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From Jefferson County Superior Court No. No. 06-2-00348-8

**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

JEFFERSON COUNTY,

Respondent

v.

MICHAEL ANDERSON,
Appellant.

RESPONDENT'S BRIEF

JEFFERSON COUNTY
PROSECUTING ATTORNEY'S OFFICE

Philip C. Hunsucker, WSBA #48692
Chief Civil Deputy Prosecuting Attorney
P.O. Box 1220
Port Townsend, WA 98368
Phone: (360) 385-9219 (Direct)

Attorneys for Respondent Jefferson County

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I. INTRODUCTION

This case involves the latest phase of Jefferson County's 20-year effort to resolve the public nuisance Michael Anderson has created and maintained on his property in Port Hadlock, Washington (property). Filed in 2006, the complaint in this case sought to enforce solid waste violations, enforce the Model Toxic Controls Act (Chapter 70.105D RCW) and to abate a public nuisance as defined by RCW 7.48.010, RCW 7.48.120 and RCW 9.66.010. CP 1, 6.

In 2008, the superior court determined Anderson's property was a public nuisance. In 2011, Anderson was enjoined from bringing on to the property "any motor vehicle, vehicle hulk, trailer, fifth wheel, boat, or other personal property that did not/or could not arrive at the property under its own power." Two prior nuisance abatements in 2011 and 2012 removed hundreds of junk vehicles from the property.

A 2012 amended permanent injunction gives the superior court continuing jurisdiction to prevent Anderson from bringing more junk vehicles on to the property, but that did not stop him. Based on extensive proof discussed below, the superior court held on January 26, 2018 in separate orders that Anderson violated the 2012 amended permanent injunction by bringing 90 *more* junk vehicles on to the property and by doing so "created, condoned and worsened the nuisance." (CR 342, 678).

Anderson was ordered for the third time to abate the conditions at the property “that make it a public nuisance.” CR 342, 680.

The appellant’s brief fails to mention an important basis for both January 26, 2018 orders, an agreed “run and drive” test for whether vehicles Anderson brought to the property were junk vehicles (CR 155, ¶7), and the results of the agreed “run and drive” test conducted on September 13, 2017. CR 341, 669 (Finding of Fact 12), and CR 342, 678 (Finding of Fact 19.) The superior court’s May 26, 2017 agreed order approved the agreed “run and drive” test. CR 155, ¶7. The agreed order states that vehicles that were not operable “qualify as junk vehicles under Jefferson County Code and the applicable provisions of the RCW.” *Id.*, ¶7. The test was simple—if Anderson could not get the automobiles, trucks, construction equipment or vessels to operate within five minutes while being videoed, “then those vehicles are junk vehicles and will be marked physically to identify them as junk vehicles.” *Id.* As this agreement was in writing and was approved by the superior court, it is binding on the parties and this Court. RCW 2.44.010, CR 2A.

At the agreed “run and drive” tests on September 13, 2017, some of the vehicles on the property passed. CP 342, 678. Ninety-eight vehicles either failed the agreed “run and drive” test or were so obviously inoperable that Anderson did not ask for them to be tested. CR 342, 678

(Findings of Fact 10 and 13) and 685-695 (Exhibit 11). Comparing the results of this test to the vehicles left on the property in 2012, the County determined that over 90 junk vehicles were brought on to the property *in violation of the 2012 amended permanent injunction*. CP 171, ¶¶32-41. This evidence alone constitutes substantial evidence that supports the superior court’s finding of fact that Anderson intentionally has disobeyed the 2012 amended permanent injunction. CP 341, 670. This evidence alone also constitutes substantial evidence that supports the superior court’s finding of fact that Anderson has created, condoned and worsened the nuisance by violating the terms of the 2012 amended permanent injunction. CP 342, 678. Nowhere in the appellant’s brief are these facts even mentioned, much less challenged. Nor were they challenged below. Unchallenged findings of fact are verities on appeal. *State v. Hill*, 123 Wash. 2d 641, 644, 870 P.2d 313, 315 (1994). The agreed “run and drive” test and its results by themselves provide substantial evidence that support the conclusions of law in both the order of contempt (CR 341) and the order requiring issuance of a warrant to abatement the nuisance (CR 342).

Additional substantial evidence supports the fact findings in both of the superior court’s January 26, 2018 orders. For example, in a 2017 declaration, Anderson admits:

I put most of the vehicles I trade or buy in my name. Sometimes I keep the title provided by the seller and act as an interim owner *while I dispose of the vehicle. On rare occasions, someone will come by needing a part I have, and if I don't need it, I will sell it to him.* Some of the vehicles I obtain are *parts vehicles* used in rebuilding collector vehicles for old car hobbyists.

CP 162, 112 (emphasis added). A “vehicle wrecker” includes someone “who deals in secondhand vehicle parts.” RCW 46.80.010(5) (emphasis added). At the time of the January 26, 2018 hearing, vehicle parts, parts cars and parts boats were kept on the property. CP 342, 688 (Vehicles 98 & 124), 692 (Vehicle 160), 693 (Vehicle 171), 694 (Vehicle 187). Anderson says he “believed he had not crossed the line in to vehicle wrecker territory.” Appellant’s Brief, 19. But “he readily acknowledged that he occasionally *sold parts from his parts vehicles* and collections to neighbors and other rebuilders.” *Id.* (emphasis added.) Anderson *does* deal in secondhand vehicle parts, so he is a vehicle wrecker.

Anderson’s attempt to make this appeal mostly about the junk vehicles he says were not abandoned, which he wrongly claims are not properly considered solid waste, is belied his statements from his 2017 declarations summarized in Exhibit 11 attached to the order requiring issuance of a warrant to abate the nuisance. CR 342, 685-95. As the superior court found, “The solid waste brought on to the Subject Property since March 27, 2012 includes but is not limited to construction of

demolition waste, propane tanks, riding mowers, tanks of unknown use and junk vehicles (including boats). CP 342, 677.

After the warrant to abate the nuisance was issued, Anderson “removed all the offending vehicles” from the property, namely those “listed in Exhibit 11/12.” Appellant’s Brief, 5, 11-12. As further analyzed below, there no longer any need for the order directing issuance of a nuisance warrant, so the appeal of that order should be moot.

II. COUNTERSTATEMENT OF THE ISSUES

A. Issues Related to Assignment of Error 1.

1. RAP 5.3(a) states the appellant *must* “designate the decision or part of decision that the party wants reviewed” and “should attach to the notice of appeal a copy of the signed order or judgment from which the appeal is made.” RAP 2.4(a) states an appellate court “will, at the instance of the appellant, review the decision or parts of the decision designated in the notice of appeal,” unless the order prejudicially affects the decisions designated in the notice (RAP 2.4(b).) Anderson did not designate the order denying his motion to declare non-conforming use or any part of it and failed to attach the order to his notice of appeal and the order does not prejudicially affect the decisions designated in the notice. Should

the decision of the superior court be affirmed based on Anderson's failure to appeal it?

2. Assuming the four elements of the doctrine of collateral estoppel apply, the doctrine bars relitigation of an issue previously decided. The superior court determined that in the 2012 amended permanent injunction all four collateral estoppel elements were satisfied and that the decision was determinative that Anderson's non-conforming prior to zoning was an illegal scrap yard and wrecking yard, not a legal non-conforming use. Should the Court affirm the superior court's application of the doctrine of collateral estoppel?
3. A party seeking to obtain a declaration of a legal non-conforming use has the burden of proving the non-conforming use. The superior court held that Anderson's prior admissions, the history of the litigation, and the admissions in the 2017 Anderson Declaration, prove Anderson is not entitled to a legal non-conforming use of a vehicle storage yard. Should the Court affirm the superior court's order that the evidence does not satisfy Anderson's burden of proof?

B. Issues Related to Assignments of Error 2 and 3.

1. When a superior court makes findings of fact that conduct on a property violates an injunction or constitutes a nuisance, review is

limited to determining whether substantial evidence supports the findings of fact. When the findings are unchallenged on appeal, the findings are treated as verities. The superior court made unchallenged findings of fact that conduct on the property violates the 2012 amended permanent injunction and thereby constitutes a public nuisance. Should the superior court's decision be affirmed on the basis that substantial evidence supports those findings of fact?

2. A written agreement between the parties that is approved in court is binding on the parties and the Court per RCW 2.44.010 and CR 2A. The December 15, 2017 order was a written agreement approved by the superior court that contained an agreed "run and drive" test for determining junk vehicles. Is the December 15, 2017 order and the results of the agreed "run and drive" test binding on the parties and the Court?
3. Under conflict preemption precedents, a state law preempts a local ordinance when an ordinance permits what state law forbids or forbids what state law permits. RCW 70.95.160 authorizes county solid waste regulations to be more stringent than the minimum functional standards adopted by the Department of Ecology,

namely Chapter 173-304 WAC. Does JCC 8.10.100 permit what Chapter 70.95 RCW forbids?

C. Issue Related Only to Assignment of Error 3.

An injunction and an abatement each are separate remedies for addressing a public nuisance. RCW 7.48.020 and RCW 7.48.200. Disobeying an injunction is enforceable by contempt. RCW 7.21.010(1)(b) and RCW 7.21.030. After finding someone in contempt of an injunction issued for a creating or maintaining public nuisance, a superior has authority to order abatement under authority granted by RCW 7.21.030(2)(c) and its inherent authority. Did the superior court have authority to order abatement of only the junk vehicles at the property when it found as a fact that “The solid waste brought on to the Subject Property since March 27, 2012 includes but is not limited to construction of demolition waste, propane tanks, riding mowers, tanks of unknown use and junk vehicles (including boats)” (CP 342, 677)?

III. COUNTERSTATEMENT OF THE CASE

A. The May 26, 2017 Order¹ and its Agreed “run and drive” test Are Not Mentioned in Appellant’s Brief for a Junk Vehicle But Provide Unchallenged Findings of Fact that Support the Appealed Orders.

On May 23, 2017 the County and Anderson tested 56 vehicles to see if they were operable, a key element in determining whether vehicles are junk vehicles under state law. RCW 46.55.010(5). These are some of the vehicles they encountered that day:



¹ CR 155 was not listed in Appellant’s Designation of Clerk’s Papers and consequently was not listed in the Index to Clerk’s Papers. When the superior court transmits the supplemental index of Clerk’s Papers, Respondent will file an amended brief with citations to the pages of any items listed in the supplemental clerk’s index, including CR 155.



CP 171, Exhibit 6 (Vehicle 155).



CP 171, Exhibit 6 (Vehicle 161).

On May 23, 2017, the parties could not test all of the automobiles, trucks, construction equipment or vessels on Anderson's property. CR 155, ¶2. At that time, parties were working on an out of court settlement that potentially involved changes in land use for Anderson's property. CR 155, 1. Between May 23, 2017 and May 26, 2017, the parties worked on an agreed order to postpone a May 26, 2017 hearing on a nuisance abatement. *Id.*

One result of the settlement negotiations was the May 26, 2017 superior court agreed order. The agreed order allowed Anderson to work on hazardous waste and solid waste issues. CR 171, ¶23. The agreed order put on hold solid waste claims about Anderson's other location located on Maude Street in Irondale. CP 155, ¶11. The agreed order makes clear to Anderson that he may not develop the property until it is removed from Ecology's Hazardous Sites List. CR 155, ¶¶9-10.

1. Anderson's Admission about Junk Vehicles Demonstrates the Purpose of the agreed "Run and Drive" Order Was to Decide Which Vehicles Were Junk Vehicles.

The agreed order also contained an admission by Anderson, namely that: "Because vehicles were not operable on May 23, 2017, those vehicles qualify as junk vehicles under Jefferson County Code and the applicable provisions of the RCW. Many of the yet untested vehicles,

trucks, construction equipment or vessels mentioned in the preceding section may also qualify as junk vehicles.” CR 155, ¶3.

2. The Agreed “Run and Drive” Test Gave Anderson Five Minutes to Get Each Vehicle He Wanted Tested to Run.

The May 26, 2017 agreed order also set out an agreed “run and drive” test for whether vehicles on Anderson’s property were junk vehicles under both state law and the JCC. CR 155, ¶7, CR 341, 669 (Finding of Fact 12), and CR 342, 678 (Finding of Fact 19.) The test was simple—if Anderson could not get the automobiles, trucks, construction equipment or vessels to operate within five minutes while being videoed, “then those vehicles are junk vehicles and will be marked physically to identify them as junk vehicles.” *Id.*

3. Ninety-Eight Junk Vehicles Did Not Survive the Agreed “Drive and Run” Test.

Ninety-eight vehicles either failed the agreed “run and drive” test or they obviously would not run and Anderson did not request they be tested. CR 342, 678 (Findings of Fact 10 and 13) and 685-695 (Exhibit 11). Appellant’s brief fails to mention the agreed order, the agreed “run and drive” test or the results of the agreed “run and drive” test.

B. The Superior Court Previously Held the Property Is a Public Nuisance.

Anderson understood well what he was doing when he entered into the May 26, 2017 agreed order because prior to 2012 he fought and lost an

injunction and nuisance abatement proceeding that took place over the course of at least six years. CP 1, 1. The history of the case prior to November 2, 2012 is documented in a 2012 amended permanent injunction issued to Anderson. CP 129. Anderson did not appeal the 2012 amended permanent injunction.

In 1997, the County began its efforts to obtain Anderson's compliance with the JCC. *Id.*, 74. The property had been the subject of complaints by neighbors to the County's Public Health Department. *Id.* The conditions on the property are visible to any person standing on the Old Hadlock Road right of way, an adjacent business and on the adjacent parcel. *Id.*, 75.

In December 2005, County Public Health Department employees, Mark Nelson and Alan Gardner, along with Washington Department of Ecology (Ecology) employee Fern Svendson, entered the property. *Id.* Nelson took soil samples that were tested and showed the presence of petroleum hydrocarbons in soil at the property above Ecology screening levels. *Id.* Ecology performed a Site Hazard Assessment on the property and ranked it a "1," meaning its risk to the environment is as great as any other parcel that has received a Site Hazard Assessment. *Id.*, 76. Ecology placed the property on its Hazardous Sites List where it remains to this day. CP 171, ¶12.

In April 2006, Anderson signed a performance contract with the County in which he promised to address the hazardous substances on the property. *Id.*, ¶13. Anderson failed to do so. *Id.* As a result, the County sued Anderson. *Id.*

The County filed this civil action on November 1, 2006, seeking to abate a public nuisance as defined by RCW 7.48.010, RCW 7.48.120 and RCW 9.66.010. CP 1, 6. On May 30, 2008, the superior court found that a public nuisance existed on the property and entered a partial judgment on that finding. CP 129, 76. In 2009, County Public Health Department employees and the Washington State Patrol inspected the property and determined there were at least 182 junk vehicles at the property. CP 171, ¶15.

C. The 2011 Permanent Injunction and the 2011 and 2012 Nuisance Abatements Resulting In Over 200 Tons of Solid Waste, Including Over 200 Junk Vehicles.

On March 9, 2011, the superior court granted partial summary judgment and ordered the issuance of a revised warrant to abatement the nuisance. CP 129, 77. The relief granted included a permanent injunction. *Id.*, 79-80. The 2011 permanent injunction enjoined Anderson from the following activities at the property: (1) Crushing or parting motor vehicles; (2) processing scrap metal; and, (3) “depositing or leaving at or bringing or hauling” to the property “any motor vehicle, vehicle hulk,

trailer, fifth wheel, boat, or other personal property that did not/or could not arrive at the property under its own power.” CP 165 Exhibit 5 at 7-8.

A revised warrant to abatement the nuisance was signed on March 10, 2011. *Id.*, 77. After the 2011 revised warrant to abatement the nuisance was signed, a “massive clean-up” began that “included 77 tons of solid waste including numerous ‘junk vehicles’ (as that term is defined in state law) that were removed primarily by Defendant Anderson.” *Id.*, 78.

“Despite this clean-up more junk vehicles were either revealed by the clean-up or arrived at the [property] as the clean-up progressed.” *Id.* On May 18, 2011, a State Trooper determined that 39 vehicles remaining on the property satisfied at least 3 of the 4 criteria found in RCW 46.55.010 that determine whether a vehicle is a junk vehicle. CP 129, 78.

In February 2012, the superior court issued a revised warrant to abate the nuisance for the removal of “remaining solid waste, junk vehicles and vehicle hulks.” *Id.*, 79. Some 221 vehicles or vehicle hulks were removed from the property by Anderson. *Id.* In addition, approximately 175 tons of solid waste was removed from the property by a private firm, Peninsula Recycling and Auto Wrecking. *Id.*

After this second cleanup effort, the County consented to Anderson leaving on the property “approximately 110 to 120 items, some of which, from the viewpoint of the County, amount to solid waste unlawfully

disposed at the property.” *Id.* In the current phase of this public nuisance case, Anderson claimed that in 2017 a motion that this consent amounted to an “exemption” of these items from abatement. CR 157 and CR 179. Anderson’s 2017 motion to “except” was denied on December 15, 2017 (CR 193) and is not listed in his notice of appeal or discussed in the appellant’s brief.

D. In November 2012, the Superior Court Issued an Amended Permanent Injunction with Continuing Jurisdiction that Anderson Did Not Appeal.

In April 2012—despite the 2011 and 2012 nuisance abatements of over 200 tons of solid waste including hundreds of junk vehicles—the County learned that Anderson was returning junk vehicles to the property in violation of the March 2011 permanent injunction. *Id.* This was the result of a complaint made to the County Public Health Department that on April 21 and 22, 2012 that Anderson was towing vehicles on to the property. CP 107, 19. The superior court held Anderson in contempt for this April 2012 activity. CP 129, 80.

The amended permanent injunction was issued on November 2, 2012, and gave the superior court continuing jurisdiction. *Id.*, 83. The 2012 amended permanent injunction enjoined Anderson from the following activities at the property: (1) Crushing or parting motor vehicles; (2) processing scrap metal; and, (3) “depositing or leaving at or

bringing or hauling” to the property “any solid waste, including but not limited to junk vehicles, vehicle hulks, vehicle parts, tires and/or any other personal property which fits the statutory definition of solid waste.” *Id.*, 83. The superior court found as a fact that “it is necessary to enter a permanent and mandatory and prohibitive injunction to ensure that such activity does not re-occur” and that the County “has a well-grounded fear that it is more likely than not that unlawful activity regarding solid waste and junk vehicles will re-occur” at the property. *Id.*, 82.

E. Over Ninety Junk Vehicles Were on Anderson’s Property After the Agreed “Run and Drive” Test for Junk Vehicles.

In 2014 and 2015, the County Public Health Department received new complaints that Anderson was bringing more solid waste to the property and started the process that resulted in two inspections in May 2017 and one in September 2017. CP 171, ¶¶22 and 32. On May 3, 2017 and May 23, 2017, employees of the County’s Public Health Department inspected the property and tested 56 vehicles to determine whether they qualify as junk vehicles under RCW 46.55.230 and JCC 8.10.100. *Id.*, ¶35. Three days later, the agreed order was entered by the superior court that contained the agreed “run and drive” test. CP 155.

On September 13, 2017, employees of the County’s Public Health Department again inspected the property. CP 171, ¶38. That day,

Anderson and the County employees performed the agreed “run and drive” test on vehicles at the property. *Id.*, ¶40. The County took video of every attempt Anderson made to get vehicles to run. *Id.* There were many vehicles that obviously would not run, so Anderson elected not to try. *Id.* A list of the vehicles Anderson got to run are listed in Exhibit 7 to the November 14, 2018 declaration of Roger Parker, a County Public Health employee. *Id.*, ¶52. Mr. Parker has expertise in determining junk vehicles under state law and the JCC (*Id.*, ¶¶5-19), and opined that over 90 junk vehicles were brought on to the property after the 2012 amended permanent injunction issued. *Id.*, ¶¶48-54.

On January 26, 2018, the superior court found that the “solid waste brought on to the Subject Property since March 27, 2012 includes but is not limited to construction or demolition waste, propane tanks, riding mowers, tanks of unknown use and junk vehicles (including boats).” CP 342 677. *See also* CP 341, 669-70. The superior court also found that ninety-eight vehicles were junk vehicles under state law and the JCC. CP 342, 678 (Findings of Fact 10 and 13) and 685-695 (Exhibit 11).

F. Anderson Violated the 2012 Amended Permanent Injunction.

After the 2012 nuisance abatement, on March 12, 2012, County Public Health Department employee Allison Petty prepared a photo log of the items left on the property after the nuisance abatement. CP 107, 19-

68, CP 171, ¶33. Ms. Petty's 2012 photo log identifies photos and other information about the vehicles remaining on the property using a number for each vehicle. CP 107, 19-68. Mr. Parker, the Public Health Department employee who did the 2017 inspections, reviewed Ms. Petty's photo log and determined that there were many items of solid waste, including junk vehicles. *Id.* Mr. Parker continued to use the same numbers for vehicles as Ms. Petty that remained on the property five years later (CP 171, ¶¶42-43 and Exhibits 4 and 5), then added new numbers for vehicles added since the Petty photo log was created. *Id.*, ¶¶42-43 Exhibits 5 and 6. A detailed list of vehicles removed from the property since Ms. Petty's photo log was created is in Paragraphs 60 to 148 of Mr. Parker's November 14, 2018 declaration. CP 171, ¶46. Based on the September 13, 2017 inspection and his analysis, Mr. Parker determined that over 90 junk vehicles were brought on to the property between March 19, 2012 and September 13, 2017. *Id.*, ¶¶41-47. Mr. Parker prepared a summary of voluminous records that listed all the vehicles he determined to be junk vehicles in Exhibit 10 to his January 23, 2018 declaration. CP 332, Exhibit 10. Mr. Parker also prepared a summaries of voluminous records which included the substance of Anderson's statements in over 100 vehicle-by-vehicle declarations he filed in December 2017. CP 332 Exhibits 11 and 12.

In its January 26, 2018 order of contempt (CP 341), the superior court found as a fact that:

Based on the May 3, 2017, May 23, 2017 and September 13, 2017 inspections by Environmental Health, as reflected in the Declaration of Roger Parker filed on November 14, 2017, solid waste on the SP has been brought onto the SP after March 27, 2012 in violation of the prohibition in the Amended Permanent Injunction of: “Depositing or leaving at or bringing or hauling to the parcel known as APN 901-112-013 any solid waste, including but not limited to junk vehicles, vehicle hulks, vehicle parts, tires and/or any other personal property which fits within the statutory definition of solid waste.”

CP 341, 669. The superior court also found that: “Competent evidence was presented by the County in support of its contention that Anderson has intentionally violated the 2012 Amended Permanent Injunction.” *Id.*, 670. Based on its findings of fact, the superior court held Anderson in contempt of the 2012 amended permanent injunction. *Id.*, 671.

G. On December 15, 2017 the Superior Court Entered an Order Denying Anderson’s Motion to Declare the Property Non-Conforming Use.

The complaint does not allege zoning violations. CP 1. However, Anderson litigated a defense to zoning laws by trying to establish a legal non-conforming use. CP 158, 159, 162. On December 15, 2017, the superior court held that Anderson’s claim of legal non-conforming use had been rejected on November 2, 2012 in the 2012 amended permanent injunction. CP 194, 219. Specifically, the December 15, 2017 order determined the doctrine of collateral estoppel bars

relitigation of the non-conforming use issue because the superior court held in its 2012 amended permanent injunction that:

- After considering evidence of non-conforming use presented by Anderson at that time, the superior court held that Anderson had been operating an illegal and unlawful scrap processing facility and wrecking yard at the property until the time the permanent injunction was issued. *Id.*, 220.
- Anderson “cannot be and is not ‘grandfathered’ as a legal non-conforming use for scrap processing or as a wrecking yard at the property because those uses occurring at or upon the property have never been legal, lawful or licensed by the State of Washington. *Id.*, 219-220.
- The nature of Anderson’s business at the property was not a merely a “vehicle storage area.” *Id.*, 220.

The superior court also considered the evidence presented by Anderson in his 2017 motion which consisted of Anderson’s “own statements (which are contradicted by his prior admissions, including those under oath) and copies of aerial photographs allegedly showing vehicles have been stored on the SP since 1981.” *Id.*, 221. The superior court held that the aerial photographs are just as consistent with the superior court’s prior holdings as they are with Anderson’s claim of legal

non-conforming use. *Id.* Accordingly, the superior court held the aerial photos do not tend to prove Anderson’s claim. *Id.* The superior court concluded that “Anderson’s prior admissions, the history of the litigation, and the admissions in the 2017 Anderson Declaration, prove Anderson is not entitled to a legal non-conforming use of a ‘vehicle storage yard.’” *Id.*

H. Before the County Could Abate the Nuisance Caused by Anderson’s Violation of the 2012 Amended Permanent Injunction, Anderson Removed All 98 Junk Vehicles from the Property.

After he filed this appeal and after the warrant to abate the nuisance was issued, Anderson “removed all the offending vehicles” from the property. Appellant’s Brief, 5, 11-12. “Exhibits 11/12” refers to Exhibits 11 and 12 of the January 22 Roger Parker Declaration. CR 332. Exhibit 11 is the list of junk vehicles that either failed the agreed “run and operate” test or were so clearly inoperable that Anderson did not want them tested. CR 342, 681, 685-95; CR 332, ¶¶ 14, 18, Exhibit 11.

IV. ARGUMENT

A. Standards of Review.

1. Review of the superior court’s findings of fact and conclusions of law is limited to determining whether the superior court’s findings are supported by substantial evidence and, if so, whether the findings in turn support the conclusions of law. *Willener v. Sweeting*, 107 Wash. 2d 388, 393, 730 P.2d 45, 49 (1986);

Landmark Dev., Inc. v. City of Roy, 138 Wash. 2d 561, 573, 980 P.2d 1234, 1240 (1999). Substantial evidence is defined as a quantum of evidence sufficient to persuade a rational fair-minded person the premise is true. *Sunnyside Valley Irr. Dist. v. Dickie*, 149 Wash. 2d 873, 879–80, 73 P.3d 369, 372 (2003). If the standard is satisfied, a reviewing court will not substitute its judgment for that of the superior court even though it might have resolved a factual dispute differently. *Id.*

2. Questions of law are reviewed de novo. *Id.*
3. Whether collateral estoppel applies to bar relitigation of an issue is reviewed de novo. *Christensen v. Grant Cty. Hosp. Dist. No. 1*, 152 Wn.2d 299, 305, 96 P.3d 957 (2004).
4. Interpretation of constitutional provisions, statutes, and court rules are questions of law and are reviewed de novo. *Optimer Int'l, Inc. v. RP Bellevue, LLC*, 170 Wash. 2d 768, 771, 246 P.3d 785, 787 (2011).
5. Whether an ordinance is constitutional is a question of law and requires de novo review. *Cannabis Action Coal. v. City of Kent*, 183 Wash. 2d 219, 225–26, 351 P.3d 151, 154 (2015); *Weden v. San Juan Cty.*, 135 Wash. 2d 678, 693, 958 P.2d 273, 280 (1998);

State Dep't of Ecology v. Wahkiakum Cty., 184 Wash. App. 372, 376–77, 337 P.3d 364, 366–67 (2014).

B. Anderson's Assignment of Error 1 Should Not Be Reviewed Because He Failed to Appeal a Prior Final Order Denying His Motion to Declare Non-Conforming use (CR 194).

Anderson only appealed the January 26, 2018 orders holding him in contempt for again violating the 2012 amended permanent injunction (CR 341) and requiring the County Clerk to issue a warrant to abate the nuisance that condoned, created or maintained the nuisance by violating the 2012 amended permanent injunction (CR 342, 678). *See* Notice of Appeal transmitted to the Court of Appeals on February 27, 2018 at 1. The superior court also entered an order on December 15, 2017 denying Anderson's motion to declare non-conforming use (CR 194). Anderson did not appeal the December 15, 2017 order. *Id.* However, Anderson's Assignment of Error 1 seeks to reverse that order. Appellant's Brief, 2-3. The December 15, 2017 order was based, in part, upon application of the doctrine of collateral estoppel. CR 194, 220-221. But Anderson never discussed collateral estoppel in his superior court reply brief. (CR 179).

The Rules of Appellate Procedure (RAP) require that a party seeking review must timely file a notice of appeal that, among other things, *must* “designate the decision or part of decision that the party wants reviewed” and “should attach to the notice of appeal a copy of the signed order or judgment from which the appeal is made.” RAP 5.3(a)

(emphasis added). RAP 2.4(a) states an appellate court “will, at the instance of the appellant, review the decision or parts of the decision designated in the notice of appeal.” Anderson did not designate the order denying his motion to declare non-conforming use or any part of it and failed to attach the order to his notice of appeal. Anderson’s notice of appeal attaches two orders (CR 341 and CR 342) but does not attach the order denying his motion to declare non-conforming use. Anderson’s notice of appeal mentions nothing about appealing the December 15, 2017 order denying he has a legal non-conforming use. *See* Notice of Appeal, 1.

The December 15, 2017 order does not prejudicially affect the decisions designated in the notice (RAP 2.4(b)) because legal non-conforming use is not a defense to violation of a permanent injunction (CR 341) or abatement of public nuisance (CR 342). Where a nuisance exists, it is not excused by the otherwise lawful quality of the business or structure causing nuisance. *Tiegs v. Watts*, 135 Wash. 2d 1, 13, 954 P.2d 877, 884 (1998); *MJD Properties, LLC v. Haley*, 189 Wash. App. 963, 970, 358 P.3d 476, 480 (2015).

Since Anderson did not comply with the requirements of RAP 5.3(a), the Court should apply RAP 2.4(a) and affirm the superior court’s December 15, 2017 order denying his motion to declare non-conforming use (CR 194).

C. The Superior Court Correctly Held that Anderson Is Not Entitled to A Declaration of Non-Conforming Use.

If the Court decides not to affirm on the basis of Anderson’s failure to appeal related to the December 15, 2017 Order (CR 194), the Court

nevertheless should affirm because the superior court correctly decided the motion on the basis of collateral estoppel and a failure of proof.

1. The Superior Court Correctly Applied the Doctrine of Collateral Estoppel.

In its December 15, 2017 order, the superior court correctly applied all the elements of collateral estoppel (CR 194, 220-221) to hold that Anderson’s claim of non-conforming use failed. In the 2012 amended permanent injunction, the superior court held that Anderson had been operating an illegal and unlawful scrap processing facility and wrecking yard at the property until the time the permanent injunction was issued. CP 194, 220. The 2012 amended permanent injunction also held that Anderson “cannot be and is not ‘grandfathered’ as a legal non-conforming use for scrap processing or as a wrecking yard at the property because those uses occurring at or upon the property have never been legal, lawful or licensed by the State of Washington. *Id.*, 219-220.² “An order of injunction shall bind every person and officer restrained from the time he or she is informed thereof.” RCW 7.40.120.

An appeal will lie from the granting of an injunction. *Greyhound Lines, Inc. v. City of Tacoma*, 81 Wash. 2d 525, 527, 503 P.2d 117, 118 (1972). Anderson did not appeal the 2012 amended permanent injunction,

² Non-conforming use previously had been litigated by Anderson in 2011 with the superior court coming to the same conclusion quoted here when the 2011 permanent injunction was issued on March 9, 2011. CP 165, Exhibit 5, 6.

so its results are binding upon him. *State ex rel. Carroll v. Simmons*, 61 Wash. 2d 146, 149, 377 P.2d 421, 423 (1962). Since the nature of Anderson’s business at the property was decided in the order which granted the amended permanent injunction (CR 129, 2³) and Anderson did not timely appeal, Anderson is precluded from litigating that again. *Brighton v. Washington State Dep’t of Transp.*, 109 Wash. App. 855, 861, 38 P.3d 348 (2001).

Anderson never discussed collateral estoppel in his 2017 superior court reply brief. (CR 179). At the hearing on January 26, 2018, in response to a question from the court about collateral estoppel, counsel for Anderson admitted that while Anderson only considered his selling of parts at the property occasional and not wrecking, “but the Judge did.” RP 12. And, when the court followed up immediately after that—“Right. Okay. Well the Judge found that”—counsel for Anderson responded by saying, “Right.” *Id.* Anderson does not discuss the superior court’s application of the doctrine of collateral estoppel in the appellant’s brief.

The doctrine of collateral estoppel bars relitigation of an issue after the party against whom the doctrine is applied has had a full and fair opportunity to litigate his or her case. The purpose of the doctrine is to promote the policy of ending disputes. The party asserting the doctrine

³ Finding of Fact 7: Anderson “has never been licensed by the state of WA as a scrap processor or a wrecking yard at any address in Jefferson County at any time.”

must prove: (1) the issue decided in the prior adjudication is identical with the one presented in the second action; (2) the prior adjudication must have ended in a final judgment on the merits; (3) the party against whom the plea is asserted was a party or in privity with the party to the prior adjudication; and, (4) application of the doctrine does not work an injustice. *Id.* at 860. All these requirements are met. Application of the doctrine of collateral estoppel would not work an injustice here as Anderson has had an opportunity to present his evidence and his arguments on the issue. *Hanson v. City of Snohomish*, 121 Wash. 2d 552, 563, 852 P. 2d 295, 301 (1993). *See also* Collateral estoppel (issue preclusion)—Avoiding injustice, 14A Wash. Prac., Civil Procedure § 35:36 (2d ed.). Anderson had a full and fair opportunity to litigate these issues—three times—with the first time having been in 2011. CP 165, Exhibit 3, 4, & 5, CP 129, 81 and CP 194. Accordingly, the superior court’s order denying Anderson’s motion to declare non-conforming use should be affirmed.

- 2. The Superior Court Correctly Held that Anderson’s Prior Admissions, the History of the Case, and the Evidence Presented Do Not Satisfy Anderson’s Burden to Prove Prior Legal Non-Conforming Use.**
 - a. Anderson Had the Burden of Proving Prior Legal Non-Conforming Use.**

A landowner seeking to establish a prior legal non-conforming use must show that (1) *the use began before the applicable zoning ordinance was adopted*, (2) *the use was lawful before the ordinance was adopted*, (3) the landowner did not abandon the use after the ordinance was adopted, and (4) the use was continuous, not occasional or intermittent. *Jefferson Cty. v. Lakeside Indus.*, 106 Wash. App. 380, 385, 23 P.3d 542, 544, *amended*, 29 P.3d 36 (Wash. Ct. App. 2001); *N./S. Airpark Ass'n v. Haagen*, 87 Wash. App. 765, 772, 942 P.2d 1068, 1071 (1997). Discussed below, Anderson failed the prior non-conforming use test.

b. Until 2017, Anderson's Claimed Non-Conforming Use Was for an "Auto Parts and Auto Repair Place of Business."

Anderson's "auto parts" business, started in 1981 that continues to this day, was explained by in Anderson's February 10, 2011 declaration:

I hardly ever buy a vehicle that runs and drives. However, I am well aware of the value of vehicle parts and I know how to make money selling them. It has been my understanding that if a vehicle is transferred in my name, I can sell parts from that vehicle.

CP 165, Exhibit 4, 14:7-9. Attachment 12 to this 2011 declaration is riddled with admissions about parts. *Id.*, Attachment 12. Lest there be any doubt that Anderson's "auto parts" business has continued in this fashion to this day, consider Anderson's 2017 declarations:

I also have been given or bought or traded work or vehicles for inoperable motors, vehicles, boats and other mechanical constructs that I believe I can repair or make operational or restore

[as in classic cars] and sell or trade them. *I have always put these vehicles in my name so I can legally sell parts from them or sell the repaired vehicle without any later hassle. Along with the vehicles I have collected working accessories such as tires, batteries, and other parts.*

With my mother's permission I continued to use her property at 890 Old Hadlock Road primarily for storage of repairable vehicles and boats *and parts vehicles and other useful materials*, although I continued to occasionally do a large project there.

CP 159, 100 (emphasis added). And:

I put most of the vehicles I trade or buy in my name. Sometimes I keep the title provided by the seller and act as an interim owner *while I dispose of the vehicle. On rare occasions, someone will come by needing a part I have, and if I don't need it, I will sell it to him.* Some of the vehicles I obtain are *parts vehicles* used in rebuilding collector vehicles for old car hobbyists.

CP 162, 112 (emphasis added). Anderson is a "vehicle wrecker" because he is "*deals in secondhand vehicle parts.*" RCW 46.80.010(5) (emphasis added). At the time of the January 26, 2018 hearing, vehicle parts, parts cars and parts boats were kept on the property. CP 342, 688 (Vehicles 98 & 124), 692 (Vehicle 160), 693 (Vehicle 171), 694 (Vehicle 187). Anderson says he "believed he had not crossed the line in to vehicle wrecker territory." Appellant's Brief, 19. But "he readily acknowledged that he occasionally *sold parts from his parts vehicles* and collections to neighbors and other rebuilders." *Id.* (emphasis added.) Anderson *does* deal in secondhand vehicle parts, so he is a vehicle wrecker. Anderson's

business is now and has been since at least 1981 an illegal wrecking yard. “It is unlawful for a vehicle wrecker to keep a vehicle or any integral part thereof in any place other than the established place of business, designated in the certificate issued by the department, without permission of the department.” RCW 46.80.130(1).

Anderson’s made other admissions over the years to the same effect that are *not* consistent with a “vehicle storage use” prior to 1992, when zoning took effect:

- 2007 Sworn Responses to Discovery: “My business *is* repairing vehicles, *selling used parts*, and when I had a Hulk Hauling license, *I hauled cars for scrap.*” CP 165, ¶12, Exhibit 7.
- April 2008 Anderson Affidavit: “My business and the way I support myself and my family *is* through *dealing in scrap metal and automobile repairs and parts.*” CP 165, ¶11, Exhibit 6 at 3 (emphasis added). “I operate Michael’s Hulk Hauling as a metal recycling business. I also repair vehicles that have sustained damage *or which have been in wrecks.*” *Id.*, 2 (emphasis added).
- 2011 Anderson Declaration: “I have repaired peoples’ vehicles *and sold automobile parts from 860 and 890 Old Hadlock Road since 1975.* CP 165, ¶9, Exhibit 4, 2. “I also acknowledge that *for more than 35 years* I have been engaged in the business of

repairing motor vehicles, *including the disassembly and sale of parts from those motor vehicles.*” *Id.*, 11 (emphasis added).

The chart below compares Anderson prior and current non-conforming use arguments:

Anderson’s Non-Conforming Use Claim—Then and Now	
2011 Opposition to Summary Judgment	2018 Appellant’s Brief
<p>“It is the position of Defendant Michael Anderson that his use of his property on Old Hadlock Road in Jefferson County constitutes an existing non-conforming use. <i>He has used that property, on which he had lived, for more than 35 years as an auto parts and auto repair place of business.</i>”</p> <p>CP 165, ¶8, Exhibit 3 (emphasis added).</p>	<p>Anderson “argues that the legal non-conforming use of vehicle storage yard, which was the <i>primary use</i> of the property since 1984 when he moved his repair and rebuild business to another location, CP 159, should be allowed to continue as described in Jefferson County Code 18.20.280.”</p> <p>Appellant’s Brief, 13 (emphasis added).</p>
2011 Anderson Declaration	2017 Anderson Declaration
<p>“I freely acknowledge that I am the owner of the real property located at 890 Old Hadlock Road. I also acknowledge that <i>for more than 35 years I have been engaged in the business of repairing motor vehicles, including the disassembly and sale of parts from those motor vehicles.</i> I have always attempted to comply with applicable rules and regulations. I have been licensed to conduct business since January 1, 1981. <i>That business has been conducted on the property at 890 Old Hadlock Road since that time, and without interruption.</i>”</p>	<p>“When I was 21 I took out a business license and started Michael’s Custom Rebuild on January 1, 1981 while I was still living at my mother’s [890 Old Hadlock Road]. I worked on other people’s cars and bought or traded for broken down vehicles that <i>I sold parts from or repaired and sold or used myself.</i>”</p> <p>CP 159, 100 (emphasis added).</p> <p>“With my mother’s permission I continued to use her property at 890 Old Hadlock Road <i>primarily for storage of repairable vehicles and boats and parts vehicles and other useful materials,</i></p>

CP 165, ¶9, Exhibit 4, 11 (emphasis added).	<i>although I continued to occasionally do a large project there.</i> <i>Id.</i> (emphasis added).
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Anderson’s recent attempts to reshape the alleged non-conforming use at the property into a “vehicle storage yard” since 1984 is rubbish.

c. The Evidence Anderson Submitted in 2017 Does Not Prove Prior Legal Non-Conforming Use, Especially Considering the Burden of Proof Was Andersons, He Made Conflicting Admissions and *Two* Prior Final Orders on the Topic Anderson Failed to Appeal Went Against Him.

Anderson “argues that the legal non-conforming use of vehicle storage yard, which was the *primary use* of the property since 1984 when he moved his repair and rebuild business to another location, CP 159, should be allowed to continue as described in Jefferson County Code 18.20.280.” Appellant’s Brief, 13 (emphasis added).

At the time of the January 26, 2018 hearing, vehicle parts, parts cars and parts boats were kept on the property. CP 322, ¶18, Exhibit 11; CP 342, 688 (Vehicles 98 & 124), 692 (Vehicle 160), 693 (Vehicle 171), 694 (Vehicle 187).

Even in the appellant’s brief, Anderson admits he “buys or trades or is given vehicles that are usually not road worthy,” “a potentially antique or collector vehicle that will have value once it is restored” or “an inoperable vehicle that is missing a part or in

need of repair that will be worth the effort to make operable again.” Appellant’s brief, 8. He also admits in that brief that he “has parts cars.” *Id.*

The evidence submitted in support of Mr. Anderson’s 2017 motion are his own statements and aerial photographs. CP 159, CP 162.

However, one of Anderson’s 2017 declarations says the property was used “primarily for storage of repairable vehicles and boats *and parts vehicles and other useful materials, although I continued to occasionally do a large project there.*” CP 159, 100 (emphasis added). So, Anderson’s illegal wrecking yard use continues. Anderson’s 2017 statements (CP 159, 99-101) are best understood as an attempt to repackage his illegal wrecking yard use into a “vehicle storage yard use,” as the continuum of his admissions discussed above show.

Copies of aerial photographs allegedly showing vehicles have been stored on the property since 1981 (CP 159, 103-108) are just as consistent with the property being used for an illegal scrap processing facility or an illegal wrecking yard, as they are with Mr. Anderson’s new claim that the property was really the “Anderson Storage Yard.” CP 194, 221. That is why the aerial photos are not proof that the property only was used as a “storage area.” *Id.* Because this evidence does not make it more likely that the property was used only to store vehicles, the aerial photographs

are not relevant. ER 401.⁴ To be relevant, evidence must: (1) tend to prove or disprove the existence of a fact; and, (2) that fact must be of consequence to the outcome of the case. *State v. Weaville*, 162 Wash. App. 801, 818, 256 P. 2d 426, 435 (2011). Since the aerial photos are just as consistent with the prior decisions of the superior court that Anderson operated an illegal scrap processing facility and an illegal wrecking yard as they are with Anderson's claim of vehicle storage only, the evidence does not tend to prove Anderson's non-conforming use.

Anderson contends that the prior superior court judge, Judge Crad Verser, "*acknowledged by omission, that is by not including 'vehicle storage yard' in his list of activities that could not continue at SP, that storage yard is, therefore, a vested legal non-conforming use.*" Appellant's Brief, 21 (emphasis added). *See also* Appellant's Brief, 3 & 17. But Judge Verser *already* had decided the year before the non-forming use issue against Anderson in 2011, when he entered the 2011 abatement and permanent injunction order. CR 165 Exhibit 5 (Conclusions of Law E-G). And, Anderson admits that Judge Verser's allowing Anderson to keep the items was based on the consent of the County. Appellant's Brief, 17. The actual finding of fact says, the County consented to Anderson leaving on

⁴ "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." *Id.*

the property “approximately 110 to 120 items, *some of which, from the viewpoint of the County, amount to solid waste unlawfully disposed at the property.*” CP 129, 79. Anderson previously claimed he was entitled to an “exemption” that let him keep vehicles still on the property five years later. The superior court disagreed on December 15, 2017. CR 163.

Given that Anderson had the burden of proof on prior legal non-conforming use (*see* Section IV.C.2.a, above), and the superior court’s *two* prior, final, and un-appealed decisions that the property was used as an illegal scrap processing facility and an illegal wrecking yard, Anderson’s attempt to repackage the use of the property into a “vehicle storage yard” prior to the 1992 zoning is preposterous. CP 194, 221.

At best for Anderson, his 2017 evidence shows that he stopped *crushing vehicles* on the property *after* the 2012 amended permanent injunction was issued. Even if he cleaned up his act in 2012 and *only* stored vehicles on the property starting then—which even Anderson’s 2017 declaration does not claim—that would not prove that the vehicle storage yard use started *prior* to the 1992 zoning. Accordingly, the Court should affirm the superior court’s December 15, 2017 order denying Anderson a declaration of non-conforming use.

D. Since Anderson Removed All 98 Junk Vehicles, that Moots His Appeal of the January 26, 2018 Requiring Issuance of a Warrant to Abate the Nuisance.

After the warrant to abate the nuisance was issued, Anderson “removed all the offending vehicles” from the property, namely those “listed in Exhibit 11/12.” Appellant’s Brief, 5, 11-12. Exhibit 11 is the list of junk vehicles that either failed the agreed “run and operate” test or were so clearly inoperable that Anderson did not want them tested. CR 342, 681, 685-95; CR 332, ¶¶ 14, 18, Exhibit 11. Thus, there no longer any need for the order directing issuance of a nuisance warrant. An issue is moot if an appellate court cannot provide effective relief. *City of Sequim v. Malkasian*, 157 Wash. 2d 251, 258, 138 P.3d 943, 947 (2006); *In re Stevens*, 191 Wash. App. 125, 133, 361 P.3d 252, 255 (2015).

Accordingly, the appeal of the order requiring issuance of a warrant for a nuisance abatement (CR 342) should be dismissed as moot.

E. Under RCW 7.21.030(2)(c), and its Inherent Power, the Superior Court had Authority for the Abatement Order.

If the Court decides not to dismiss as moot Anderson’s appeal of the order requiring issuance of a warrant for a nuisance abatement (CR 342), the court should affirm the order because the superior court had authority to issue the order pursuant to RCW 7.21.030(2)(c) and its inherent authority. The January 26, 2018 order requiring issuance of a warrant to abate a nuisance (CR 342), found as a fact that: “The

Defendant, Michael Anderson has created, condoned and worsened the nuisance by violating the terms of the 2012 Amended Permanent Injunction.” CR 342, 678. In that order, Anderson was ordered to abate the conditions at the property “that make it a public nuisance.” CR 342, 680.

The appellant’s brief claims that the superior court did not have grounds to order junk vehicles removed under the Jefferson County Code and, “Instead a county or municipality must use the public nuisance route, with more stringent safeguards for the property owner.” Appellant’s Brief, 31. But this *is* a public nuisance case—filed in 2006—that seeks to abate a public nuisance as defined by RCW 7.48.010, RCW 7.48.120 and RCW 9.66.010. CP 1, 6. And, in 2008, the superior court determined Anderson’s property was a public nuisance. In 2011 and 2012, Anderson was enjoined in connection with that public nuisance. Under both RCW 7.21.030(2)(c) and its inherent power to enforce the 2012 amended permanent injunction, the superior court was had the legal authority to order the abatement of the junk vehicles.

1. Under RCW 7.21.030(2)(c), the Superior Court had Authority for the Abatement Order.

“If the court finds that the person in contempt of court is yet within that person’s power to perform, the person may find the person in

contempt of court and impose one of more of the following remedial sanctions: ... (c) An order designed to ensure compliance with a prior order of the court.” RCW 7.21.030(2)(c). In the January 26, 2018 contempt order, the superior court found as a fact both the violation of the 2012 amended permanent injunction (CP 341, 669-71) and it was within Anderson’s power to comply. CP 341, 668. It was within the superior court’s power under RCW 7.21.030(2)(c) to require the abatement of junk vehicles for violation of its 2012 amended permanent injunction.

2. Under its Inherent Power, the Superior Court had Authority for the Abatement Order.

“The court may use its inherent contempt power to coerce compliance with its lawful order and is not limited in its exercise of this power by the punishments prescribed by the civil contempt statute.” *Yamaha Motor Corp., U. S. A. v. Harris*, 29 Wash. App. 859, 866, 631 P.2d 423, 428 (1981); *Burke & Thomas, Inc. v. Int’l Org. of Masters, Mates & Pilots, W. Coast & Pac. Region Inland Div.*, Branch 6, 92 Wash. 2d 762, 776, 600 P.2d 1282, 1290 (1979). It was within the superior court’s inherent power to require the abatement of junk vehicles for violation of its 2012 amended permanent injunction.

Accordingly, if the Court reaches the review of the order requiring issuance of a warrant to abate the nuisance, it should affirm.

F. State Statutes Do Not Preempt Jefferson County’s Solid Waste Regulations.

The Washington constitution grants every local government the power to “make and enforce within its limits all such local police, sanitary and other regulations as are not in conflict with general laws.” Wash. Const. art. XI, § 11. The purpose of the Jefferson County Solid Waste Code, Chapter 8.10 JCC is “to protect the public health and the environment, and promote the safety and welfare of the citizens of Jefferson County.” JCC 8.10.010. “It is expressly the purpose of these rules and regulations to provide for and promote the health of the general public . . .” *Id.* An ordinance is valid under Wash. Const. art. XI, § 11 unless: (1) the Ordinance conflicts with some general law; (2) the Ordinance is not a reasonable exercise of the County’s police power; or (3) the subject matter of the Ordinance is not local. *Weden v. San Juan County*, 135 Wash.2d 678, 692–93, 958 P.2d 273, 280 (1998).

The legislature has placed the “primary responsibility on county and city governments to assume primary responsibility for solid waste management and to develop and implement aggressive and effective waste reduction and source separation strategies.” RCW 70.95.010(6)(c). Indeed, the very purpose of Chapter 70.95 RCW is to assign primary responsibility for adequate solid waste handling to local government,

reserving to the state, only those functions necessary to assure effective programs throughout the state. RCW 70.95.020(1).

A statute will not be construed as taking away the power of a municipality to legislate unless this intent is clearly and expressly stated. *State ex rel. Schillberg v. Everett Dist. Justice Court*, 92 Wash. 2d 106, 108, 594 P.2d 448, 450 (1979). An ordinance may be more restrictive than a state enactment so long as the statute does not forbid the more restrictive ordinance. *Seattle Newspaper–Web Pressmen’s Union v. City of Seattle*, 24 Wash.App. 462, 469, 604 P.2d 170, 174 (1979); *Lawson v. City of Pasco*, 144 Wash. App. 203, 212, 181 P.3d 896, 900 (2008), *aff’d*, 168 Wash. 2d 675, 230 P.3d 1038 (2010).

1. State Statutes Do Not Preempt the Field.

If the Legislature is silent on its intent to occupy a given field, this Court may refer to the purposes of the particular legislative enactment and to facts and circumstances upon which the statute was intended to operate. *HJS Dev., Inc. v. Pierce Cty. ex rel. Dep’t of Planning & Land Servs.*, 148 Wash. 2d 451, 477, 61 P.3d 1141, 1154 (2003). The Legislature knows how to write preemption language. *See for example* RCW 19.290.200 (“The state of Washington hereby fully occupies and preempts the entire field of regulation of scrap metal processors, recyclers, or suppliers within

the boundaries of the state.”) No such preemption language appears in Chapter 70.95 RCW or Chapter 46.55 RCW.

The Supreme Court has held that legislature did not by adopting Chapter 46.80 RCW pre-empt the field of motor vehicle wrecking yard regulation. *Lenci v. City of Seattle*, 63 Wash. 2d 664, 670, 388 P.2d 926, 931 (1964). Neither is there reason to think that by adopting Chapter 46.55 RCW, the legislature intended to pre-empt the field of for solid waste regulations addressing junk vehicles—especially not when a court has held their presence on a property to be a nuisance.

2. State Statutes Authorize Jefferson County’s Solid Waste Regulation To Be More Restrictive than the Statutes.

RCW 70.95.160 requires each county to adopt solid waste regulations. The County’s solid waste regulations are in Chapter 8.10 JCC. RCW 70.95.160 requires that the county’s solid waste regulations “shall assure that solid waste storage and disposal facilities are located, maintained, and operated in a manner so as properly to protect the public health, prevent air and water pollution, are consistent with the priorities established in RCW 70.95.010, *and avoid the creation of nuisances.*” (Emphasis added.)

RCW 7.95.160 specifically authorizes the county to have solid waste regulations that are “more stringent than the minimum functional

standards” adopted by the Department of Ecology. The minimum functional standards adopted by the Department of Ecology are in Chapter 173-304 WAC. JCC 8.10.100. Jefferson County concedes that Chapter 8.10 JCC has more stringent standards than in Chapter 173-304 WAC.

3. The Language of RCW 46.55.230 Is Language of Permission, Not Language of Preemption.

Anderson relies on RCW 46.55.230 to argue that “under state law junk vehicles **do not** fit within the statutory scheme of solid waste.” Appellant’s Brief, 26 (emphasis in original). But Chapter 46.55 RCW deals with towing and impoundment. And, RCW 46.55.230(1) states: “*Notwithstanding any other provision of law, any law enforcement officer having jurisdiction, or any employee or officer of a jurisdictional health department acting pursuant to RCW 70.95.240, or any person authorized by the director shall inspect and may authorize the disposal of an abandoned junk vehicle.*” (Emphasis added.) This language *permits* law enforcement and health departments to authorize the disposal of an abandoned junk vehicle. It does not *preempt* a County’s from adopting more stringent solid waste regulations as authorized by RCW 7.95.160. Nor does it prohibit a court from finding as a fact that junk vehicles on a particular property constitute a public nuisance.

To be sure, RCW 46.55 uses the words “abandoned junk vehicle.” But just as Chapter 46.55 RCW defines “junk vehicle” in RCW 46.55.010, as the appellant’s brief itself shows (Appellant’s Brief, 26), that section also defines “abandoned vehicle” in a way that makes sense for what Chapter 46.55 RCW regulates—towing and impoundment. “‘Abandoned vehicle’ means a vehicle that a *registered tow truck operator has impounded* and held in the operator’s possession for one hundred twenty consecutive hours.” RCW 46.55.010(1) (emphasis added).

In this case, the statutory definition of junk vehicle in RCW 46.55.010(5), the broader definition of junk vehicle in JCC 8.10.100 and the agreed “drive and run” test were used to determine that over 90 junk vehicles were brought on to the property *in violation of the 2012 amended permanent injunction*. CP 171, ¶¶32-41. And, for the abatement order itself, the court found as a fact that Anderson “has created, condoned and worsened the nuisance *by violating the terms of the 2012 Amended Permanent Injunction*.” CP 342, 678 (emphasis added). Preemption does not apply and this Court should affirm all the appealed orders.

G. The County Is Entitled to Attorney’s Fees for Defending the Injunction on Appeal.

RCW 7.21.030(3) states: “The court may, in addition to the remedial sanctions set forth in subsection (2) of this section, order a

person found in contempt of court to pay a party for any losses suffered by the party as a result of the contempt and any costs incurred in connection with the contempt proceeding, *including reasonable attorney's fees.*" Attorney's fees were ordered by the superior court as part of its remedial sanction for violating the 2012 amended permanent injunction.

V. CONCLUSION

Anderson has not challenged any finding of fact on appeal—all the assignments of error are laid out as errors of law. Appellant's Brief, 2. Accordingly, all the findings of fact are verities on appeal. Even if the findings of fact had been challenged on appeal, substantial evidence supports the superior court's findings of fact, including that Anderson "has created, condoned and worsened the nuisance *by violating the terms of the 2012 Amended Permanent Injunction.*" CP 342, 678 (emphasis added). The findings of fact in the January 26, 2018 orders (CP 341 and CP 342) are verities either because they are not challenged on appeal or because they are supported by substantial evidence, which, in turn, support the conclusions of law. The superior court correctly held Anderson in contempt and ordered abatement based on that contempt. Accordingly, the Court should affirm all the appealed orders.

Anderson's claim of legal non-conforming use is not a defense to violation of an injunction or an abatement of a nuisance. In any event,

Anderson failed to appeal the order denying his motion to declare non-conforming use (CP 155), the order correctly applied the doctrine of collateral estoppel based on final, but not appealed, conclusions of law in the 2012 amended permanent injunction (and the 2011 permanent injunction) and the order correctly determined that Anderson has not met his burden of proving a prior legal non-conforming use. Accordingly, if the Court reaches the issue, it should affirm the order (CP 155).

As Anderson admits, all of “the offending vehicles” have been removed, so the order requiring issuance of a warrant abatement to abate the nuisance is moot and should be dismissed. If not dismissed as moot, the order requiring a warrant for the nuisance abatement as a result of Anderson’s violation of the 2012 amended permanent injunction should be affirmed because the superior’s court findings of fact were supported by substantial evidence, which then supported the conclusions of law.

Finally, this Court should award the County reasonable attorney’s fees pursuant to RCW 7.21.030(3) as a part of the remedial sanction for Anderson’s violation of the 2012 amended permanent injunction.

RESPECTFULLY SUBMITTED this 19th day of November 2018.

Respectfully submitted,



Philip C. Hunsucker,
WSBA #48692
Chief Civil Deputy Prosecuting
Attorney for Jefferson County

CERTIFICATE OF SERVICE

I hereby certify that on the 19th of November 2018, I caused to be served the above Respondent's Brief on Behalf of Respondent Jefferson County, Washington on the following party at the following address:

Joan Best,
2072 Victoria Ave,
Port Townsend, WA 98368-7327
Email: joanbest-lawyer@earthlink.net

*Attorneys for Appellant Michael
Anderson*

By: U.S. Postal Service, ordinary first-class mail.

MICHAEL HAAS,
PROSECUTING ATTORNEY
FOR JEFFERSON COUNTY



By: _____
Philip C. Hunsucker, WSBA #48692
Chief Civil Deputy Prosecuting
Attorney Attorneys for Respondent
Jefferson County

JEFFERSON COUNTY PROSECUTING ATTORNEY'S OFFICE

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