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COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By.....

No. 309967

(Kittitas County Superior Court  
No. 11-2-00228-7)

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COURT OF APPEALS  
DIVISION III  
OF THE STATE OF WASHINGTON

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VERN THOMPSON,

Appellant,

vs.

KITTITAS COUNTY, subdivision of the  
State of Washington,

Respondent.

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**REPLY BRIEF OF APPELLANT**

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ORIGINAL

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## COUNTER STATEMENT OF FACTS

Generally, Appellant Vern Thompson (“Thompson”) disputes Respondent Kittitas County’s (“County”) characterization of this case. However, in lieu of addressing and disputing the County’s presented facts line by line, Thompson will instead present the Court with those he finds to be the most important. However, this is not to say that any facts not discussed are conceded, rather, in order to aid this Court in honing in on the facts and issues in this case, Thompson is compelled to make the following clarifications.

### 1. The County Raises Irrelevant Facts Pertaining to Prior Actions

The first sentence within the County opening Brief<sup>1</sup>, it raises an irrelevant fact. Simply, the County argues that Thompson has been subject to a nuisance violation before. Brief, at 1. This previous violation, or its outcome, was not argued or raised below, and thus is not at issue here. Nor should it have any relevant weight to the Court’s review. As such, the first paragraph of the County’s Brief under the Statement of the Case section, beginning on page 2 and continuing on to page 3, should be disregarded as irrelevant.

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<sup>1</sup> Brief of Respondent Kittitas County (“Brief”).

## 2. The County Mischaracterizes the Iammarino Report

The County also fails to present a complete report from code officer Ms. Iammarino, (Iammarino) attempting to gloss over the fact that Iammarino's designation of inoperability was simply the absence of a charged battery. Specifically, in her February 2010 report, Iammarino stated that, out of 37 vehicles on Thompson's property, "27 were licensed, but could not be started without additional components, *i.e.*, batteries." HR #12 pg. 1.<sup>2</sup> Iammarino then listed out the vehicle, its license number, its expiration, and its condition of inoperability. *Id.* However, the only designations in this latter category were merely the absence of a battery. *Id.*<sup>3</sup> No additional findings were made as to the functionality of the vehicles, as Iammarino specifically stated that she didn't bother inspecting the vehicles further. *Id.* The County also fails to mention that Thompson testified, under oath, that after Iammarino inspected his vehicles he "bought 15 batteries but [Iammarino] never came back." CP 6. In the end, these key facts are at the heart of Thompson's case—*i.e.* whether or not simply missing a battery renders a car inoperable and thus "junk" under the Kittitas County Code ("KCC" and "Code").

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<sup>2</sup> Thompson refers the Court to the County's description and citation format of the Hearing Examiner's record as contained within its Brief.

<sup>3</sup> There was only one other designation, that being the "White Pontiac" being a "hulk only."

3. The Notice of Violation and Abatement Did Not Contain any Language Pertaining to the Sanitary Conditions of Thompson's Property

Finally, the County also attempts to interject facts into evidence that did not occur. Namely, the County argues that Thompson's Notice of Violation and Abatement *did* contain a reference to the sanitary conditions of his property. Brief, at 11. This is completely false, refuted by the plain language within Thompson's Notice of Violation and Abatement ("Notice of Violation.") The Notice of Violation issued to Thompson on January 7, 2011, states in bold that Thompson was being cited for violating 1) KCC 17.08.330 for operating a "junkyard" in the AG 3 Zone; and 2) IPMC<sup>4</sup> 302.8 for parking, keeping or storing "inoperative or unlicensed motor vehicle[s]." HR # 23, p. 2. By the plain language of this notice, there was no mention of the IPMC provisions pertaining to the sanitary conditions of the property. Accordingly, any argument addressing this issue is improper.

## ARGUMENT

### I. QUESTIONS OF STATUTORY CONSTRUCTION ARE REVIEWED *DE NOVO*

Within its opening Brief, the County failed to recognize the proper standard of review for issues of **statutory construction** as they apply to the County ordinances in this case.

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<sup>4</sup> International Property Management Code.

“Statutory construction is a question of law and [the court’s] review is de novo.” *Sleasman v. City of Lacey*, 159 Wn.2d 639, 642 (2007) (citing *Cockle v. Dep’t of Labor & Indus.*, 142 Wn.2d 801, 807 (2001)).<sup>5</sup> Furthermore, it is well established that the court “interpret[s] local ordinances the same as statutes.” *Id.* (citing *Kitsap County v. Mattress Outlet*, 153 Wn.2d 506, 509 (2005)). Altogether, “[t]he authority to **interpret** statutes ultimately lies with the courts.” *New Castle Investments v. City of LaCenter*, 98 Wn. App. 224, 228 (1999) (citations omitted) (emphasis added).

Here, the County devoted a substantial part of its Brief to arguing that, because the finding of a nuisance is an issue of fact, all the County must demonstrate is that the Hearing Examiner’s decision below was supported by substantial evidence. *See generally* County’s Brief, at pgs. 9-13. However, this argument completely misunderstands an essential gravamen of Thompson’s assignments of error—that being the improper construction of words within the Code, such as the meaning of the term “inoperable” as part of the definition for finding a nuisance.

Specifically, the clear questions of law are listed in Thompson’s Opening Brief on pages 2 and 3. All of these questions pertain to statutory construction. As such, this Court conducts a *de novo* review as was the

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<sup>5</sup> *See also Vance v. XXXL Dev., LLC*, 150 Wn. App. 39, 41 (2009) (the court conducts a *de novo* review of a trial court’s legal conclusions, including its statutory interpretations).

case in *Sleasman v. City of Lacey*, 159 Wn.2d 639 (2007) wherein the Supreme Court was called upon to interpret the meaning of the word “developed” as it was used in a City of Lacey ordinance. *Id.* at 642.

According to the County, the question of “whether a vehicle is operable or inoperable...is a question of fact” in the same way that it “is a fact question...like determining if a traffic light was red or green.” Brief, at 16-17. However, County’s argument fails in the context of this case. Simply, the construction/definition of the word “inoperable” might be as all-encompassing as the County argues—including a vehicle with insufficient gas or battery—or it might have a meaning not so draconian which only includes vehicles that need professional/substantial repairs. Unlike the plain meanings affixed to individual colors,<sup>6</sup> the word “inoperable” can take meanings that range from a car merely having a flat tire to (as the County humorously pointed out) the current operating status of the Titanic.<sup>7</sup>

Indeed, because the County’s own argument that “inoperable” could apply to a century old ship wreck, while hyperbolic, nevertheless underscores the point that “inoperable” is subject to differing meanings—*i.e.* it is ambiguous. *See Cockle v. Dep’t of Labor & Indus.*, 142 Wn.2d

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<sup>6</sup> Brief, at 17.

<sup>7</sup> Brief, at 15.

801, 808 (2001).<sup>8</sup> As such, the Court should conduct a *de novo* review on this and other issues of statutory construction in this case.

## II. THE COUNTY MISINTERPRETS THE FARM EXEMPT VEHICLE PROVISION

In addressing Thompson's exempt farm vehicles, the County fails to mention key Code and statutory provisions and significantly distorts others. In doing so, the County attempts to foist a new meaning and construction of these statutes and provisions in order to substantiate its terse arguments. First, the County fails to address the proper starting point for the farm vehicle exception—the Kittitas County Code itself. Specifically, both KCC 17.08.329 and 17.08.330 contain an agricultural equipment exception which states: “[KCC 17.08.329 and 17.08.330] **shall not** be interpreted to include the normal storage or accumulation of viable and/or operable agricultural equipment.” *Id.* (emphasis added). This exception alone is enough to legitimize the storage of the eight vehicles that Thompson has accumulated and used for agricultural purposes. CP 7. Again, the County never addresses this point. Rather, the County jumps straight to RCW 46.16.010(5)(d), only to then significantly omit key language from it.

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<sup>8</sup> “When statutory language is susceptible to more than one reasonable interpretation, it is considered ambiguous.” *Cockle v. Dep't of Labor & Indus.*, 142 Wn.2d 801, 808 (2001).

Former RCW 46.16.010 only sheds light on what the exemption for storage of agricultural equipment might mean. In general, former RCW 46.16.010<sup>9</sup> mandated that “to operate any vehicle over and along a public highway of this state” an individual must obtain “a current and proper vehicle licenses and display vehicle license number plates as provided by this chapter.” *Id.* However, this statute had several exemptions, one of which is for “farm vehicles.”<sup>10</sup>

Looking at the statute as a whole, former RCW 46.16.010 defined farm vehicles for purposes of determining under what conditions a license was required. *See id.* Conversely, it is not directly applicable to the nuisance code. Nevertheless, even if the Court were to consider this licensing statute, its analysis should not begin and end with RCW 46.16.010 as the County has implied. Rather, the Court should look to how the legislature further defined “farm vehicles” which is found in RCW 46.04.181:

**"Farm vehicle" means any vehicle other than a farm tractor or farm implement which is: (1) **Designed and/or used primarily in agricultural pursuits on farms for the purpose of transporting machinery,****

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<sup>9</sup> RCW 46.16.010 was effective until July 1, 2011.

<sup>10</sup> As defined within RCW 46.16.010: Farm vehicles if operated within a radius of fifteen miles of the farm where principally used or garaged, farm tractors and farm implements including trailers designed as cook or bunk houses used exclusively for animal herding temporarily operating or drawn upon the public highways, and trailers used exclusively to transport farm implements from one farm to another during the daylight hours or at night when such equipment has lights that comply with the law.

**equipment, implements, farm products, supplies and/or farm labor thereon and is only incidentally operated on or moved along public highways for the purpose of going from one farm to another;**

RCW 46.04.181 (emphasis added). Applying this definition to the exceptions under KCC 17.08.329 and 17.08.330, Thompson clearly owns eight farm vehicles which are exempt from the County's nuisance provisions. CP 7. The record is clear that Thompson uses these vehicles to transport and store farming materials and animal feed. *Id.*

To this argument, the County has provided no rebuttal. Rather, it completely focuses on the fact that Thompson uses these farm vehicles to store feed for his animals and, surprisingly, argues that equipment used in farming endeavors ceases to be for agricultural use unless it is operated on the highways and needs the licensing exemption. However, these arguments fail on two accounts. First, the County's argument is refuted by the plain language of the Code as it specifically states that KCCs 17.08.329-.330 "**shall not** be interpreted to include the **normal storage or accumulation** of viable and/or operable agricultural equipment." *Id.* (emphasis added).

Second, even if the court were to look to state statutes, RCW 46.04.181 clearly states that a "farm vehicle" means any vehicle other than a farm tractor or farm implement which is "[d]esigned...for the purpose of

transporting machinery, equipment, implements, farm products, supplies and/or farm labor thereon and is only incidentally operated on or moved along public highways.” *Id.* There is no mention of *how often* this farm vehicle must physically move, rather there is only a limitation—*i.e.* the vehicle must only *incidentally* operate on or along public highways. *Id.* Under the County’s reasoning, a tractor that never goes on public highways and therefore isn’t incidentally operated on public highways ceases to be a farm vehicle.

Given the above, the County’s argument that the farm vehicle exemption “is for vehicle that transport, not containers that sit” is wholly unsupported by the Code and state statutes and indeed refuted by the very same language.

### **III. THOMPSON’S VEHICLES ARE NOT “JUNK” NOR IS HIS PROPERTY A “JUNKYARD” UNDER THE CODE**

Many of Thompson’s arguments pertaining to whether or not his vehicles are “junk” or his property is a “junkyard” under the code, were unaddressed by the County within its Brief. As such, only those arguments raised by the County will be addressed in this Reply. For the remaining issues, Thompson directs the Court to his Opening Brief.

Much of this case hinges on the construction and meaning of the phrase “inoperable motor vehicle” as contained within KCC 17.08.329

and KCC 17.08.330. However, nowhere within the KCCs is this phrase, or the term “inoperable,” interpreted or defined. Indeed, as demonstrated by the County itself within its Brief, the word “inoperable” is susceptible to “more than one reasonable interpretation.” *Cockle*, 142 Wn.2d at 808.

In light of this ambiguity, two principles of statutory construction must apply to determining the correct construction of the word “inoperable.” First, “[s]tatutes in derogation of the common law are *strictly construed* and no intent to change that law will be found unless it appears with clarity.” *Matthews v. Elk Pioneer Days*, 64 Wn. App. 433, 437 (1992) (citing *McNeal v. Allen*, 95 Wn.2d 265, 269 (1980)) (emphasis in original). And second, “[a] statute must be given a reasonable construction to avoid absurd consequences.” *Bellevue Fire Fighters Local 1604, Int'l Ass'n of Fire Fighters, AFL-CIO, CLC v. City of Bellevue*, 100 Wn.2d 748, 754 (1984).

Given these rules, Thompson argued that, simply because a car is missing its car battery, has a flat tire, or is out of gas, all issues that are easily remedied—the vehicle should not be deemed “inoperable” and therefore “junk” under the County Codes. Thompson’s Opening Brief, at 12. Similarly, the location where a car with a dead battery exists is not, *ipso facto*, a junkyard.

The County's sole argument on the ambiguousness of the word "inoperable" was simply to flatly deny that such an ambiguity exists. Brief, at p. 17. According to the County, the term "inoperable" has the same certain and definite meaning as the words "red or green." *Id.* Therefore, the County argues, a vehicle's operability under the terms of the code is merely whether "[i]t either starts and can move or it cannot." Brief, at p. 17.

In making this terse argument, the County has demonstrated and substantiated Thompson's contention that the word "inoperable" is ambiguous. As Thompson stated in his Opening Brief, "the County's interpretation, if strictly applied, would designate all vehicles which have flat tires, dead batteries, or out of gas as 'inoperable' and therefore 'junk.'" Thompson's Brief, at p. 12. To use the County's own words within its Brief, because a vehicle that is out of gas cannot start and thus cannot move, it is "inoperable" and therefore "junk" under the County codes. Both reason and case law dictate that this interpretation should not stand as it invites and allows for completely "absurd consequences." *Bellevue Fire Fighters Local 1604, Int'l Ass'n of Fire Fighters, AFL-CIO, CLC*, 100 Wn.2d 748 at 744 (1984).

Indeed, it was to avoid these kinds of "absurd consequences" that the Court in *State v. Smelter*, 36 Wn. App. 439, 445-446 (1983) reached its

conclusion that “inoperable” means something more than being incapable of moving. *See id.* There, the Court intimated that, so long as a vehicle is only in need of minor repairs that could be done by a layperson—such as changing a flat tire, adding fuel, or inserting a battery—said vehicle is nonetheless deemed operable and viable. *See id.*, at 444.

The County attempted to distinguish *Smelter* by arguing that it is inapposite as “[a] vehicle that has been sitting in a field since at least 2000 [] cannot be **presumed** to have gotten there under its own power nor can it be presumed that by a simple replacement it could start and move from that location under its own power.” Brief, at p. 16 (citation omitted) (emphasis added). However, this argument begs the obvious question. If a visibly intact vehicle is parked *anywhere*, regardless of the period of time, how can one presume that it *did not* arrive there under its own power absent additional information and context? The County’s argument is nonsensical and is built purely on an unsubstantiated presumption—a presumption that Thompson’s cars were transported and deposited on his property rather than driven there under their own power. Altogether, the *Smelter* case is persuasive in the fact that it demonstrates to the Court how the term “inoperable” means something more than simply being able to “start and can move or it cannot” as the County has stated. *See Smelter*, 36 Wn. App. at 444-445; Brief, at 17.

Ultimately, the County's argument is unpersuasive and fails to address several pages of legal analysis and argument within Thompson's Opening Brief. Given this fact, Thompson's argument still remains—the County's interpretation of "inoperable vehicle" cannot stand as it would lead the kinds of "absurd consequences" as described above. *Bellevue Fire Fighters*, 100 Wn.2d at 754. Rather, the standard should be more along the lines of inquiry contained within *Smelter*, which asks whether the vehicle in question is "reasonably capable of being rendered operable" by merely filling it with gasoline, or in this case, installing a battery. *Smelter*, 36 Wn. App. at 445-446.

#### **IV. THOMPSON'S VEHICLES ARE NOT "JUNK VEHICLES" UNDER THE CODE**

The County also argues that because Thompson's violation was predicated on Chapters 14 and 17 of the Kittitas County Code, KCC 18.01.010(2)(r)—which defines "junk vehicles"—does not apply. Brief, at p. 17. However, this argument fails given that "statutes which stand in *pari materia* are to be read together as constituting a unified whole, to the end that a harmonious, total statutory scheme evolves which maintains the integrity of the respective statutes." *State v. Wright*, 84 Wn.2d 645, 650 (1974) (citations omitted). Furthermore, even when the County does address KCC 18.01.010(2)(r), it erroneously states that "at least two of the

five criteria be met.” Brief, at 17. This is incorrect. The Code provision clearly requires the satisfaction of “three” of the five elements, not two.

Finally, even when the County does address these issues, it offers zero evidence as to the satisfaction of these elements, absent Thompson’s concession that all of his vehicles are at least three years old. The code, as a whole, indicates that a collection of cars that can be easily made to run is not a junk yard in the normal understanding of the term. It is undisputed that these vehicles were not being stripped with various parts being sold as is common with junkyards. CP 6. These cars are not missing doors, windows, transmissions, or body parts. This is a hobby collection, not a junk yard.

**V. THE CODE DEFINITIONS OF “JUNK VEHICLE” AND “JUNKYARD” TOGETHER RENDER THE CODE UNCONSTITUTIONALLY VAGUE**

KCCs 17.08.329-.330, and KCC 18.01.010 both contemplate whether a vehicle is “inoperable” or not. Thompson has argued that this term is ambiguous and thus should be read *in pari materia* with the entire Code. However, absent reading these statutes together, these Code provisions conflict in such a way that “forbid[] conduct in terms so vague that persons of common intelligence must guess at its meaning and differ as to its application.” *Burien Bark Supply v. King County*, 106 Wn.2d 868, 871 (1986).

Specifically, these ordinances do not define the following terms: “inoperable vehicle,” “apparently inoperable,” or “unlicensed.” *See* KCCs 17.08.329-.330, and KCC 18.01.010. As demonstrated *infra*, the terms “inoperable vehicle” could encompass anything from a completely totaled vehicle to a brand new vehicle which is simply out of gas. The word “apparently” only further muddies the water as to what exactly is prohibited within these ordinances. Finally, the term “unlicensed” is also left undefined.

Ultimately, the question remains, what does the term “inoperable” mean in the context of these code provisions? The County has stated that inoperable simply means a vehicle that “either starts and can move or it cannot.” Brief, at 17. However, given this definition, is it safe to assume that an ordinary person would know that if his/her car runs out of gas and cannot move, that his vehicle is now junk and any property that it is parked on is transformed by the County Code into an abatable junkyard as a matter of law? The answer is a resounding no.

Indeed, the Supreme Court in *Burien Bark Supply* tackled a similar issue when it was called upon to determine whether or not the phrase “processing in limited degree” within the context of a commercial tree bark sorter was void for vagueness. 106 Wn.2d at 871-872. There the court stated:

A citizen should be able to determine the law by reading the published code. A citizen should not be subjected to *ad hoc* interpretations of the law by county officials.

*Id.* at 872. Thus, because the terms within the applicable King County Code provision were not within “common practice and understanding” to the point that it would “provide fair notice of what [the code provision] prohibits,” the provision in *Burien Bark Supply* was void for vagueness. *Id.* at 872-873.

The phrase “inoperable vehicle,” like the phrase “processing in a limited degree,” is simply open to various degrees of interpretation. Indeed, as stated above, this interpretation can span from a car out of fuel to the Titanic. In the end, KCCs 17.08.329-.330, and KCC 18.01.010 simply do not define their respective language in such a way that the ordinary citizen would be provided “fair notice of what [these codes] prohibit.” *Burien Bark Supply*, 106 Wn.2d at 872.

## **VI. THOMPSON’S DUE PROCESS RIGHTS WERE VIOLATED AT THE HEARING BELOW**

The County argues that Thompson’s claim of violation of his due process rights is frivolous<sup>11</sup> and unsupported by the evidence. Brief, at 23. However, the County fails to mention key, contextual facts and evidence

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<sup>11</sup> Counsel for Thompson does not take such allegations lightly, nor should such allegations be haphazardly made. Nevertheless, Thompson has demonstrated both in his opening brief and this reply brief that he has good faith arguments pertaining to this issue.

which substantiate Thompson's claim. It is undisputed that no person testified on behalf of the county. Rather, the County's sole evidence against Thompson was a single declaration. *See* CP 4-5. On this matter, Thompson, appearing *pro se*, made it clear on appeal to the superior court that code enforcement officer was not present at the hearing,<sup>12</sup> foreclosing any opportunity he *should* have had to cross examine the officer. CP 45; *Verbatim Transcript*, at p.4. Furthermore, Thompson correctly argued that it was improper for the Hearing Examiner to consider this declaration as it was completely based on hearsay.<sup>13</sup> Finally, even when Thompson attempted to produce his own expert testimony to rebut the Iammarino declaration, the Hearing Examiner improperly limited and precluded such testimony. CP 9-10.

In the end, the County had the burden of proof to establish by a preponderance of the evidence that Thompson violated the Code. KCC

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<sup>12</sup> The County argued that if Thompson wanted to cross-examine Iammarino, he should have subpoenaed her to be at the hearing. Brief, at p. 24. However, this avoids the fundamental issue that, because Iammarino's declaration was the sole piece of evidence proffered against Thompson, Ms. Iammarino of a necessity should have been at the hearing in the first place, otherwise such evidence would be inadmissible under the hearsay rules.

<sup>13</sup> The County attempts to refute the designation of the Iammarino declaration as hearsay by confusingly stating in a foot note that the declaration "was made based upon [Ms. Iammarino's] site visits, photographs, and personal observations." However, this is the **exact** type of out-of-court statement that the hearsay rule precludes. As clearly stated within ER 801(c): "'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Given this language, it is absolutely clear that Iammarino's declaration was and is hearsay, especially when she did not attend or testify at the hearing.

18.02.020(5)<sup>14</sup>. It failed to do so by offering only hearsay evidence. This fact, and the fact that Thompson was unable to both cross examine the code officer and rebut her testimony with his own expert, clearly violated Thompson's due process rights under the 14<sup>th</sup> amendment. Thompson was simply not afforded an open record hearing in which he could defend his rights.

#### **VII. THOMPSON OWNS A NONCONFORMING USE**

Thompson satisfied his requisite burden of proof in establishing he has a legal, nonconforming use to collect and restore cars on his property. He did so through **oral testimony given under oath** at the hearing below where in he stated that he obtained a license to restore cars since 1981. CP 7. This fact was further corroborated by Mr. Gary Wivag who also testified under oath that he has sold Thompson cars over the 20 year span that he has known him. CP 9. Taken together, these testimonies establish that Thompson has been collecting and restoring cars on his property since 1981— two years prior to the County's adoption of a zoning code in 1983.

“[O]nce a non-conforming use is established, the burden shifts to the party claiming abandonment or discontinuance of the non-conforming use to prove such.” *Van Sant v. City of Everett*, 69 Wn. App. 641, 648

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<sup>14</sup> KCC 18.02.020(5)(c): The burden of proof is on the county to establish the violation by a preponderance of the evidence. The observation of a violation on different dates shall be prima facia evidence that the violation continued to exist on intervening dates.

(1993). “This burden of proof is not an easy one” as it requires the concurrence of two factors 1) an intention to abandon, and 2) an overt act, or failure to act, which implies abandonment. *Id.* (citation omitted).

On this wise, the County has produced **zero** evidence that Thompson was either 1) lying under oath about his use of the property since 1981 or 2) that Thompson had abandoned this nonconforming use at any time since 1981. Realizing that it lacked such evidence, the County retreats to language within *Rhod-A-Zalea & 35<sup>th</sup>, Inc. v. Snohomish County*, 136 Wn.2d 1, 10 (1998) for the proposition that even if Thompson owns a nonconforming use, “such use is still subject to later-enacted health, safety, and welfare regulations.” Brief, at 21.

However, this language merely means that local government ordinances can phase out non-conforming uses. *See id.* at 7-8. When the Court reviews the applicable Code in this instance, it will quickly discover that **the only way** a nonconforming use can cease in Kittitas County is via abandonment or discontinuance. *See* KCC 17.80.030.<sup>15</sup> There is simply no mention within the Code that later-enacted health, safety or welfare regulations can divest individuals of nonconforming uses.

Ultimately, Thompson met his burden of proof, shifting said burden to the County. However, the County has failed to demonstrate that

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<sup>15</sup> If a nonconforming use is discontinued for any reason for more than three years, it shall not be reestablished. KCC 17.80.030

Thompson abandoned or discontinued his nonconforming use. Finally, because “the state Legislature has deferred to local governments to seek solutions to the nonconforming use problem according to local circumstances,”<sup>16</sup> the Kittitas County Code is the sole authority for discontinuing nonconforming uses. As such, there is no Code provision which allows nonconforming uses to be set aside due to nuisance violations.

**VIII. EVEN IF THE COUNTY PREVAILS, IT IS NOT ENTITLED TO ATTORNEYS FEES.**

Finally, the County has argued that it is entitled to all of its attorney’s fees, asserting 1) that all of Thompson’ arguments are frivolous pursuant to RAP 18.9(a)<sup>17</sup>; and 2) RCW 4.84.370 entitles such fees if it is the prevailing party.<sup>18</sup> Simply, these arguments fail given the simple facts of this case and the specific language of RCW 4.84.370.

First, the County is correct in stating that “[t]he Court resolves all doubts **against** finding an appeal frivolous after considering the record as a whole.” *Delany v. Canning*, 84 Wn. App. 498, 510 (1997) (emphasis added), cited in Brief, at 24. However, the County fails to mention the other high standards it must demonstrate in order to label Thompson’s appeal frivolous. First, “[a]n award of attorney fees is not warranted under

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<sup>16</sup> *Rhod-A-Zalea*, 136 Wn.2d at 7 (emphasis added) (internal citations omitted).

<sup>17</sup> Brief, at 24.

<sup>18</sup> *Id.* at 25.

RAP 18.9 if the issues presented on appeal are at least debatable.”

*Kirshenbaum v. Kirshenbaum*, 84 Wn. App. 798, 929 (1997). Indeed, an appeal is only frivolous if the “appellate court is convinced that [the appeal] presents **no debatable issues** upon which reasonable minds might differ **and** it is so devoid of merit that there is no reasonable possibility of reversal.” *Del Guzzi Const. Co., Inc. v. Global Nw., Ltd., Inc.*, 105 Wn.2d 878, 889 (1986). Stated another way, so long as the appeal contains *at least one* debatable issue, the appeal cannot be frivolous. A lawsuit is only frivolous if, “when considering **the action in its entirety**, it cannot be supported by any rational argument based in fact or law.” *Write v. Dave Johnson Ins. Inc.*, 167 Wn. App. 758, 785, *review denied*, 175 Wn.2d 1008 (2012)(emphasis added).<sup>19</sup>

As clearly apparent within the briefs filed in this appeal thus far, all issues here are at least debatable, if not meritorious. *See Green River Comm College Dist No. 10 v. Higher Education Personnel Bd*, 107 Wn.2d 427, 443 (1986) (raising of a meritorious issue precludes appeal from being frivolous).

Altogether, these factors present a very high hurdle for the County to claim that all of the issues on appeal here are frivolous—one that it

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<sup>19</sup> This rule, as cited by the court in *Write v. Dave Johnson Ins. Inc.*, primarily applies to motion for fees under RCW 4.84.185. However, because the definitions of frivolousness under RCW 4.84.185 and RAP 18.9 substantially overlap, Thompson believes that the rules under both these provisions equally control.

ultimately cannot overcome. Rather, the County merely presents a throwaway argument, making bold and unsubstantiated arguments that Thompson lacks evidence or meritorious arguments on appeal. In reality, Thompson's Opening Brief and this Reply should effectively disabuse the County of any notion that this appeal is frivolous. As such, the Court should reject this argument.

The County has also claimed fees under RCW 4.84.370(1). However, this statute does not apply to Thompson's appeal of a nuisance violation according to its plain language.

Simply, by its plain language, RCW 4.84.370(1) applies only to the issuance, conditioning, or denial of a "**development permit** involving a site-specific rezone, zoning plat, conditional use, variance, shoreline permit, building permit, site plan, or similar use approval or decision"—not to decisions pertaining to nuisance abatement. *Id.* (emphasis added). Thompson's appeal does not relate to any development permit, let one the issuance, conditioning or denial of one.

Indeed, this Court in *Tugwell v. Kittitas County*, 90 Wn. App. 1 (1997) stated:

[RCW 4.84.370(1)] was enacted as part of the Land Use Petition Act. That statute does not define the phrase "development permit" in subsection (1). **This case involves a rezoning, not a development permit, so**

**RCW 4.84.370 is inapplicable.** The requests for attorney fees are denied.

*Id.* at 15 (citations omitted) (emphasis added). *Tugwell* pertained to a rezoning decision, which this Court found to be outside of the purview of RCW 4.84.370. *Id, see also Henderson v. Kittitas County*, 124 Wn. App. 747 (2004). Altogether, just as rezoning approvals/denials were not “development permits” in *Tugwell* and *Henderson*, notices of nuisance violation and abatements are equally not “development permits” as well. For this simple, yet clear reason, RCW 4.84.370 is inapplicable to this case.

For the above given reasons, the County’s arguments for attorney’s fees, provided that they prevail, do not apply to this case as Thompson’s appeal is neither frivolous nor one that pertains to a “development permit.” The County’s attempt to force Thompson to pay its fees should be rejected.

#### CONCLUSION

It bears repeating that Thompson has been collecting and restoring vehicles for over 30 years. Because this is his hobby, Thompson’s restoration efforts are minor and never involve major disassembly or complex repairs. Accordingly, each one of his vehicles can properly operate so long as they have a charged battery. Nevertheless, the County

designated Thompson's decades long car collection as "junk" simply because they were missing a battery and thus, in the County's opinion, inoperable. However, the County came to this designation without providing any evidence that Thompson's cars met the minimum requirements to be designated a "junk vehicle" under the Code's nuisance provisions.

The County has argued that the term inoperable is unambiguous, defining it as whether a vehicle "can start[] and can move or it cannot." Brief, at 17. However, to accept the County's construction of the definition of "junk vehicles" is to accept that any car that is out of fuel, has a flat tire, or a dead battery, is similarly inoperable and "junk" under the County's Code. Equity and reason dictates that such should not be the case. Accordingly, this Court should find that Thompson's cars are not "junk vehicles" under the Code; that Thompson's property is not a "junk yard" and that eight of Thompson's vehicles are farm exempt under the Code.

Nevertheless, even if the Court accepts the County's erroneous determination and definition, Thompson still provided unrebutted evidence that he has restored and collected cars on his property several years before the County's Code was adopted. Thus, Thompson has a legal nonconforming use in the property to continue to engage in his collecting

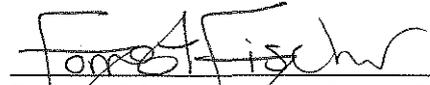
and restorative practices. This nonconforming use, under the Code, can only be set aside by discontinuance or abandonment for three years. The County has provided no evidence that such a discontinuance or abandonment has occurred. Thus, this Court should find that the Hearing Examiner lacked substantial evidence to support his finding that Thompson does not own a nonconforming use.

As such, the hearing examiner's rulings should be vacated, and the County's demand that Thompson pay for its attorney's fees be rejected.

RESPECTFULLY submitted this 18th day of March, 2013.

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**DECLARATION OF SERVICE**

I, Linda Hall, declare:

I am a citizen of the United States, a resident of the State of Washington, and an employee of Groen Stephens & Klinge LLP. I am over twenty-one years of age, not a party to this action, and am competent to be a witness herein.

On March 18, 2013, I caused a true and correct copy of the foregoing document to be served on the following person via the following means:

Neil A. Caulkins	<input type="checkbox"/> Hand Delivery via Legal Messenger
Deputy Prosecuting Attorney	<input checked="" type="checkbox"/> First Class U.S. Mail
Kittitas County Courthouse	<input type="checkbox"/> Federal Express Overnight
205 W 5th Ave., Ste. 213	<input type="checkbox"/> Electronic Mail
Ellensburg, WA 98926-2887	<input type="checkbox"/> Other _____

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

Executed this 18 day of March, 2013 at Bellevue, Washington.

  
Linda Hall