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COURT OF APPEALS
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STATE OF WASHINGTON

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No. 34050-0-II

COURT OF APPEALS
DIVISION II
OF THE STATE OF WASHINGTON

COLIN F. YOUNG,
Appellant

v.

KITSAP COUNTY,
a municipal corporation in the State of Washington,
Respondent

APPELLANT'S REPLY BRIEF

pm 8/19/06

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I. Limiting Respondent Submissions

a. Relevance of Pre-Ownership History

On pages 2-4 of the respondent's brief Kitsap County has presented a detailed complaint history of the subject property prior to purchase of the subject property by the appellant.

Complaint history under another owner, as presented by the county, is irrelevant to the constitutional issues before this court. Additionally, the County's complaint history argument is subject to collateral estoppel as detailed below, and should be stricken from consideration by the reviewing court.

Any and all evidence submitted by the county from the time prior to the appellant's January 1, 2000 purchase of the subject property is not relevant evidence, germane to establishing the appellant maintained a public nuisance on the subject property. The appellant properly objected to the admission of any evidence predating his purchase of the subject property on the basis that such evidence was not relevant to the issues of determining the present existence or not of a public nuisance.

Evidence is relevant when it tends to make the existence of any fact of consequence more or less probable. ER 401.

In the early proceedings of this matter, the issue before the Hearing Examiner was whether or not a public nuisance, as defined in 2002 by the enactment of Ordinance 261 Public Nuisances, was present on a property purchased by the appellant in January of 2000.

As the sole subject of this review, the Nuisance Ordinance did not yet exist to apply the previous owner, and therefore, any prior complaint history does not come to bear on the questions before this court.

Moreover, information prior to January 1, 2000, as detailed by the County, applies to a distinct and earlier county statute, the Interim Zoning Ordinance, and is not relevant to the ordinance being challenged in this matter.

Any violation history preceding the petitioner's purchase of the subject property should be disregarded, as the County cites no authority supporting the relevance or propriety of the county's submission and argument.

b) Collateral Estoppel

By product of a previous Kitsap District Court ruling, Collateral Estoppel also applies to the county's submission of complaint history of the subject property.

In August of 1999 the appellant moved to intervene on a Kitsap County action against the previous owner of the subject property. However, Kitsap County argued strongly against Colin Young's intervention, convincing the court that without ownership, Colin Young was not responsible for the subject property, and intervention by the Petitioner should not be permitted by the court.

In the aforementioned ruling to deny intervention without ownership, the Kitsap court determined the Petitioner was not responsible for conditions on the property before his January 1, 2000 purchase, and Kitsap County cannot once again raise the

issue of the appellant's pre-purchase responsibility for the subject property as the County is bound by collateral estoppel on this issue.

Once again, under the focus of this appeal, the violation history under previous owner is not germane to establishing in validity of the Public Nuisances ordinance.

By submitting a complaint history under the previous owner of the subject property, the respondent is attempting to develop a linkage by attributing responsibility to the appellant for complaints prior to January 1, 2000, where the county successfully argued the appellant's responsibility in 1999. Collateral Estoppel clearly applies, thus limiting consideration of this Court to the time after the appellant's purchase of the subject property.

c. Respondent's Possessory Responsibility Theory

On page 6 of the respondent's brief the respondent presents an errant theory of a party holding possessory interest in the subject property sharing responsibility for a Public Nuisance action.. Kitsap County Code clearly identifies the "responsible" party for land use violation purposes in this matter as the "landowner", and that identification section does not include any mention of those with a "*possessory*" interest being responsible. Without authority cited to support possessory responsibility in the subject property, the court must disregard the county's proposed possessory responsibility theory.¹

¹ See Kitsap County Code for party identification in zoning violations .

d. Respondent's Submission of Declaratory Judgment

On page 10 of the respondent's brief, the county attempts to minimize the need for this court to consider the appellant's representative standing pleadings by directing the court to examine the appellant's declaratory judgment action which the respondent has included in the appendix of the county's brief.

As the appellant's declaratory judgment action is not part of the record below, it must be stricken from the record and not considered by the court.

e. Relevance of "Junk Vehicles" Argument

At page 27 of the respondent's brief, the county once again raises the issue of junk motor vehicles, claiming "*uncontested facts establish that the property contains numerous junk vehicles.*" Nothing could be farther from the truth. The county raises this unsupported issue only in an attempt to demonize the appellant's conduct, and diminish the appellant's vagueness argument.

The Kitsap Hearing Examiner's finding of "junk vehicles" was overturned by the Mason County Superior Court after extensive briefing on the issue during the appellants' LUPA hearing. The Honorable Judge Sawyer found that the evidence submitted by the county did not support a finding of "junk vehicles". Clearly, the issue of "junk vehicles" on the subject property is moot. All references to "junk vehicles" by the respondent in this matter should be stricken from consideration.

II. Standing

A limited or partial constitutional examination of the Public Nuisances ordinance is neither practical nor in the interests of judicial economy.

On page 9 of the respondent's brief the county infers that representative standing is required to challenge components or subjects of the Public Nuisances ordinance not germane to the remaining Hearing Examiner finding of a nuisance "vehicle lot" on the subject property.

An interest in the subject matter of the litigation sufficient to confer standing may be established either in a personal or a representative capacity. See, e.g. United States v. Raines 362 U.S. 17, 27 . [Vovos v. Grant, 87 Wn.2d 697 (1976)]

But the assertion of a hypothetical or speculative injury does not necessarily negate a party's standing to sue. [Snohomish County Bd. of Eq. v. Wash. Dep't of Revenue, 80 Wn.2d 262, 264 (1972)]

Respondent agrees against the appellant's standing to address several hypothetical constitutional issues in this matter in pages 6 through 10 of the respondent's brief. Generally the respondent claims that the challenged issues were not used against the appellant and therefore the appellant cannot challenge the constitutionality of these issues. As First Amendment violations are in fact presented by the appellant, a less restrictive application of standing applies.

The basic test for standing is "whether the interest sought to be protected by the complainant is arguably within the zone of interest to be protected or regulated by the stature of constitutional guarantee in question [Seattle School Dist. No. 1 v. State 90 Wn.2d 476, 493 (1978)]

Our Supreme Court has criticized "unrealistically strict" considerations of standing, and it has noted that Washington is increasingly taken a broader less restrictive view. [Seattle School Dist. No. 1 v. State 90 Wn.2d 476, 493 (1978)]

It is clear that a piecemeal constitutional examination of any lengthy and poorly written statute such as the Nuisance Ordinance is not consistent with judicial economy or the public interest, as further review is a certainty. The ordinance's "let's catch everything" legislative philosophy produces an analytical nightmare for both enforcement and review.

Should the appellant not be granted the necessary standing in this matter, repetition of effort is assured for both litigants and courts, as each of dozens of potential constitutional violations brought up on appeal for review. In this regard it is doubtful that a Hearing Examiner appeal to the LUPA decision sufficient or an effective process, especially if it restricts standing.

Considering the limitations against raising constitution issues at the Examiner Level, and the apparent limiting of LUPA constitution examination to issues that apply to the landowner in the Examiner hearing, it is clear the LUPA process is insufficient for an effective constitutional examination of the Public Nuisances Ordinance.

Additionally, the County's proposed subject matter limitation for standing is not supported by chapter RCW 36.70C governing Land Use Petitions. Moreover, the validity of the appellant's LUPA standing is determined without limitation by RCW 36.70C.060(1):

36.70C.060(1) The applicant and owner of the property to which the land use decision is directed.

Subject matter limitations put forth by the respondent should be disregarded as they are not valid, and do not serve judicial economy. Clearly the appellant qualifies

generally for standing in this matter and should be able to address the constitutional issues raised on review.

III. Due Process

In section 6 of the Respondents brief, the County argues that Procedural Due Process requirements are met by the Public Nuisances ordinance. The respondent claims “*The private interests affected by the Nuisance Ordinance are minimal.*” (emphasis added) Attempting to support this fallacy, respondent states the County is “*only*” allowed to abate “*conditions which constitute a nuisance.*”

Quite obviously the county must allege a nuisance prior to abatement, and stating the county will only abate those conditions which constitute a nuisance does not substantiate the respondent’s claims of a “minimal” affect.

The respondent fails to acknowledge that declaring a nuisance is completely subjective, overbroad, and accomplished by low level county employees without any administrative guidelines. Any thing that is offensive to any one is the determining criteria established in the Nuisance Ordinance for declaring a public nuisance.

As previously briefed, any perceived public nuisance is subject to immediate summary abatement, completely at the discretion of a low level county employee.

It is quite clear, from a careful and considered reading of Chapter 9.56 Public Nuisances, that with very little effort a “public nuisance” could be subjectively identified at each turn of a corner in Kitsap County. Obviously, any alleged “nuisance”

stands to impact, or “affect”, landowners and businesses alike, with loss of time, money, productivity, and from a commercial perspective, business.

County wide, perceived nuisance violations from the this grossly overbroad and unreasonable ordinance could literally be counted in the tens of thousands on the first day of its enactment, and again on any day thereafter.

Under no perceivable set of facts could the instantaneous determination/creation of tens of thousands of “Public Nuisances” in Kitsap be seriously considered as a “*minimal*” impact on private interests.

Summary abatement is clearly not “*severely limited*” as claimed by the county in section 6 of the respondent’s brief. In fact, a careful reading of the ordinance reveals that summary abatement is not in the least limited.²

The respondent’s claim that “*private interests affected by the Nuisance Ordinance are minimal*” is completely without substantiation or merit. Here the respondent fails miserably in the attempt to demonstrate how summary abatement is “*limited*.”

The fact remains that the risk for erroneous or malicious deprivation of property is realistic and significant, especially considering the past history of abuses by Kitsap Code enforcement personnel.³

Given that established law enforcement screening for personality deficiencies is not a prerequisite for commissioning Kitsap code enforcement personnel, the likelihood for continued abuse of power in enforcement activities assures that due

² The issue of summary abatement is comprehensively discussed in the appellant’s opening brief

³ See Citation Table following Colin Young’s Response to Kitsap’s Staff Report

process violations will continue to occur under the ordinance's framework for summary abatement.

On page 20 of the respondent's brief the County claims "*the public has a significant interest in abating conditions that constitute a nuisance*", citing *Edmonds Shopping Center v. City of Edmonds*.

However, the remaining "vehicle lot" violation is distinguished from *Edmonds* in that card rooms and gambling are expressly regulated by state statute, and thus a valid exercise of Municipal Police Power. On the other hand, a "vehicle lot" is not expressly designated as a public nuisance by state statute. The respondent is left to attribute public interest to "*common sense dictates that the accumulation and storage of vehicles is harmful to the environment.*" a statement by the respondent that is completely unsupported and without reasoned argument.

Further, on page 21, the respondent contends that the Nuisance Ordinance is not unduly oppressive because it only impacts those that create nuisances. The fact of the matter is that because it is infected with highly subjective criteria and overbreadth, the Public Nuisances ordinance can be applied to most any person, property, condition, or business, at any time. The Public Nuisances ordinance is clearly charging full speed into the area of protected rights and behavior and is certainly oppressive.

Where a controversy is of serious public importance and immediately affects substantial segments of the population and its outcome will have a direct bearing on the commerce, finance, labor, industry or agriculture generally, questions of standing to maintain an action should be given less rigid and more liberal answer. [Vovos v. Grant, 87 Wn.2d 697 (1976)]

As to impacting only “*those that create the nuisances,*” the Court need look no further than how the ordinance impacts vehicle “Collectors”, including the appellant. Vehicle repair and storage facilities are effectively oppressed by the nuisance ordinance mandating the storage of more than 10 vehicles, or “junk vehicles” unlawful, clearly limiting their ability to maintain a profitable business.

The ordinance’s foregoing oppression clearly causes vehicle storage to become in short supply, inhibits effective and efficient operation of repair facilities, and causes these facilities to diminish in number and become more expensive.

Many other businesses that depend on outdoor storage are easily in violation of the ordinance, and complying with the ordinance will limit the supply and efficiency of their respective service. Therefore the cost the consumer pays for services in general, and the consumer’s ability to satisfy his needs, are effected in a negative aspect by the ordinance.

This it has clearly been demonstrate that there are oppressive and secondary impacts from the Public Nuisances ordinance that the respondent chooses to ignore. These ordinance impacts will be shouldered by all types of consumers in Kitsap, not just automobile collectors.

IV. First Amendment Implications

In sections 7,8, and 9 of the Respondents brief, the County challenges the appellant's vagueness and overbreadth argument, argues against preemption of the Nuisance ordinance, and claims no conflict with State statute or constitutionally protected conduct.

In the respondent's brief the County attempts to narrow many of the appellant's arguments claiming there are no First Amendment rights at issue. However, the appellant clearly demonstrates the ordinance's First Amendment implications in his opening brief on page 26 and in footnotes #2 and #5, all of which describe the potential for classifying outdoor works of art as public nuisances subject to abatement in addition to illustrating the widely recognized artistic expression present in collectable automobiles and collector activities.

In a clear demonstration of First Amendment protected expression, the automobile collector buys, sells, trades, *stores*, restores, *repairs*, maintains, *and shows* his collector vehicles and parts, in both a private and public forum. In this regard the vehicle collecting is similar in all aspects to other forms of visual art.

The vehicle collector labors to recreate the masterpiece by restoring each of the components of the final production, assembling or causing to have assembled the final work which then commands the appreciation and awe of the people. In this fashion, collector activities closely parallel production of other forms of artistic expression.

Quite simply, the "Collector" activities cannot be harmoniously described as a "public nuisance" by the inferior Nuisance Ordinance, and as the appellant is an

established and practicing Collector⁴ of Chrysler vehicles, preemption of the Nuisance Ordinance by RCW 46.04.125 unquestionably applies in this matter.

Hundreds of thousands of automotive collectors and hobbyists attend myriad of car shows and swap meets each year in Washington state. Meanwhile, tens of thousands of vehicles of all nature⁵ are displayed for appreciation and competition. With the average collector vehicle restoration costing between 20 and 30 thousand dollars, and vehicle purchase prices reflecting at least the cost restoration, one can only estimate the enormous amount of money that is spent each year in Washington purchasing and restoring collectable automobiles.

Based on participation, a reasonable estimate of the value of Washington's vehicle Collector industry might be well approach \$100 million each year.

With recent sale of a 1971 Plymouth Hemi Cuda at \$3.6 million (a car of the nature that Young has collected), the courts must certainly recognize the only justification for such a extraordinary price is that a work of art has been purchased.

Herein lies the motivation for the legislature to establish the extraordinary RCW's 46.04.125 Collector, 46.04.3815 Parts Car, 4612.130 Parts Cars, as well as the very unique finding following RCW 46.04.125. The finding following RCW 46.04.125 in part states; "*and maintaining motor vehicles of historic and special interest, which*

⁴ On page 24 of the respondent's brief, the county claims no evidence has been submitted indicating that the appellant is a collector, and the court should therefore refuse the preemption argument. The county is mistaken in that the declaration of Colin Young attached to Young's LUPA brief clearly establishes him as a collector specializing in Chrysler automobiles. Further, the county has provided no evidence whatsoever that Young is not a collector, even though the county has been presented with this claim repeatedly for 10 years.

⁵ Freedom of expression also applies, but is not limited to, the showing of motorcycles, tractors, and boats, regardless if they are antique or modern in their design and style.

hobby contributes to the enjoyment of citizens and the preservation of Washington's automotive memorabilia.” The terms *historic, special interest, preservation, memorabilia, and hobby contributes* all illustrate the importance of expression and communication of an impression, which in the instant case takes the form of visual stimulus, or more accurately, artistic expression.

It is well established that no sentence or word of any legislation is without meaning. It is obvious from the words used in the finding following RCW 46.04.125 **Collector**, that protecting our First Amendment right to expression, as well as maintaining the significant economic stimulus of “Collectors,” were principal considerations in formulating RCW 46.04.125 **Collector**, 46.04.3815 **Parts Car**, and 46.04.130 **Parts Cars**.

Realizing that restoring and maintaining a **Collector** vehicle is a formidable challenge, our lawmakers also protected the necessary peripherals to the hobby of collecting restoring and maintaining collectable vehicles.

By way of 46.04.125 **Collector**, 46.04.3815 **Parts Car**, and 46.04.130 **Parts Cars** our State lawmakers demonstrate an understanding that collectable vehicles could not be appreciated by the citizenry if parts cars were not available to restore and maintain these special vehicles, and thus the legislators have afforded “parts cars” the same protection as “**Collector**” by indicating the shared “finding” which follows RCW 46.04.125 **Collector**.⁶

⁶ On page 25 of the Respondent's brief, the County claims that the RCW 46.04.125 **Collector** does not expressly preempt the Nuisance Ordinance. As the Nuisance Ordinance was legislated some six years after our “Collector” statutes, specific preemption of Nuisance Ordinance by RCW 46.04.125 clearly was not possible.

This court needs look no further than Harold Lemay's Automobile Museum in Tacoma to establish the importance and validity of Washington State's effort to protect automobile collector hobbyist activities. Standing as the largest private collection of automobiles in the world, Lemay's efforts have preserved historic art in the form of the automobiles that span more than 100 years of production, as well as presenting vehicles from all over the world. One weekend each year Lemay's museum opens its doors to tens of thousands of people from all over the country who come to see more than 7000 different vehicles on display. However, had Lemay been subject to the tyranny of Kitsap's Public Nuisances ordinance, not one person would be able to appreciate the variety of "automotive expression" present at his museum today.

The purpose of the State legislating our vehicle "**Collector**" statutes is clearly to establish supremacy of the State law protecting automotive collector hobbyist activity from diminishment by errant Municipal Corporation legislation like Kitsap's Public Nuisances ordinance, otherwise, our "**Collector**" statutes serve no purpose what so ever.

To argue that the American automobile is not a recognized and practiced form of artistic expression and that First Amendment protections do not apply in this matter is clearly an exercise in futility.

As demonstrated above, Kitsap's Nuisance Ordinance is preempted by a superior state statute and it conflicts with general laws, thus in enacting the Public Nuisances ordinance the county has exceeded the grant of police powers from RCW

36.32.120(7) as well as violated the citizens First Amendment protected right to expression.

V. RCW 36.32.120(10) as an Enabling Statute

On page 23 of the respondent's brief, the County argues that RCW 36.32.120(10) empowered the Nuisance Ordinance to declare all manner of things as a public nuisance. In fact, the respondent's argument is a post facto application of law.

Investigation has shown that RCW 36.32.120(10) was not an established State statute when Kitsap's Ordinance 261 - Public Nuisances was enacted. In fact, State records⁷ show that RCW 36.32.120(10) did not exist until subsection (10) was added as part of Substitute House Bill 1409, nearly 2 years after Kitsap's Ordinance 261 took effect.

RCW 36.32.120 Powers of Legislative Authorities

The legislative authorities of the several counties shall:

(10) Have power to declare by ordinance what shall be deemed a nuisance within the county, including but not limited to "litter" and "potentially dangerous litter" as defined in RCW 70.93.030; to prevent, remove, and abate a nuisance at the expense of the parties creating, causing, or committing the nuisance; and to levy a special assessment on the land or premises on which the nuisance is situated to defray the cost, or to reimburse the county for the cost of abating it. This assessment shall constitute a lien against the property which shall be of equal rank with state, county, and municipal taxes.

2003 c 337 6; 1994 c 301 8; 1993 c 83 9; 1989 c 378 39; 1988 c 168 8; 1987 c 202 206; 1986 c 278 2; 1985 c 91 1; 1982 c 226 3; 1979 ex.s. c 136 35; ,, etc.

NOTES:

Findings -- 2003 c 337: See note following RCW 70.93.060 .

Effective date -- 1993 c 83: See note following RCW 35.21.163 .

Intent -- 1987 c 202: See note following RCW 2.04.190 .

⁷The office of the code reviser for the State of Washington maintains all records of RCW revisions.

Severability -- 1986 c 278: See note following RCW 36.01.010 .
Effective date -- 1982 c 226: See note following RCW 35.21.180 .

2003 session House Bill 1409 contained the first iteration of RCW 36.32.120(10), and was voted into law during 2003 legislative session. HB 1409 is principally concerned with reducing public litter and establishing penalty provisions to that end.⁸ In the bill's preamble or subtitle, HB 1409 identifies its purpose as:

“ AN ACT Relating to littering; amending RCW 70.93.030, 70.93.060, 7.80.120, 46.61.645, and 36.32.120; creating a new section; repealing RCW 70.93.100; and prescribing penalties.”

Even if RCW 36.32.120(10) is considered a valid enabling statute, other complications are present. If in fact HB 1409 enables corporate municipalities to liberally declare public nuisances beyond the scope of “litter,” it is not indicated in the title, and arguably there exists a “Subject in Title” violation in HB 1409

Additionally, as indicated in notes following RCW 36.32.120, we are directed to apply the findings following RCW 70.93.060, which give no indication of intent to regulate vehicles on private property, as in the alleged “vehicle lot” nuisance:

RCW 70.93.060 Littering prohibited - Penalties - Litter cleanup restitution payment.....

Findings -- 2003 c 337:

(1) The legislature finds that the littering of potentially dangerous products poses a greater danger to the public safety than other classes of litter. Broken glass, human waste, and other dangerous materials *along roadways, within parking lots, and on pedestrian, bicycle, and recreation trails elevates the risk to public safety, such as vehicle tire punctures, and the risk to the community volunteers who spend their time gathering and properly disposing of the litter left behind by*

⁸ Although RCW 70.93.050(1) references “junk vehicle” it clearly identifies that the vehicle must be abandoned, and goes on to identify that violations applying to public property or “private property not owned by him.” As there are no abandoned vehicles in instant matter, and the property is owned by the petitioner, grounds for violation/jurisdiction/action are not present, and this statute does not support vehicles other than those that are abandoned.

others. (emphasis added) As such, the legislature finds that a higher penalty should be imposed on those who improperly dispose of potentially dangerous products, such as is imposed on those who improperly dispose of tobacco products.

(2) The legislature further finds that litter is a nuisance, and, in order to alleviate such a nuisance, counties must be provided statutory authority to declare what shall be a nuisance, (emphasis added) to abate a nuisance, and to impose and collect fines upon parties who may create, cause, or commit a nuisance." [2003 c 337 1.]

Effective date -- 2002 c 175: See note following RCW 7.80.130

It is difficult to imagine the drafters of HB 1409 conceiving the foregoing preamble and associated findings while intending for low level county employees to go freely about, declaring nuisances at will. Rather, clearly these findings are a limiting criteria.

Nor did the framers of HB 1409 intend to have the citizens stripped of constitutional rights such as the right to privacy in their personal affairs, right to liberty and freedom of expression, and right free use and enjoyment of their personal property. Yet, this is exactly how Kitsap's bureaucratic oligarchy has formulated Ordinance 261, Public Nuisances.

[1] The basic rule in land use law is still that, absent more, an individual should be able to utilize his own land as he sees fit. U.S. Const. amends. 5, 14. Although zoning is, in general, a proper exercise of police power which can permissibly limit an individual's property rights, it goes without saying that the use of police power cannot be unreasonable. STATE EX REL. RANDALL v. SNOHOMISH CY., 79 Wn.2d 619, 488 P.2d 511 (1971); IN RE GIRSH, 437 Pa. 237, 263 A.2d 395 (1970). While local governments exist to provide necessary public services to those living within their borders and to avoid harms in their protection of the public's health, safety, and general welfare, exercise of this authority must be reasonable and rationally related to a legitimate purpose of government such as avoiding harm or protecting health, safety and general, not local or parochially conceived, welfare. SAVE A VALUABLE ENV'T v. BOTHELL, 89 Wn.2d 862, 576 P.2d 401 (1978); RANDALL, SUPRA; FARRELL v. SEATTLE, 75 Wn.2d 540, 452

[97 Wn.2d 690 Norco Construction v. King County (1982)]

Clearly the intent of HB 1409 framers was litter control, and not the variety and multitude of regulations, penalties, declarations and unconstitutional tax found in Ordinance 261.

A close examination of the Nuisance Ordinance shows that only a small percentage of the ordinance deals with what is commonly characterized as litter, while the remainder would be most accurately described as an opportunistic attack on individualism and freedom of expression.

Quite simply, since July 27, 2003, if the issue is *your own litter on your own property*, it may not be declared a nuisance by any ordinance enacted subsequently to HB 1409, claiming to be enabled by RCW 36.32.120(10). Thus it is clear that Public Nuisances ordinance exceeds County's police powers by declaring all manner of things as Public Nuisances subject to abatement without any amortization period.

Accordingly, a provision which exempts existing nonconforming uses is ordinarily included in zoning ordinances because of the hardship and doubtful constitutionality of compelling the immediate discontinuance of nonconforming uses. (County of San Diego v. McClurken, 37 Cal, 2d 683, 686 [234 P. 2d 972])

In enacting the Public Nuisances ordinance the county simply and *suddenly* declared the storage of more than 10 vehicles per tax parcel a public nuisance⁹ subject to abatement, with the landowner penalized for the costs for abatement.

In the absence of facts establishing a nuisance of circumstances showing a condition substantially detrimental to the public health, safety, morals or welfare, zoning ordinances or resolutions which attempt to immediately abolish existing nonconforming uses are unconstitutional insofar as they deprive individuals of

⁹ Under the Nuisance Ordinance "Vehicle Lot" classification there exists no adjustment or consideration for the size of the tax parcel. Consistently devoid of sound reasoning, the nuisance ordinance limit of 10 vehicles applies to one tenth of an acre parcel in equal fashion as it applies to 5000 acres; a maximum of 10 vehicles allowed. Selecting a limit of 10 vehicles is **purely arbitrary and irrational**, and as with the 250' screening requirement, the county details no reasoning for selecting these numbers.

vested rights without due process of law. United States Constitution, amendment 14, § 1. State ex rel. Modern Lbr. Millwork Co. v. MacDuff, 161 Wash. 600, 297 Pac. 733; State ex rel. Warner v. Hayes Inv. Corp. 13 Wn.2d 306, 125 P. (2d) 262. The weight of authority is to the same effect. Antieau, Seasongood Cases Municipal Corporations (3d ed.), 422, 423, note 9; 2 Rathkopf, The Law of Zoning and Planning, 58-1, chapter 58.

Kitsap County provided no testimony or evidence to the Hearing Examiner which established how the petitioner's property and more than 10 vehicles posed a threat to health, welfare, or safety of the public, thus immediate cessation of the long vested right to store more than 10 vehicles on a property is unconstitutional.

Needless to say, it is just as unconstitutional when the state seeks to accomplish the purpose of eliminating a nonconforming use by using the penal provisions of the zoning resolution to punish the nonconforming property owner.
[Washington v. Thomasson 61 Wn.2d 425 (1963)]

Between the time the Nuisance Ordinance was enacted and the appellant was charged. the county did not demonstrate any significant "vehicle lot" evil present on the subject property, or one any of the hundreds of other nonconforming properties storing more than 10 vehicles. Without a demonstration of such an "evil", immediate cessation of Kitsap's newly defined nonconforming use "vehicle lot," loss of personal liberties, in this regard, is not justified.

An ordinance requiring an immediate cessation of a nonconforming use may be held to be unconstitutional because it brings about a deprivation of property rights out of proportion to the public benefit obtained....

We there pointed out that to require the immediate cessation of a nonconforming use is unconstitutional if it brings about a deprivation of property rights out of proportion to the public benefit obtained therefrom Austin v. Older (1938), 283 Mich. 667, 278 N. W. 727.

See State ex rel. Miller, 40 Wn.2d at 222(quoting Austin v. Older, 283 Mich. 667, 278 N.W. 727, 730 (1938))

VI. Tax vs. Fee

On page 16 of the respondent's brief the county argues that this court should not consider the tax vs. fee argument stating "*Although the petitioner was never charged or required to pay this \$10 fee, he asserts that his Court should consider it because he basically had to chose between the fee and taking the case to the Hearing examiner. In reality, the Petitioner was never presented with this choice*" On the contrary, in the respondent's brief, the respondent demonstrates that the appellant was approached directly by the county with just that choice.

On page of the respondent's brief, the county states "*On December 11, 2003, Eric Baker, the Code Enforcement Supervisor at the time, sent the Petitioner a request to enter into a Voluntary Correction Agreement Pursuant to section 9.56 of the KCC (hereafter the 'Nuisance Ordinance')*. Baker' request obviously identified the perceived violations and later charged "junk vehicles" and corrective measures for compliance which include the participating in the "Environmental Mitigation Agreement" requiring the \$10 tax at issue in this matter.

To propose the appellant was not subject to the \$10 is not accurate. The appellant simply chose to have the validity of the ordinance and its components reviewed, as such a review was not available at through the Hearing Examiner process.

The appellant directs the Court to his previously submitted arguments addressing the merits of the Tax v. Fee issue.

VI. Conclusion

This court clearly must recognize the appellant's First Amendment protected right to expression as it applies vehicle "Collectors" in this matter and to the constitutional issues presented under both a representative standing and a personal standing basis.

The court should consider the deficiencies inherent in the Public Nuisances mandated appeal process and act accordingly. If a quasi judicial Hearing Examiner and LUPA hearings undermine and limit an appellant's ability to bring a comprehensive constitutional examination of an ordinance before the court, it would not unreasonable to consider the Public Nuisances specified appeal process insufficient and a procedural due process violation in itself.

The Court should not be swayed by the respondent's attempts to narrow the issues and arguments, while the Court should discard irrelevant and unsupported submissions and conclusions by the County.

The issues and arguments presented for review by the appellant are carefully considered, substantial, and necessary, unlike the ordinance the appellant is challenging. If representative standing is necessary to consider each and every constitutional issue presented by the appellant, then it is within the powers of this court to adopt the necessary perspective.

The appellant prays the court grant the appellant standing ,serve both judicial economy and a great public interest, and that the Court declare Kitsap's Public Nuisances ordinance unconstitutional as a whole.

DATED this 18 day of August, 2006



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614 Division St.
Port Orchard, WA

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

COLIN F. YOUNG,
Appellant

v.

KITSAP COUNTY, a
municipal corporation in
the State of Washington,
Respondent

Court of Appeals # 34050-0-II

CERTIFICATE OF MAILING

FILED
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DIVISION II
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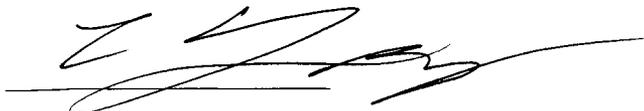
I, Colin F. Young, certify and declare under penalty of perjury of the laws of the State of Washington the following:

1) That I a resident of Kitsap County in the State of Washington, over the age of 21 years, and competent to be a witness herein.

2) That on the 19th of August, 2006, I personally mailed by United States Post Service First Class to the Court of Appeals - Division II, at 950 Broadway STE 300, Tacoma, WA 98402 And to the Respondent's attorney Phillip Bacus at 614 Division St. MS-35A Port Orchard, WA 98366 the following document(s):

- 1) APPELLANT'S REPLY BRIEF
- 2) CERTIFICATE OF MAILING

DATED at Silverdale, Washington, this 19th day of August, 2006



COLIN F. YOUNG, Appellant pro se
1785 Spirit Ridge Dr.
Silverdale WA 98383 360-697-4966