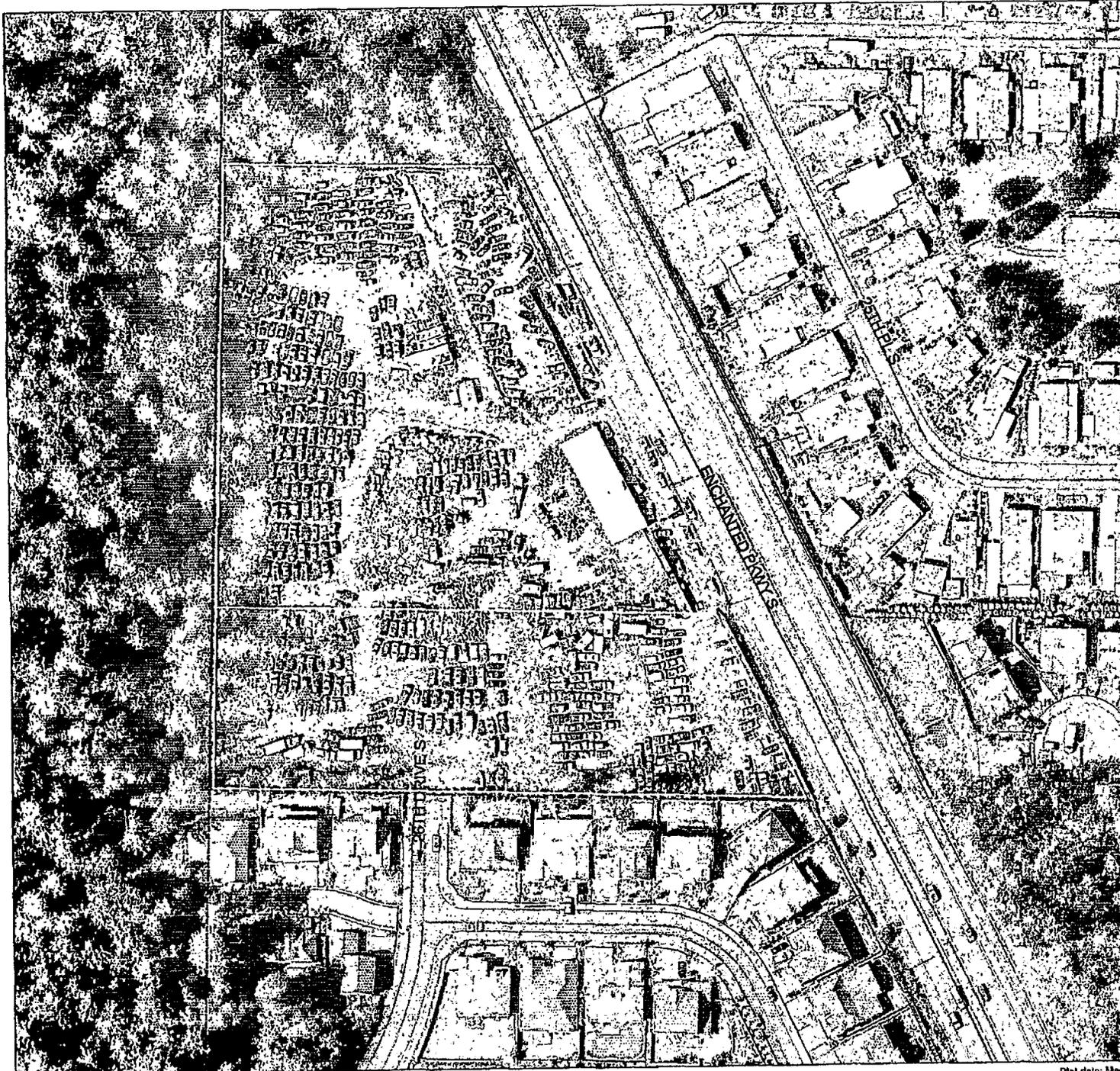
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EXHIBIT 5F

KC-00026

Exhibit No. 5F
 Item No. 205G0103
 Received 5/13/03

King County Hearing Examiner



KING COUNTY

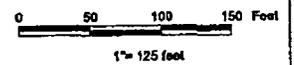
2007 aerial
332104-9038

- Township Lines
- S-T-R
- QSLINES
- SECLINES
- TWP LINES
- Streets
- Water Bodies
- Parcels
- KC Ortho - 2007
- Cities

Exhibit No. 56
 Item No. 20500103
 Received 5/12/07

King County Hearing Examiner KC-00027

EXHIBIT 56



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DECLARATION OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the foregoing is true and correct:

That on July 23, 2010, I sent in the manner below, true and correct copies of the APPELLANTS OPENING BRIEF and this DECLARATION OF SERVICE to:

Jean Jorgensen
SINGLETON & JORGENSEN, INC., P.S.
337 Park Ave N.
Renton, WA 98057-5716
[Via Legal Messenger]

Sherry McMilian
PO Box 508
Maple Valley, WA 98038
[Via U.S. Postal Mail]

DATED at Seattle, Washington this 23rd day of July, 2010.



Diana Cherberg