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SUPREME COURT OF THE
STATE OF WASHINGTON

KING COUNTY, a Washington municipal corporation, JEFFREY L. SPENCER, a single man, RONALD A. SHEAR, a single man,

Appellants,

v.

KING COUNTY DEPARTMENT OF DEVELOPMENT AND ENVIRONMENTAL SERVICES, an executive agency,

Respondent.

FILED
AUG 15 2012
CLERK OF THE SUPREME COURT
STATE OF WASHINGTON

AMICUS CURAIE MEMORANDUM OF PIERCE COUNTY

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ORIGINAL

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I. INTRODUCTION

In land use cases courts have held that to establish a nonconforming use the use must have "lawfully existed" prior to the enactment of contrary zoning regulations. Contrary to Washington case law, in the present case the Court held that Shear had proven that his use of the property was nonconforming despite undisputed evidence that the property was illegally graded without the necessary permits and in violation of the King County Code. The Court's holding is contrary to Washington case law, improperly narrows the meaning of the term "legally existing" and ignores that fact that compliance with other regulations is necessary to lawfully develop property. If left to stand, the decision would limit the effectiveness of land use and permit requirements, imperil the success of community planning, and change the long-standing policy of disfavoring nonconforming uses.

II. IDENTITY AND INTEREST OF AMICUS CURAIE PIERCE COUNTY

Pierce County is the second most populous county in Washington and home to approximately 802,150 residents. The County has the responsibility for enforcing land use regulations on behalf of its residents in the unincorporated areas of the County. Nonconforming use issues occur frequently in Pierce and other counties. Confusion concerning what

is required to prove a nonconforming use negatively impacts property owners, the public, and the County's ability to enforce land use regulations. It further encourages property owners to "act first [without obtaining necessary land use permits] and beg forgiveness later" when developing property. Property owners, the public and local governments would benefit from clarity in court decisions law addressing nonconforming use issues and this issue in particular.

III. ISSUE OF CONCERN TO AMICUS CURAIE

Issue Number Two as set forth in the Petition for Review is of concern to Amicus Pierce County:

IV. STATEMENT OF THE CASE

Amicus Pierce County adopts the Statement of Facts set forth in the Petition for Review.

V. ARGUMENT

A nonconforming use is a use which "lawfully existed" prior to the enactment of a zoning ordinance, and which is maintained after the effective date of the ordinance, although it does not comply with the zoning restrictions applicable to the district in which it is situated. *Rhod-A-Zalea & 35th, Inc. v. Snohomish County*, 136 Wn. 2d 1, 6, 959 P.2d 1024 (1998), *citing* 1 Robert M. Anderson, American Law of Zoning § 6.01 (Kenneth H. Young ed., 4th ed.1996).

The landowner bears the burden of establishing that a valid nonconforming use exists and bears the initial burden of proving that (1) the use existed before the local government enacted the contrary zoning ordinance; (2) the use was lawful at the time; and (3) the applicant did not abandon or discontinue the use for over a year prior to the relevant change in the zoning code. *McMilian v. King County*, 161 Wn.App. 581, 591, 255 P.3d 739, (2011), *citing First Pioneer Trading Company, Inc. v. Pierce County,* 146 Wn.App.606, 614, 191 P.3d 928 (2008).

The requirement that a use be "lawfully existing" before the change in applicable zoning regulations is correct. If a property owner (or his lessee) uses his property without benefit of approvals required under all regulations associated with the development of the property, he should not thereafter benefit from his unlawful actions when the zoning regulations change.[1]

For example, consider the situation where a property owner decides to use his property for a retail nursery, a use which is allowed under then applicable zoning regulations. Assume that rather than first obtaining required permits and approvals for grading, driveway

[1] Pursuant to the Growth Management Act ("GMA"), regulations which control "development or land use activities" are referred to as "development regulations." RCW 36.70A.030(7). Such regulations are broader than zoning or use regulations and include, but are not limited to, critical areas regulations, subdivision regulations, and other "official controls." See RCW 36.70.550 et. seq.

installation, sewer, electrical power, stormwater drainage, building construction, etc., the owner simply develops the property and opens his business. Assume further that thereafter the zoning changes and the use (retail nursery) is not allowed at this location. If the local government thereafter seeks to enforce compliance with current zoning regulations, what must the property owner prove to support a finding that his business "lawfully existed" before the zoning changed? Is it sufficient for the property owner to show that his use as a retail nursery was in operation ("existed") before the zoning changed? The Washington Supreme Court and Divisions I and II have required compliance with regulations other than zoning regulations to support a finding that the use "legally existed" before the zoning changed. *See Rhod-A-Zalea, supra, McMilian, supra,* and *First Pioneer, supra.*

In the instant case, however, the Hearing Examiner and Court of Appeals erred in determining that Shear and Spencer ("Shear") need only comply with the zoning code to establish the nonconforming use. The Examiner (and Court) failed to consider the undisputed fact that Shear had graded the property and extended the driveway without required permits prior to September, 2004, the date the applicable zoning ordinance became effective.

A. "Lawfully Existing" Requires Compliance With Land Use Legislation and With General Legislation.

The requirement that a use be "lawfully existing" prior to the time the zoning regulations change is not unique to Washington.

> The courts have recognized that ordinances which protect existing uses are intended to protect only those uses which were legally established before the enactment or effective date of the restrictive regulation. Such ordinances are not intended to protect uses which were not legally commenced or continued.

1 Anderson, American Law of Zoning § 6.11.

Division I recently addressed in detail the issue of whether the requirement that the use be "lawfully established" simply means compliance with zoning regulations or whether a property owner must comply with general statutory requirements in *McMilian v. King County,* 161 Wn.App at 591-599. In *McMilian* the Court concluded that based upon the principle that nonconforming uses are disfavored under the law and the policy of phasing out nonconforming uses, compliance with both land use legislation and general legislation is required to establish a "lawfully existing" use. *McMilian v. King County,* 161 Wn.App. at 599.

The same result was reached by Division II in *First Pioneer,* wherein the Court held that a use was not "lawfully existing" where the property owner had failed to obtain building permits and site development permits prior to the date the applicable zoning ordinance became effective.

In *First Pioneer*, the property owner claimed it had a lawfully established nonconforming use because it had operated a steel fabrication business before such use was prohibited by a change in the County zoning regulations. *Id.* at 609. First Pioneer never obtained required permits including building permits, site development permits, or even a conditional use permit before the zoning regulations changed. *Id.* at 610. The Court applied a literal reading of "lawfully existing" and held that First Pioneer's industrial use was never lawfully established because it failed to obtain the necessary building, site development, or land use permits prior to the date the zoning changed. *Id.* at 617.

B. The Court of Appeals Erred by Failing to Follow the Requirement That the Use Be "Lawfully Existing" at the Time the Applicable Zoning Changed.

Although the Court of Appeals in this case recognized that the use must have "lawfully existed" prior to the change in the applicable zoning regulations, the Court erred by failing to apply the law to the facts within the record. *See King County et al v. King County Department of Development and Environmental Services,* 167 Wn.App. 561, 566-70, 273 P.3d 490, 495 (2012) ("*DDES*"). In *DDES* the Court specifically relied upon the Hearing Examiner's findings that "grading had occurred" and "access driveways had been extended" prior to September 2004, the change in the applicable zoning regulations. *DDES, Slip Op.* at 9. The

Court was further aware that Shear had not obtained a grading permit for either the grading activity or the driveway extension.[2] The Court nevertheless upheld the Examiner's conclusion that Shear's use was nonconforming because it was "in existence" prior to the 2004 zoning change. *Id.*

From the record in this case it appears that neither the Hearing Examiner nor the Court of Appeals considered what was required to prove that Shear's use was "legally existing" prior to the change in the zoning regulations. Instead the Examiner and Court appear to have focused only on whether the use was "in existence", not whether it was "legally existing".[3] Such an oversight is not only contrary to the law in this state, it goes against both the principle that nonconforming uses are disfavored under the law and the policy of phasing out nonconforming uses.

---

[2] The Hearing Examiner found that Shear's grading activities were of a level required to have a grading permit (See HE findings 11, 18, 19, 20, 21, and conc. 34 and 35 at PFR, App. D). It is undisputed that he did not have a grading permit and therefore a condition to obtain a grading permit was imposed by the Hearing Examiner and upheld by the Court of Appeals. See Slip. Op. p. 15.

[3] In Shear's Answer to Petition for Review, he argues that the Hearing Examiner considered the use conducted by Shear on the subject property prior to 2004, and that the Examiner found the use conducted by Shear was "lawful if indeed it was established." Answer to Petition for Review, pp. 7-8. Contrary to Shear's argument, the issue is not whether the use was or wasn't allowed under the zoning regulations, but whether the property owner had, in addition to complying with zoning regulations, obtained necessary permits such as grading, building, site development, etc., associated with development of property in order for the use to be "legally existing" before the zoning regulations changed.

VI. CONCLUSION

Amicus Pierce County requests this Court accept review and reverse the Court of Appeals' decision regarding the nonconforming use issue in this case. To allow a published decision which is contrary to prior case law of this Court (*Rhod-a-Zalea, McMilian,* and *First Pioneer*), and which fails to recognize a basic principle of land use law regarding nonconforming uses should not be allowed to stand.

Respectfully submitted this 31st day of July, 2012.

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Subject: King County, Spencer & Shear v. KC Dept. of Dev. & Env. Svcs., Supreme Court #87514-6

Attached for filing is Pierce County's Amicus Curiae Memorandum by Jill Guernsey, Deputy Prosecuting Attorney, WSBA #9443, jguerns@co.pierce.wa.us.

A hard copy will follow by U.S. Mail.

Thank you,

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My apologies for not sending to you yesterday. Please let me know if you would like a hard copy mailed today also.

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Subject: King County, Spencer & Shear v. KC Dept. of Dev. & Env. Svcs., Supreme Court #87514-6

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Thank you,

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