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NO. 66432-8

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COURT OF APPEALS  
FOR THE STATE OF WASHINGTON  
DIVISION I

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

**Appellants,**

vs.

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

**Respondent.**

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**BRIEF OF APPELLANTS SHEAR AND SPENCER<sup>1</sup>**

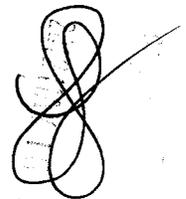
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<sup>1</sup> This brief has been revised and re-filed pursuant to the Court's letter of April 5, 2011 regarding deficiencies in references to the record.

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## I. INTRODUCTION

This case arises as a code enforcement action brought by King County, through its Department of Development and Environmental Services (DDES), against Ron Shear (“Shear”) as the operator of an organic materials processing business and Jeff Spencer (“Spencer”), the owner of the farmland that the business that Shear works for, Buckley Recycle Center, Inc. (“BRC”), has operated on for the last six plus years. The County raised serious charges—that Shear was operating, without permits, a materials processing facility, a new County term that came into existence in the fall of 2004. DDES Notice of Code Violation (“Notice of Violation”), Exhibits before the Hearing Examiner (“EHE”), Sub. No. 18, Ex. 7.<sup>2</sup> Worse yet, the County alleged that Shear’s use of Spencer’s farm field was actually an unauthorized activity within a protected wetland and flood plain. *Id.* Clearly, the County believed that Shear was a bad actor by engaging in such a business, and Spencer was equally a bad actor by allowing Shear to use his farm property for what Spencer thought was a valid, permissible agriculturally-related purpose. Faced with these serious charges, Shear and Spencer appealed the County’s Notice of Violation.

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<sup>2</sup> The Court received all referenced documentary exhibits (as opposed to pleadings or decisions issued by the Hearing Examiner) under Sub. No. 18, but the exhibits, some of which were oversized, were collected together in a box labeled “Sub. No. 18” and were not assigned clerk’s papers numbers. We will refer to such exhibits throughout using the format “EHE, Sub No. 18, Ex. \_\_\_\_”.

EHE, Sub No. 18, Ex. P-1 and P-2. An extended appeal process ensued, at the end of which, the King County Hearing Examiner issued a detailed report and decision (the “Decision”, cited herein as “HE”<sup>3</sup>) which vindicated Shear and Spencer, in part, and vindicated, in part, the County’s regulatory oversight for operations such as Shear’s business. HE, CP 275. Although not in full agreement with the Hearing Examiner, Shear was and remains willing to abide by the terms of the Decision. However, the County (DDES) took exception to their own Hearing Examiner’s Decision, and appealed to the Superior Court. LUPA Petition, CP 1-46.

Although King County initially asserted numerous errors by its Hearing Examiner in its LUPA Petition, the County then narrowed its appeal to the following three issues:

1. Did the Hearing Examiner’s factual finding that “there is no conclusive evidence that actual crushing operations and grinding began before September of 2004” preclude his legal conclusion that Defendant Shear established a legal nonconforming materials processing use on the subject parcel?

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<sup>3</sup> The report and decision of the Hearing Examiner (the “Decision”) is included as an exhibit or appendix to various documents that are themselves within the Clerk’s Papers, including as Appendix A to the King County Hearing Examiner’s Response Brief on LUPA Appeal (Sub. No. 29), at CP 250-82.

2. Did the Hearing Examiner exceed his jurisdiction when he refused to apply King County flood hazard regulations on due process grounds?
3. Did the Hearing Examiner exceed his jurisdiction under *In re King County Hearing Examiner* and the plain language of the King County Code when he denied Defendants' Notice and Order appeal but placed conditions directing DDES' discretionary permit processes?

DDES Brief on LUPA Appeal Issue #1, 1, CP 50.

As more fully set forth below, the Hearing Examiner's factual findings were supported by substantial evidence, the Hearing Examiner's conclusions were proper interpretations of law, and the Hearing Examiner's decision to fashion a remedy that respects County codes while appropriately curbing blatant and obvious County acrimony towards Shear and Spencer, so that they may enjoy the fruits of their success in the code enforcement process, was entirely appropriate. However, the trial court found for DDES on all of the above three issues, reversed the Decision, and remanded to the Hearing Examiner with instructions to (1) set a reasonable timeline for grading permit review procedures; (2) not impose any conditions on DDES' Code-delegated permit review process; and (3) remove the previously ordered CUP requirement that was no longer required pursuant to the trial court's order. CP 664.

This Court should reverse the trial court and affirm the Hearing Examiner's Decision.

## **II. ASSIGNMENTS OF ERROR**

### **A. Assignments of Error**

The trial court committed the following errors:<sup>4</sup>

- (1) Entering the Order Granting LUPA Appeal;
- (2) Entering Finding of Fact 1;
- (3) Entering Finding of Fact 2;
- (4) Entering Finding of Fact 3;
- (5) Entering Finding of Conclusion of Law 1;
- (6) Entering Finding of Conclusion of Law 2;
- (7) Entering Finding of Conclusion of Law 3;
- (8) Entering an Order which prohibited the the Hearing

Examiner, on remand, from imposing any conditions on DDES's Code-delegated permit review process.

### **B. Issues Pertaining to Assignments of Error**

The assigned errors present the following issues for review by this Court:

- (1) Whether the trial court erred in determining that

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<sup>4</sup> Shear and Spencer adopt and incorporate any argument made by King County Hearing Examiner in its brief.

“conclusive evidence” was necessary to sustain the Hearing Examiner’s determination that Shear’s operations were a lawful nonconforming use? (Assignments of Error 1, 2, and 5)

(2) Whether the trial court erred in determining that actual crushing and grinding of materials was necessary to establish a lawful nonconforming use under King County Code 21A.08.010? (Assignments of Error 1, 2, and 5)

(3) Whether the trial court erred in not finding substantial evidence to support the Hearing Examiner’s findings related to the establishment of a nonconforming use? (Assignments of Error 1, 2, and 5)

(4) Whether the trial court erred in determining that the King County Critical Area Ordinance does contain an enforceable flood hazard area standard for purposes of code enforcement, and that DDES sufficiently met its burden to prove that the Spencer parcel is subject to critical area review requirements described in the grading permit application process? (Assignments of Error 1, 3, and 6)

(5) Whether the trial court erred in concluding as a matter of law that the Hearing Examiner exceeded his jurisdiction and authority under King County Code 20.24.010 and 20.24.080 in imposing conditions on the King County DDES permit and review process in his Report and Decision. (Assignments of Error 1, 4, 7, and 8)

### **III. STATEMENT OF THE CASE**

#### **A. Parties**

Ronald A. Shear, co-appellant, and the company by which he is employed, BRC, operate an environmentally-friendly business on agricultural property located in the designated agricultural production district in the Auburn-Kent Valley.

Jeffrey L. Spencer, co-appellant, is a land owner of farmland in South King County.

King County, co-appellant, through its Hearing Examiner, issued a decision in favor of Shear and Spencer on all of the issues upon which King County DDES then appealed to the trial court.

King County DDES, respondent, brought a code enforcement action regarding Shear's activities upon Spencer's property, and appealed the King County Hearing Examiner's decision to the trial court regarding the issues identified above.

#### **B. Factual Background**

##### **1. Introduction**

The core of Shear's operation is to accept land clearing debris and other organic, vegetative type waste, otherwise destined for landfills, and to process that material by grinding, chipping, sorting and screening to create hog fuel, animal bedding, mulch, biomass fuel and other valuable

products which are then sold to third party users, including local farmers and municipalities. Transcript of Hearing (“TR”), Sub No. 16A, Shear Testimony 6/26/09, 1145-1151.<sup>5</sup> The business is a variable one which is dependant upon the seasons and the economy. The use and level of activity does not look the same all of the time. TR, Sub No. 16A, Shear Testimony 6/26/09, 1151-1152 and 11/12/09, 2589-2590. As noted by the Hearing Examiner, the piles of organic debris tend to increase during the summer months and are mostly processed during the winter months. Hearing Examiner’s Finding of Fact (“FOF”) No. 15, HE, CP 254-255.

2. Establishment of Uses

BRC has been involved in this type of organic material recycling business since 1999 on a property located near the Spencer property. TR, Sub No. 16A, Shear Testimony 6/26/09, 1144-1145. In 2003, BRC expanded its operations to the Spencer property. TR, Sub No. 16A, Shear Testimony 6/26/09, 1156. In September 2004, Ord. No. 15032 introduced the term “materials recycling facilities” and required a conditional use

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<sup>5</sup> The Court received the transcript of the proceedings before the Hearing Examiner as a series of continuously page-numbered volumes under Sub. No. 16A. The transcript was not assigned clerk’s papers numbers, with the exception of the transcript from one date of the proceedings. The transcript for June 29, 2009 was separately paginated, provided to the Court under Sub. No. 24 and assigned the clerk’s papers numbers that are used herein. We will refer to the transcript for all other dates as provided at Sub. No. 16A using the format “TR, Sub No. 16A, [testifying party and date], [page number].”

permit (“CUP”). Conclusions of Law (“COL”) No. 8, HE, CP 266. According to a DDES senior official, Randy Sandin, these provisions became effective October 9, 2004. TR, Sub No. 16A, Sandin Testimony 6/25/09, 952-953. Although BRC’s activities seemingly fit the definition, BRC did not believe it should be subject to CUP requirements. BRC had been operating lawfully as an “interim recycling facility” for years without the need for such permits. COL No. 20, HE, CP 269. Thus, an issue in this appeal became the date that the use applicable to BRC’s business was “established” on the Spencer property. If it was a permitted nonconforming use, additional permits might not be required.

Subsequently the Hearing Examiner determined that even though BRC established that Shear’s operation was a prior nonconforming use, first as an interim recycling facility and later as a materials processing facility, a CUP was nonetheless required due to the significant expansion of the use since Ord. No. 15032 was adopted. COL No. 38, HE, CP 274. However, although BRC did not appeal the CUP requirement, King County appealed to the trial court the issue of whether BRC was an established materials processing facility at the time of the code change. DDES LUPA Brief Issue #1, 1, CP 50. Since King County’s Notice of Violation alleged that Shear was operating a materials processing facility at the time it was issued, that is not in question. EHE, Sub No. 18, Ex. 7.

There is substantial evidence to support the Hearing Examiner's conclusion that BRC had established a materials processing facility at the time of code adoption. In the Hearing Examiner's decision, FOF Nos. 15 to 22 set forth the Hearing Examiner's analysis of the evidence presented in that regard. HE, CP 254-56). That evidence includes testimony of the parties, testimony of an adverse neighbor, and both aerial and ground photographs. The Hearing Examiner reviewed, weighed, and synthesized all of the available information.

Shear was interested in relocating BRC's business from a one acre (Shear) site nearby to a larger (Spencer) site. TR, Sub No. 16A, Shear Testimony 6/26/09, 1156. Spencer and Shear testified that their business relationship on the Spencer property began in October 2003 when BRC began leasing the Spencer property, and that even before the formal lease, BRC began storing equipment on the Spencer property. TR, Sub No. 16A, Shear Testimony 6/26/09, 1186. TR, Sub No. 16A, Spencer Testimony 6/30/09, 1732-1740. The grinder started being used on site sometime in 2003. TR, Sub No. 16A, Spencer Testimony 6/30/09, 1736-1740.

An important piece of admitted evidence was Ex. 67(f), an aerial photograph of the Spencer property from April 24, 2004, which shows major changes from prior photographs, including an expanded driveway and a series of large mounds, plus the storage of vehicles or equipment

immediately west of the new northerly driveway spur. EHE, Sub No. 18, Ex. 67(f). The Hearing Examiner appropriately noted that by the Spring of 2004, something different was happening on the Spencer property. FOF No. 19, HE, CP 255.

Ex. 67(f) is corroborated and supported by an adversary of Spencer and Shear, Mr. Yee Hang, operator of a flower farm immediately to the south testified in his declaration that:

The Shear operation began in about 2004. The operation involves receiving large quantities of materials, such as soil, stumps, wood chips, and green organic materials, and their storage in large piles on the proper and processing through methods such as chipping and grinding.

EHE, Sub No. 18, Ex. 56, p. 2, ¶5.

Mr. Hang further testified at the hearing as follows:

Q. Okay. With regard to your observations of the activities on the Spencer property to the north of you, what have you seen occurring on the property?

A. I saw in 2004 – between 2004 and 2005 they were dumping some kind of dirt on Mr. Spencer's property on the north side of his property and the dirt would come in from just the west side of Mr. Spencer's property.

TR, Sub No. 16A, Hang Testimony 6/23/09, 184.

Ex. 67(e), an aerial photograph taken in 2005, shows that the operation has expanded even further, and at this point, Mr. Hang testified that dust from trucks and grinding was having a significant impact on his

farm. TR, Sub No. 16A, Hang Testimony 6/23/09, 177; *See* EHE, Sub No. 18, Ex. 67(e).

The Hearing Examiner found no “conclusive” evidence that actual crushing operations and grinding began before the winter or spring of 2005. COL No. 10, HE, CP 267. The County made much of that in its appeal to the trial court. However, as developed more fully below, “conclusive evidence” is not a controlling legal standard in this matter. Rather, on appeal, it is only necessary that the Hearing Examiner found “substantial evidence.” *See* RCW 36.70C.130(1)(c) (the LUPA petitioner—here, DDES—has the burden regarding sufficiency of evidence to show that “the land use decision is not supported by evidence that is substantial when viewed in light of the whole record before the court.”)

The Hearing Examiner reviewed the history of County codes that arguably embrace the operations of BRC and concluded that BRC’s operations qualified as an interim recycling facility immediately prior to the adoption of Ord. No. 15032 (COL No. 20) and also qualified as a materials processing facility for source-separated organic waste processing immediately prior to that time. COL No. 20, HE, CP 269; COL No. 14, HE, CP 267-68. Yet, the Hearing Examiner concluded that BRC must bring its operations within the purview of the County regulatory system on

a prospective basis. COL No. 23, HE, CP 270. BRC has not challenged this, in part because the overall context of the Decision provides a mechanism through which Shear will be treated fairly by King County DDES.

3. Encroachment On Critical Areas

Apparently in recognition that an exception to wetland regulation would apply to this converted farmland, the County on appeal to the trial court abandoned its unsuccessful effort before the Hearing Examiner to establish that there was a violation of wetlands regulations, in favor of establishing a violation of the flood hazard regulations. DDES Brief on LUPA Appeal Issues Presented, 1, CP 50.

The Hearing Examiner's extensive Findings of Fact with respect to the flood hazard issue are set forth in FOF Nos. 40-55. HE, CP 260-64. The Hearing Examiner took testimony from witnesses Levesque, Sandin, Gauthier and Neugebauer, and also examined numerous maps created by a variety of regulatory agencies. *See* EHE, Sub No. 18, TR, Sub No. 16A. There was also an investigation performed for a third party which revealed additional information about the flood hazards in the area. EHE, Sub No. 18, Ex. 71.

The Hearing Examiner concluded that the County had not met its burden of establishing a standard applicable to the property, and therefore

that BRC's appeal with respect to flood hazard regulations must be granted. COL No. 5, HE, CP 265-66.

C. Procedural History

On October 19, 2006, DDES filed the Notices of Code Violation and thus initiated an enforcement action against Shear and Spencer.

On October 20, 2006 and October 24, 2006, Shear and Spencer appealed DDES's Notices of Code Violation to the King County Hearing Examiner.

On January 28, 2010, King County, through its Hearing Examiner, issued its Decision.

On February 18, 2010, DDES filed its Complaint Under Land Use Petition Act (the "LUPA Petition").

On November 17, 2010, the trial court filed its Order Granting LUPA Appeal.

On December 16, 2010, Shear filed his Notice of Appeal to the Court of Appeals.

On December 16, 2010, Spencer filed his Notice of Appeal to the Court of Appeals.

On December 16, 2010, King County, through its Hearing Examiner, filed its Notice of Appeal to the Court of Appeals.

#### IV. SUMMARY OF ARGUMENT

The Hearing Examiner's factual findings were supported by substantial evidence, the Hearing Examiner's conclusions were proper interpretations of law, and the Hearing Examiner's decision to fashion a remedy that respects County codes while appropriately curbing blatant and obvious County acrimony towards Shear and Spencer, so that they may enjoy the fruits of their success in the code enforcement process, was entirely appropriate. This Court should therefore reverse the trial court and affirm the Hearing Examiner's Decision.

#### V. ARGUMENT

##### A. Standard of Review and Burdens of Proof

This Court reviews questions of law *de novo* to determine whether the facts and law supported the Hearing Examiner's land use decision. *HJS Dev., Inc. v. Pierce County*, 148 Wn.2d 451, 468, 61 P.3d 1141 (2003). Review is governed by the Land Use Petition Act (LUPA), Chapter 36.70C.120 RCW. *Id.* at 467. This Court reviews the factual record before the Hearing Examiner, as the Hearing Examiner is the local jurisdiction's body or officer for this case with the highest level of authority to make a land use determination. King County Code ("KCC")

23.20.080(F)<sup>6</sup> (“The hearing examiner’s decision is a final agency action.”); *see also* RCW 36.70C.020(2) (2010); *Pinecrest Homeowners Ass’n v. Glen A. Cloninger & Assocs.*, 151 Wn.2d 279, 288, 87 P.3d 1176 (2004); *HJS Dev., Inc.*, 148 Wn.2d at 468; *J.L. Storedahl & Sons v. Cowlitz Co.*, 125 Wn.App. 1, 6, 103 P.3d 802 (2004).

When reviewing the decision of a Hearing Examiner, courts sit in an appellate capacity and must give substantial deference to both the legal and factual determination of a hearing examiner as the local authority with expertise in land use regulations. *Lanzce G. Douglass, Inc. v. City of Spokane Valley*, 154 Wn. App. 408, 415, 225 P.3d 448 (2010), *reconsideration denied, citing City of Medina v. T-Mobile USA, Inc.*, 123 Wn. App. 19, 24, 95 P.3d 377 (2004). This Court reviews the evidence and any inferences in a light most favorable to the party that prevailed before the Hearing Examiner, as the Hearing Examiner was the highest forum exercising fact-finding authority.<sup>7</sup> *Id. citing City of Univ. Place v. McGuire*, 144 Wn.2d 640, 652, 30 P.3d 453 (2001). In this case, Shear and Spencer prevailed with respect to establishing a nonconforming use

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<sup>6</sup> Copies of all King County Code sections or rules referenced herein will be provided at Appendix A.

<sup>7</sup> The trial court did not take new evidence and as such did not engage in “fact finding”; its “findings of fact” are appropriately viewed as conclusions of law.

and whether they had violated the flood hazard ordinance. COL 20, HE, CP 269; COL 5, HE, CP 265-66.

DDES, as the LUPA petitioner, continues to carry the burden of establishing that the Hearing Examiner erred under at least one of LUPA's six standards of review. *See Pinecrest Homeowners Ass'n.*, 151 Wn.2d at 288; Rules of Procedure for King County Hearing Examiner (3/31/95) ("HE Rules"), XI.B.8.b. (burden of proof with respect to enforcement actions rests with the County). These standards are:

- (a) The body or officer that made the land use decision engaged in unlawful procedure or failed to follow a prescribed process, unless the error was harmless;
- (b) The land use decision is an erroneous interpretation of the law, after allowing for such deference as is due the construction of a law by a local jurisdiction with expertise;
- (c) The land use decision is not supported by evidence that is substantial when viewed in light of the whole record before the court;
- (d) The land use decision is a clearly erroneous application of the law to the facts;
- (e) The land use decision is outside the authority or jurisdiction of the body or officer making the decision; or
- (f) The land use decision violates the constitutional rights of the party seeking relief.

RCW 36.70C.130(1) (2009). The County's burden is to establish by a preponderance of the evidence that a violation occurred. KCC 23.20.080. KCC 23.20.080 provides in part as follows:

D. The burden of proof is on the county to establish by a preponderance of evidence that the violation was committed . . . the person cited may rebut the evidence and establish that the violation did not occur . . .

The County's HE Rules also place the obligation on the County to demonstrate that the legal standard for imposing the penalty or burden has been met, as follows:

In a proceeding to consider an appeal or challenge to a King County agency's imposition of a penalty or burden on a party or on his/her property, the agency shall be required to present a *prima facie* case based upon competent evidence demonstrating that the legal standard for imposing such burden or penalty has been met.

HE Rules XI.B.8.b. Thus, King County DDES had to establish to the trial court, and must establish to this Court based on the record below, both "competent evidence" and a "legal standard" for imposing a penalty. As further developed below, King County DDES failed to do so.

On review of a superior court's land use decision, this Court stands in the shoes of the superior court and reviews the administrative decision on the record before the administrative tribunal—not the superior court record. *HJS Dev., Inc.*, 148 Wn.2d at 483-84. Factual findings in the Hearing Examiner's Decision are reviewed under the substantial evidence test and conclusions of law are reviewed *de novo*. *Bierman v. City of Spokane*, 90 Wn. App. 816, 821, 960 P.2d 434 (1998); *Satsop Valley*

*Homeowners Ass'n., Inc. v. NW Rock, Inc.*, 126 Wn.App. 536, 541, 108 P.3d 1247 (2005).

B. The trial court erred in determining that conclusive evidence was necessary to sustain the Hearing Examiner's determination that Shear's operations were a lawful nonconforming use.

The trial court erred when it accepted the County's argument that because the Hearing Examiner stated that there was no conclusive evidence that actual crushing or grinding of materials began before September 2004, the Hearing Examiner could not have found factually or concluded legally that a materials processing use had been established before September 2004. *See* Order Granting LUPA Appeal, CP 664. The argument continues to have two flawed assumptions that shall be addressed in turn: (1) that there must be "conclusive" evidence at all, and (2) that "actual crushing and grinding of materials" is necessary to establish a materials processing facility.

The Hearing Examiner found that there was no "conclusive" evidence of crushing or grinding prior to September of 2004.<sup>8</sup> However, even if the ordinance required evidence of crushing or grinding were required to demonstrate the existence of a materials processing facility,

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<sup>8</sup> The trial court's Order incorrectly references the Hearing Examiner's Conclusion of Law 11 regarding crushing and grinding activities. The correct reference is to Conclusion of Law 10.

which as described below it does not, the law requires substantial evidence in light of the whole record, not conclusive evidence. *See* RCW 36.70C.130(1)(c) (the LUPA petitioner’s burden regarding sufficiency of evidence is to show that “the land use decision is not supported by evidence that is substantial when viewed in light of the whole record before the court.”) Substantial evidence is “a sufficient quantity of evidence to persuade a fair-minded person of the truth or correctness of the order.” *City of Redmond v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 136 Wn.2d 38, 46, 959 P.2d 1091 (1998) (quoting *Callecod v. Wash. State Patrol*, 84 Wn.App. 663, 673, 929 P.2d 510). DDES’s claim to the trial court that the Hearing Examiner’s finding of no “conclusive evidence” of crushing or grinding prior to September 2004 precluded the Hearing Examiner’s finding of a nonconforming use is not supported by law.

C. The trial court erred in determining that actual crushing and grinding of materials was necessary to establish a lawful nonconforming use under King County Code 21A.08.010.

Notably, nothing in King County’s analysis disputed or challenged the Hearing Examiner’s determination that BRC’s business was an established interim recycling facility prior to the effective date of Ord. No. 15032. COL No. 20, HE, CP 269. In fact, Randy Sandin, a senior DDES official, agreed that it was. Sandin Testimony 6/29/09, CP 200 (lines 1-

17). Rather the County argued that the fact that there is no “conclusive” evidence of “actual grinding and crushing” prior to September 2004, somehow precluded a determination that BRC was an established “materials processing facility” (the new term introduced by the ordinance) when Ord. No. 15032 was adopted. DDES Brief on LUPA Appeal 6-12, CP 55-61. As above, “conclusive evidence” was not the operative standard, but also importantly, neither grinding nor crushing was required to show existence of a “materials processing facility.”

The Hearing Examiner found that prior to the adoption of Ord. No. 15032, BRC was engaged in a use defined as an interim recycling facility (COL No. 20, HE, CP 269), which is “a site or establishment... engaged in collection or treatment of recyclable materials...and including . . . Source-separated, organic waste processing facilities . . .” *See* COL 16-18, HE, CP 268-69 (regarding evolution of definition of “interim recycling facility”). This was not a difficult determination to make. While a “source-separated organic waste processing facility” was not defined by the code, a “Yard and Organic Waste Processing Facility” was defined.<sup>9</sup>

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<sup>9</sup> Although at the hearing and in prior briefing there was some debate over whether “source-separated” was applicable to the BRC activities, that issue was not raised by King County to the trial court.

A Yard and Organic Waste Processing Facility was defined prior to the adoption of Ord. No. 15032 as follows:

Yard or organic waste processing facility. Yard or organic waste processing facility: a site where yard and garden wastes, including wood and land clearing debris, are processed into new products such as soil amendments and wood chips.

Ord. No. 11157 §10, 1993; Ord. No. 10870 §327, 1993. [Emphasis added.] An Interim Recycling Facility which processed source separated organic wastes was a permitted use of agriculturally zoned property such as Spencer's under the code in effect just prior to the adoption of Ord. No. 15032. KCC 21A.22.030(L)(1) and (2). So between 1993 and September of 2004,<sup>10</sup> someone with a business like BRC's was an outright permitted use in an agricultural zone.

Upon the adoption of Ord. No. 15032, source-separated, organic waste processing facilities as part of an interim recycling facility were no longer expressly allowed in an agricultural zone. Nor were they expressly disallowed. They simply disappeared from the land use table of uses in the King County code, although the definition did not disappear. *See* COL 18, HE, CP 268-69; KCC 21A.08.050. Instead, newly defined materials

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<sup>10</sup> Although the Hearing Examiner focuses on September 2004 as the critical date, it appears that Ord. No. 15032 was actually not effective until October 2004. TR< Sub No. 16A, Sandin Testimony 6/25/09, 953.

processing facilities were allowed, and in an agricultural zone, such facilities were limited to source-separated organic waste processing. *See* COL 18, HE, CP 268-69; KCC 21A.08.080. A materials processing facility is defined by Ord. No. 15032 and KCC 21A.06.742 as follows:

Materials Processing Facility. Materials processing facility: a site or establishment, not accessory to a mineral extraction or sawmill use, that is primarily engaged in crushing, grinding, pulverizing or otherwise preparing earth materials, vegetation, organic waste, construction and demolition materials or source separated organic materials and that is not the final disposal site.

(Ord. No. 15032 § 6, 2004) [Emphasis added.]

The definition of a materials processing facility is broader than the former yard and organic waste processing facility in terms of the source of materials, and more descriptive with respect to the types of processing that can occur. Nothing in the definition mandates that “crushing or grinding” be part of the operation. Pursuant to the above language, an operation such as Shear’s that was formerly recognized as a yard and organic waste processing facilities would be within the expanded use now called a materials processing facility.

There was evidence of grinding in 2003. TR, Sub No. 16A, Spencer Testimony 6/30/09, 1736-1740. Regardless, however, the definition of materials processing facility does not require either crushing or grinding, but rather specifically includes “or otherwise preparing”.

There is substantial evidence from both the aerial photographs and testimony that materials were being “prepared” long before the date of the ordinance. COL 10-11, HE, CP 267. BRC’s activities did include and continue to include accumulating, sorting, screening, separating or any number of other methods of preparing that do not involve crushing or grinding. TR, Sub No. 16A, Shear Testimony 6/26/09, 1145-1151. The trial court apparently ignored these activities to focus, incorrectly, on crushing and grinding.

The trial court also apparently disregarded the fact that for purposes of determining whether a use is established, the code contains clear language that is prospective in application. KCC 21A.08.010 details the requirements for establishing uses and takes into consideration the fact that uses “ramp up” over time. That provision provides in part as follows:

Establishment of uses. The use of a property is defined by the activity for which the building or lot is intended, designed, arranged, occupied or maintained. The use is considered permanently established when that use will or has been in continuous operation for a period exceeding sixty days.

[Emphasis added.] Significantly this provision has a prospective component to it. The use is defined by the activity for which the lot is “intended, designed, arranged, occupied or maintained.”

[Emphasis added.] Furthermore, the use is considered permanently

established when the use “will or has been in continuous operation for a period exceeding sixty days.” [Emphasis added.] Nothing required the County Council to add a prospective component to the notion of establishing a use. For example, to establish a nonconforming use under the Seattle Municipal Code SMC 23.42.102, the applicant must demonstrate “that the use or development would have been permitted under the regulations in effect at the time the use began, or for a residential use or development, that the use or development existed prior to July 24, 1957 and has remained in continuous existence since that date.” Copy attached in Appendix A. King County’s ordinance is different. The Hearing Examiner’s analysis took note of the prospective component and is consistent with the County’s code, whereas DDES’s analysis does not.

The Hearing Examiner’s determination that the establishment of a nonconforming use under the King County Code has a prospective component to it, and that BRC’s activities satisfied the establishment criteria, is entitled to deference. *Lanzce G. Douglass, Inc. v. City of Spokane Valley*, 154 Wn. App. 408, 415, 225 P.3d 448 (2010), *reconsideration denied, citing City of Medina v. T-Mobile USA, Inc.*, 123 Wn. App. 19, 24, 95 P.3d 377 (2004). As the Hearing Examiner

acknowledged, photographs of the Spencer property taken at different times show different levels of activity. FOF Nos. 17-22, HE, CP 255-56. Like many businesses, BRC's operations did not start all at once. Operations began in a phased manner over time, but there is no doubt that the intent was to fully operate at this location. TR, Sub No. 16A, Shear Testimony 6/26/09, 1156. TR, Sub No. 16A, Spencer Testimony 6/30/09, 1735-1737. The testimony of the neighbor, Mr. Hang, corroborates the fact that materials were being brought on site and that operations began in 2004. EHE, Sub No. 18, Ex. 56, p. 2, ¶5. TR, Sub No. 16A, Hang Testimony 6/23/09, 184. In addition, this is a business in which the activities vary seasonably and depending upon economic circumstances. TR, Sub No. 16A, Shear Testimony 11/12/09, 2589-2590. At any particular moment, a photograph could show no activity and no equipment or full activity with a lot of equipment. Certain pieces of equipment were mobile and sometimes brought to the site of the material. TR, Sub No. 16A, Spencer Testimony 6/30/09, 1738-1739. TR, Sub No. 16A, Shear Testimony 6/26/09, 1176.

Given the above, there is substantial evidence of BRC's intent to relocate its facility to the current site and that the use was planned to be in continuous operation for more than 60 days prior to September 2004, thereby establishing the existing use pursuant to KCC 21A.08.010 and KCC

21A.06.800. The Hearing Examiner's interpretation of the code with respect to establishing nonconforming use should be given its due deference.

DDES cited to well recognized statutory interpretation concepts on page 9 of its Opening Brief. CP 56. However, those concepts actually support BRC's interpretation and not that of the County. DDES's interpretation ignores and renders superfluous the word "will" in the sense of a use that "will or has been in continuous operation." An analysis which renders any part of an ordinance superfluous or meaningless is directly contrary to the rules of statutory interpretation. *Davis v. Dept. Licensing*, 137 Wn.2d 957, 963, 977 P.2d 554 (1999) (quoting *Whatcom County v. City of Bellingham*, 128 Wn.2d 537, 546, 909 P.2d 1303 (1996)).

Rather than deal with the prospective nature of the word "will", the County focuses narrowly on the words "in operation". Code provisions must be read as a whole, so that no portion is rendered meaningless. *Jackson v. Fenix Underground*, 142 Wn.App. 141, 173 P.3d 977 (2007). Strained interpretations should be avoided. *Lane v. Harborview Medical Center*, 154 Wn.App. 279, 227 P.3d 297 (2010). However, the dictionary definitions of "operation" provided by the County also do not support the County's position. CP 58. Both definitions acknowledge that an operation is not necessarily any one thing, but "a process or series of acts performed to effect a certain purpose or result" (*American Heritage Dictionary*, Second College

Ed., Houghton, Mifflin Co., 1985), or “a course or series of acts to effect a certain purpose” (*Funk and Wagnall’s Standard Desk Dictionary*, Volume 2 N-K, Funk & Wagnalls Publishing Co., 1976). CP 58. In other words, by initiating the series of acts necessary to conduct its business, BRC was conducting an “operation” pursuant to the above definitions.

Rather than rely on the language of its own code, the County in its appeal to the trial court instead resorted to broad statements of general zoning law and out of state cases on nonconforming use expansion to support its position. *See* CP 59-61. However, in the current case we have a specific ordinance, drafted by King County, which was obviously not applicable in those cases. Under the King County ordinance on the establishment of uses, intent is a relevant component. KCC 21A.08.010. Furthermore, in BRC’s case, there was more than subjective, unmanifested intent. BRC had an existing business that did the same types of things it does now at a different location. BRC had begun to relocate its business to the current location prior to the adoption of Ord. No. 15032 and was carrying out its operation at the new location. There is visual and testimonial evidence to support this. EHE, Sub No. 18, Ex. 67(f); EHE, Sub No. 18, Ex. 56, p. 2 and 5; TR, Sub No. 16A, Hang Testimony 6/23/09, 184; TR, Sub No. 16A, Spencer Testimony 6/30/09, 1735-1737.

In *City of Hillsdale v. Hillsdale Iron & Metal Co.*, 358 Mich. 377, 100 N.W.2d 467 (1960), cited by the County to the trial court, the issue was the expansion of types of uses beyond an existing nonconforming use. The City had issued a license to operate a scrap yard and had also issued permits for the construction of a building for permitted residential and office uses. However, the defendant actually used the building for purposes that were not permitted, including the operation of heavy machinery that negatively impacted the surrounding residential uses. The question of when the use was expanded relative to the ordinance was not examined. It was irrelevant since the use was not permitted prior to adoption of the ordinance.

*McDonald v. Zoning Bd. of Appeals of Town of Islip*, 31 A.D.3d 642, 819 N.Y.S.2d 533 (2006) also involves an expansion of a nonconforming use case, not a question of when the original nonconforming use arose. The opinion also does not provide a detailed analysis of the factors that went into determining the point at which the use was established.

*Urban Forest Products, Inc. v. Zoning Bd. of Appeals for Town of Haverstraw*, 300 A.D.2d 498, 751 N.Y.S.2d 581 (2002) is distinguishable from the case here since it involved a conversion from a nonconforming vehicle storage lot in a residential zone to another use entirely, also not permitted, a commercial landscaping and mulching business. In the current, case BRC's use remains unchanged as the County code migrates from one

permitted use, Interim Recycling Facility to another permitted use, materials recycling facility. These terms are closely related with an interim recycling facility seemingly subsumed by the definition of a materials processing facility.

Finally, in *Beasley v. Potter*, 493 F. Supp 1059 (1980), the Michigan court determined that the property owner seeking nonconforming status had not made substantial use of the property either before or after the zoning ordinance prohibiting it went into place. The Michigan court noted that the evaluation of whether or not a preexisting, nonconforming use is “substantial” is necessarily subjective and varies from case to case. The court noted the following:

A party does not acquire a protected interest in a nonconforming use of property unless he can show nonconformance in a reasonably substantial manner. Mere preliminary operations do not give rise to a vested right. Thus, it was insufficient to order plans, survey land, and remove old buildings to establish a nonconforming gravel mine, or to knock down an old shed, put up a sign, and erect some fences to establish a nonconforming junk yard.

*Id.* [Citations omitted]. Clearly in those cases, the use of the property had not yet begun. However, the Michigan court noted that in a case in which the parties staked out a billboard location and installed a transformer and powerline, they were held to have a vested right to use the property for a

nonconforming billboard. *Id.*, citing *Dingeman Advertising Inc. v. Algoma Township*, 393 Mich. 89, 223 NW 2d 689 (1974).

D. The trial court erred in not finding substantial evidence to support the Hearing Examiner's findings related to the establishment of a nonconforming use.

BRC's activities on the Spencer property were more than mere intentions. BRC had entered into an agreement to use the property, had made physical alterations to the site and had begun operations on site, moving materials and equipment to the site. COL No. 11, HE, CP 267. Indeed, there was even evidence of grinding in 2003. TR, Sub No. 16A, Spencer Testimony 6/30/09, 1736-1740. There was substantial evidence supporting its establishment of a nonconforming materials processing facility use.

Furthermore, the nonconforming use issue lacks any real significance, except maybe for revenue raising through the imposition of penalties and fines. The issue of whether BRC's use met the definition of a materials processing facility prior to the code change is only relevant with respect to whether or not a CUP is required, and whether administrative penalties can be imposed. A materials processing facility limited to source-separated organic materials, which the County does not dispute is the current use of the property (and in fact is the basis for the alleged violation), is a *permitted* use in the agricultural zone. BRC's use was a conforming use

with exception that it had not obtained the CUP permits required by the new ordinance. The Hearing Examiner determined that a CUP was required only because of the expansion of BRC's uses/area over time subsequent to establishment. COL No. 38, HE, CP 274. While BRC does not necessarily agree with that analysis, BRC did not appeal the Hearing Examiner's requirement that it obtain a CUP, and BRC is willing to undergo that process as long as the County will be fair in its application. If by some determination, BRC's operation is not a materials processing facility, then it was a permitted yard and organic waste processing facility when Ord. No. 15032 came into effect and it continues to be one, as a lawful nonconforming use.

E. The trial court erred in determining that the King County Critical Area Ordinance does contain an enforceable flood hazard area standard for purposes of code enforcement, and that DDES sufficiently met its burden to prove that the Spencer parcel is subject to critical area review requirements described in the grading permit application process.

The County framed its second issue in constitutional terms in an effort to obfuscate the fact that the regulations with respect to the flood hazard management are chaotic at best. The trial court did not address the constitutional argument in its Order, but found only that the King County Code adequately describes the standards applicable to Shear and Spencer, and that DDES had no burden to prove or adopt an applicable standard beyond that described in the Code. CP 664. As noted in Section V.A. above,

the burden of proof with respect to enforcement actions rests with the County, and the trial court found that DDES had met its burden to prove that the Spencer property was subject to critical areas review requirements described in the grading permit process. However, in order to meet its burden, it was incumbent upon the County to show what legal standards were applicable to the Spencer property and how BRC had failed to meet them. HE Rules XI.B.8.b and KCC 23.20.080. Instead, what became obvious from the testimony and exhibits before the Hearing Examiner is that the current state of flood hazard management is in total disarray and is a total bureaucratic morass, due to competing jurisdictional issues between federal, state and local regulatory agencies and competing computer modeling methodologies, all of which are flawed to some extent. The trial court erred when it nonetheless credited DDES' self-serving, and wholly unsupported, claim of clarity and enforceability.

Having been given the duty to assess whether or not the agency, in this case DDES, met its obligation to present a *prima facie* case of demonstrating the legal standard for imposing the burden or penalty, Hearing Examiner Smith carefully reviewed the evidence and the possible legal standards for imposing duties under the flood hazard ordinance. He found that the County had not met its burden. Hearing Examiner Smith concluded as follows:

The King County Critical Areas Ordinance (CAO), as embodied in KCC Chapter 21A.24 and supported by definitions contained in KCC Chapter 21A.06, provides a regulatory framework for determining the presence or absence of a flood hazard area on a potential floodplain property. This framework is a thorough and adequate mechanism for purposes of floodplain planning and permit review. In the permit context it directs the department to assemble the available data, determine which data is most reliable and on that basis make a flood hazard area delineation.

COL No. 1, HE, CP 264-65.

For purposes of code enforcement, however, the CAO flood hazard provisions are incomplete. For enforcement purposes one needs also a clear and intelligible standard. KCC 21A.24.230 tells us how DDES should go about formulating a standard but until that process is actually undergone, no standard exists. . . .

COL No. 2., HE, CP 265 [Emphasis added.]

While KCC 21A.24.230 provides a full menu of component floodplain factors and a roster of potential floodplain data resources, including at the top of the list the FEMA FIRM maps, it does not create a presumption that any one of these resources is to be deemed accurate and controlling for regulatory purposes. Without such a formal regulatory designation, there is no easily ascertainable adopted county flood hazard area standard applicable to the Spencer property, and the portion of the county's notice and order that cites the Appellants for conducting materials processing operations and clearing, grading and filling within a flood hazard area becomes a gesture without legal effect. Therefore, the portion of the appeals that challenges the notice and order citations for activities within a flood hazard area must be granted.

COL No. 5, HE, CP 265-55.

Examiner Smith did not make a constitutional determination. He simply concluded there was no controlling legal standard. *Exendine v. City of Sammamish*, 127 Wn. App. 574, 113 P.3d 494 (2005), on which the County relied before the trial court, has no relevance here. In that case, the court agreed that the Hearing Examiner did not have jurisdiction to rule on the constitutionality of search warrants issued by a court. In this case, the Hearing Examiner did what every decision making authority is required to do: attempt to determine what standards apply and whether burdens of proof have been met.

While the constitutionality argument is inapplicable, because no such decision was made, the Hearing Examiner's own procedural rules from the Hearing Examiner's website do not contain the language quoted by the County.<sup>11</sup> In DDES's opening brief at p. 12, it quoted what it represented to be the Hearing Examiner's procedural rule (A)(1) to state that:

[t]he hearing examiner's jurisdiction is limited to those matters specifically identified in the King County Code or assigned to the examiner by County ordinance or Council motion. Claims based on the constitutionality of the County's regulations or asserting equitable defenses may be raised in a proceeding for purposes of exhausting administrative remedies but are beyond the jurisdiction of the hearing examiner to entertain.

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<sup>11</sup> KCC 20.24.170 requires that the HE rules be posted to the Internet, so presumably one should be able to rely on what is posted and not need to inquire if subsequent changes have been made.

CP 61. However, in the rules linked to the website, which became effective in March 31, 2005, section III.A.1 begins similarly to what the County quotes but, interestingly, says nothing about constitutional issues. It reads as follows:

A. Jurisdiction

1. Dependent upon Specific Delegation

The hearing examiner's jurisdiction is limited to matters specifically identified in the King County Code or assigned to the examiner by county ordinance or Council motion. Decisions and recommendations by the examiner may expressly retain jurisdiction for purposes which are within the scope of the original matter.

2. When Jurisdictional Issues Can be Raised

The issue of the examiner's jurisdiction to hear a matter can be raised by the examiner at any time during the course of a proceeding. Jurisdictional questions should be raised by a party or interested person promptly upon becoming aware of facts which give rise to the question.

A review of the applicable flood hazard ordinances and data on which the parties rely reveals the difficulty in arriving at a standard by which to judge BRC's activities. KCC 21A.24.230A and B identify the components of the flood hazard area (A) and the potential sources of data to be analyzed (B). The ordinance provides as follows:

21A.24.230 Flood Hazard Areas — Components.

A. A flood hazard area consists of the following components:

1. Floodplain;
2. Zero-rise flood fringe;
3. Zero-rise floodway;
4. FEMA floodway; and
5. Channel migration zones.

B. The department shall delineate a flood hazard area after reviewing base flood elevations and flood hazard data for a flood having a one percent chance of being equaled or exceeded in any given year, often referred to as the “one-hundred-year flood.” The department shall determine the base flood for existing conditions. If a basin plan or hydrologic study including projected flows under future developed conditions has been completed and approved by King County, the department shall use these future flow projections. Many flood hazard areas are mapped by FEMA in a scientific and engineering report entitled “The Flood Insurance Study for King County and Incorporated Areas.” When there are multiple sources of flood hazard data for flood plain boundaries, regulatory floodway boundaries, base flood elevations, or flood cross sections, the department may determine which data most accurately classifies and delineates the flood hazard area. The department may utilize the following sources of flood hazard data for floodplain boundaries, regulatory floodway boundaries, base flood elevations or cross sections when determining a flood hazard area:

1. Flood Insurance Rate Maps;
2. Flood Insurance Studies;

3. Preliminary Flood Insurance Rate Maps;
4. Preliminary Flood Insurance Studies;
5. Draft flood boundary work maps and associated technical reports;
6. Critical area reports prepared in accordance with FEMA standards contained in 44 C.F.R. Part 65 and consistent with the King County Surface Water Design Manual provisions for floodplain analysis;
7. Letter of map amendments;
8. Letter of map revisions;
9. Channel migration zone maps and studies;
10. Historical flood hazard information;
11. Wind and wave data provided by the United States Army Corps of Engineers; and
12. Any other available data that accurately classifies and delineates the flood hazard area or base flood elevation.

None of these twelve potential sources of data are given preference over others.

An excerpt from testimony of the County's own expert, Andy Levesque from the County's Land and Water Resources Division is telling of the state of affairs:

So there are really five [flood plain] maps. There is the '75 one, which I tend to ignore because it's outdated. There's the '89 and '95 map set, which you can count as two if you

want, but they're basically the same. There's a new draft D [digital]-FIRM, and then there's the new preliminary flood study produced by the County.

EHE, Sub No. 18, Ex. 51, Levesque Deposition Testimony 3/13/08, p. 17-18, referencing EHE, Sub No. 18, Ex. 44a, 47, 48 and 49.

A senior official of DDES, Randy Sandin, Division Director, Land Use Services Division, candidly testified he did not know what FEMA map was currently effective in King County. Sandin Testimony 6/29/09, CP 210 (lines 1-4). This is not a trivial information gap. Mr. Sandin supervises the Critical Areas Review Section, the Inspection Section, and the Site Development Section of DDES. If he does not know, who would?

The boundary of the flood hazard area is a moving target. Deficiencies in the FEMA mapping process have been known since at least 1993 by King County. EHE, Sub No. 18, Ex, 69, at p. 25-26 Paragraph 3.6; and at p. 29. King County, along with everyone else, acknowledges that the FEMA Flood Insurance Rate Maps ("FIRMs") are not reliable at this location. The 1995 FIRM and the 2005 PFIRM, which is a preliminary flood insurance rate map, are being challenged by the County due to the fact that all levees other than those certified as constructed to Corps of Engineers standards are not considered as effective. *See* EHE, Sub No. 18, Ex. 98 at p. 2. This means that the majority of levees along the Green River are

disregarded leaving essentially the entire Green River Valley as a floodplain legally, but not perhaps functionally. The County itself has appealed the latest FEMA mapping. TR, Sub No. 16A, Levesque Testimony, 11/12/09, 2685.

The County's so-called appeal map (RD Ex. 44) shows a portion of the Spencer property in the 100 year flood plain, but all or substantially all of BRC's operations are outside of the flood hazard boundary. However, even the County's appeal map is suspect. At the time of the Notice of Violation there was also a document, EHE, Sub No. 18, Ex. 54a, entitled "Tributory 053 Existing Conditions Proposed Developments North Area," dated October 13, 2005. This map, created by the County's Water and Land Resources Division mimics the later 2008 appeal map in many features, except importantly that only the western one-third of the Spencer property is within the floodplain. This would mean that most, if not all, of BRC's current operation would be outside the floodplain.

And of course, there is no consistency among County maps and no common understanding of which maps are applicable. EHE, Sub No. 18, Ex. 90 points out that an attachment to Andy Levesque's March 13, 2008 deposition shows the eastern two-thirds of the Spencer property (where BRC operates) is not within the 100 year flood plain. EHE, Sub No. 18, Ex. 90, Declaration of AJ Bredberg, p. 2, Section 2, lines 8 – 14.

Additional confirmation of the floodplain boundary comes from EHE, Sub No. 18, Ex. 61, the recent (2008) permitting story (grading) of a parcel immediately north of Spencer's. Serac LLC proposed a wetland enhancement project (mitigation bank) on its property. Nothing provided by the County in response to Mr. Spencer's attorney's Public Records Requests (EHE, Sub No. 18, Ex. 61) indicates that the Serac property, and its grading activities, are within a flood hazard area. So how does the County possibly sustain its burden of proof here that BRC's operations on the Spencer property are within a flood hazard area? This is all so arbitrary. So does the County have five "legal standards"—for code enforcement? Who picks and chooses which standard to enforce?

Shear offered a very different flood hazard analysis, based more on empirical research than maps based on potentially flawed models. Substantial evidence, based on the County's own records, indicates that any localized flooding around the Spencer property is due to culvert maintenance issues, not Green River flooding. See EHE, Sub No. 18, Ex. 68, in particular the Drainage Investigation Report of November 25, 2008 and the King County WLR Division letter of May 1, 2006 to Mara Heiman.

The most detailed and thorough flood hazard analysis comes from the SNR Company. EHE, Sub No. 18 Ex. 98. The SNR Report makes many important, fact based, conclusions. First, there is no knowledge or

data to support a finding that flooding from the Green River has extended south of South 277th Street. EHE, Sub No. 18, Ex. 89, at p. 2. (The Spencer property is south of south 277<sup>th</sup> street.) King County's own data suggests that Green River flooding in the Mullen Slough area is limited to the northern area and "relatively rare"<sup>12</sup> in any event. EHE, Sub No. 18, Ex. 98, p. 2, 3<sup>rd</sup> full paragraph and last paragraph. (The Spencer property is in the southern portion of the Mullen Slough area.) Again, SNR corroborates what others have said. The FEMA maps and PFIRM 2005 maps are flawed. EHE, Sub No. 18, Ex. 98, p. 2, 4<sup>th</sup> full paragraph and 5<sup>th</sup> full paragraph. Further, there is no physical evidence that the Spencer property has ever experienced flooding from the Green River or that a normal 1% storm event would extend onto the Spencer property. EHE, Sub No. 18, Ex. 98, p. 5, paragraph 6.

Rarely in code enforcement cases is there an opportunity to review detailed studies and analyses by parties not initially under contract to either party. Mr. Neugebauer of SNR has spent years studying properties adjacent to the Spencer property. He has a level of knowledge unmatched by any County witness. Sub No. 16A, Neugebauer Testimony 11/12/09, TR 2602-

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<sup>12</sup> We note that the term "relatively rare" is the opposite of the GMA term "frequently flooded." We also question whether flooding which is "relatively rare" is a "hazard," unless we want to trivialize what a hazard is.

2605. Mr. Levesque may know his “stuff” in a broad sense of flood plain management, but he lacks Mr. Neugebauer’s detailed research in the Mill Creek and Mullen Slough areas. EHE, Sub No. 18, Ex. 98.

Given the uncertain boundary of the flood hazard area restriction, enforcement of code provisions which rely upon a vague and unsettled legal standard are inconsistent with HE Rule X1.B.8.b. and could be considered a violation of procedural due process. An ordinance which forbids conduct in terms so vague that persons of common intelligence must guess at its meaning and differ as to its application violates the essential element of due process of law-fair warning. *Burien Bark Supply v. King County*, 106 Wn.2d 868, 871, 725 P.2d 994 (1986). See also *Anderson v. City of Issaquah*, 70 Wn.App. 64, 851 P.2d 744 (1993). Here, the boundary of the flood hazard area is extremely uncertain and the conflicting documentation provides no fair warning for when a property owner would be in violation. As such, the Hearing Examiner was correct in his denial of the County’s notice of violation with respect to flood hazards. Furthermore, this court has the authority to determine constitutional issues, no matter how limited the Hearing Examiner’s authority might be. RCW 36.70C.130(1)(f).

F. The trial court erred in concluding as a matter of law that the Hearing Examiner exceeded his jurisdiction and authority under King County Code 20.24.010 and 20.24.080 in imposing conditions on DDES's permit and review process in his Report and Decision.

At the outset, the Court should know that this has been a highly contentious case, and while some of the actors who fed into that contentiousness have moved on, there is still an element of mistrust and concern on the part of Spencer and Shear that the County just wants to shut this business down and will doggedly find a way to do so. Hearing Examiner Smith himself made this observation. COL. No. 42, HE, CP 275.

KCC 20.24.100 provides authority for hearing examiners to impose conditions, modifications and restrictions. “The examiner is authorized to impose conditions, modifications and restrictions, **including but not limited to** setbacks, screenings in the form of landscaping or fencing, covenants, easements, road improvements and dedications of additional road right of way and performance bonds authorized by county ordinances.” [Emphasis added.]

The conditions imposed by the Hearing Examiner on the review process were in direct response to the County's insistence, as raised in its closing brief, that as part of the CUP review mandated by the Hearing Examiner, the County could once again examine the issues of wetlands and flood hazard, despite having lost those issues on appeal. COL Nos. 39-42,

HE, CP 74-75. This is just the heavy handedness and arbitrary attitude that profoundly scares Shear.

The Hearing Examiner's conditions simply make it clear that *Young v. Pierce County*, 120 Wn. App. 175, 84 P.3d 927 (2004), on which the County relied before the Hearing Examiner and before the trial court for the premise that it can continue to subject Shear's operation to innumerable future review requirements despite DDES's failure to establish violations (COL No. 39-41, HE, CP 274-75; King County DDES Reply Brief, p. 11-12, CP 554-555), is distinguishable. As the Hearing Examiner observed, whereas in *Young*, Pierce County asserted that more wetland information is needed, in this case DDES' notice and order asserted "unconditionally that wetland and flood hazard critical areas exist on the Spencer parcel and business operations must be shut down," and therefore "DDES, having adopted a more ambitious and conclusive regulatory stance, must be prepared to accept the burdens of its failure as well as the benefits of its success." COL No. 42, HE, CP 275. In this case, those critical areas issues that were raised by the Notice of Violation have been decided in BRC and Spencer's favor. There is such a thing as "res judicata" and "collateral estoppel" even if King County DDES thinks otherwise. Therefore, the Hearing Examiner sought to prevent the County from getting "another bite

of the apple” through its permitting process with respect to the critical areas of wetlands and flood hazard that had been decided.

In this instance the Hearing Examiner granted the appeal of Shear and Spencer with respect to violations of the critical areas ordinances and imposed such conditions as were necessary to see that the appellants’ were not forced to revisit the issues. Someone could argue that some conditions may have been superfluous, since those issues would be precluded by *res judicata* anyway. See *Hilltop Terrace Homeowners Assoc. v. Island County*, 126 Wn.2d 22, 891 P.2d 29 (1995). However, the Hearing Examiner wanted to be clear, to avoid everyone having to relitigate, when he saw the direction that the County was headed in this regard: “the conditions attached to this appeal decision will place appropriate limitations on further review designed to preserve to the Appellants the successful elements of their appeal and will retain Hearing Examiner jurisdiction to the extent necessary to assure that these limitations are observed.” COL No. 42, HE, CP 275. There is no harm or error in stating the obvious.

The Hearing Examiner’s conditions protect Shear with respect to parts of the appeal that have been granted, *i.e.*, no wetlands, no floodplain hazard and the presence of a nonconforming use. It is therefore distinguishable from *In re King County Hearing Examiner*, 135 Wn.App. 312, 144 P.3d 345 (2006), in which the King County Hearing Examiner

found an EIS to be adequate, thereby denying the appeal, but ordered that a supplemental EIS be performed.

In this case, the Hearing Examiner is simply ensuring that the permit review process does not cause the parties to have to revisit issues that have already been litigated. This is particularly appropriate given the County's clearly expressed desire to do so.

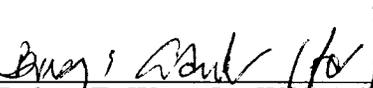
## VI. CONCLUSION

Shear and Spencer respectfully request that this Court reverse the trial court and affirm the Hearing Examiner's Decision.

Respectfully submitted this 16<sup>th</sup> day of May, 2011.

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**VII. CERTIFICATE OF SERVICE**

I certify that on the 16th day of May, 2011, I caused a true and correct copy of this BRIEF OF APPELLANTS SHEAR AND SPENCER to be served on the following in the manner indicated below:

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## VIII. APPENDIX

**20.24.010 Chapter purpose.** The purpose of this chapter is to provide a system of considering and applying regulatory devices which will best satisfy the following basic needs:

- A. The need to separate the application of regulatory controls to the land from planning;
- B. The need to better protect and promote the interests of the public and private elements of the community;
- C. The need to expand the principles of fairness and due process in public hearings. (Ord. 263 Art. 5 § 1, 1969).

**20.24.020 Office created.** The office of hearing examiner is created. The examiner shall act on behalf of the council in considering and applying adopted county policies and regulations as provided herein. (Ord. 11502 § 1, 1994; Ord. 263 Art. 5 § 2, 1969).

**20.24.030 Appointment and terms.** The council shall appoint the examiner to serve in said office for a term of four years. (Ord. 4481 § 1, 1979; Ord. 263 Art. 5 § 3, 1969).

**20.24.040 Removal.** The examiner or his or her deputy may be removed from office at any time by the affirmative vote of not less than eight members of the council for just cause. (Ord. 12196 § 21, 1996; Ord. 263 Art. 5 § 4, 1969).

**20.24.050 Qualifications.** The examiner and his or her deputy shall be appointed solely with regard to their qualifications for the duties of their office and shall have such training or experience as will qualify them to conduct administrative or quasi-judicial hearings on regulatory enactments and to discharge the other functions conferred upon them, and shall hold no other appointive or elective public office or position in the county government except as provided herein. (Ord. 12196 § 22, 1996; Ord. 263 Art. 5 § 5, 1969).

**20.24.060 Deputy examiner duties.** The deputy shall assist the examiner in the performance of the duties conferred upon the examiner by ordinance and shall, in the event of the absence or the inability of the examiner to act, have all the duties and powers of the examiner. The deputy may also serve in other capacities as an employee of the council. (Ord. 12196 § 23, 1996; Ord. 263 Art. 5 § 6, 1969).

**20.24.065 Pro tem examiners.** The chief examiner may hire qualified persons to serve as examiner pro tempore, as needed, to expeditiously hear pending applications and appeals. (Ord. 11502 § 16, 1994).

**20.24.070 Recommendations to the council.**

A. The examiner shall receive and examine available information, conduct open record public hearings and prepare records and reports thereof and issue recommendations, including findings and conclusions to the council based on the issues and evidence in the record in the following cases:

1. All Type 4 land use decisions;
2. Applications for agricultural land variances;
3. Applications for public benefit rating system assessed valuation on open space land and current use assessment on timber lands except as provided in K.C.C. 20.36.090;
4. Appeals from denials by the county assessor of applications for current use assessments on farm and agricultural lands;
5. Applications for the vacation of county roads;
6. Appeals of a recommendation by the department of transportation to deny the petition for vacation of a county road;
7. Appeals of a recommendation by the department of transportation of the compensation amount to be paid for vacation of a county road;
8. Proposals for establishment or modification of cable system rates; and
9. Other applications or appeals that the council may prescribe by ordinance.

B. The examiner's recommendation may be to grant or deny the application or appeal, or the examiner may recommend that the council adopt the application or appeal with such conditions, modifications and restrictions as the examiner finds necessary to carry out applicable state laws and regulations and the regulations, including chapter 43.21C RCW, policies, objectives and goals of the comprehensive plan, the community plan, subarea or neighborhood plans, the zoning code, the subdivision code and other official laws, policies and objectives of King County. In case of any conflict between the King County Comprehensive Plan and a community, subarea or neighborhood plan, the Comprehensive Plan shall govern. (Ord. 13625 § 17, 1999; Ord. 12196 § 24, 1996; Ord. 12171 § 1, 1996; Ord. 11620 § 5, 1994; Ord. 11502 § 2, 1994; Ord. 10691 § 3, 1992; Ord. 10511 § 2, 1992; Ord. 9614 § 123, 1990; Ord. 8804 § 1, 1989; Ord. 6949 § 16, 1984; Ord. 6465 § 13, 1983; Ord. 4461 § 1, 1979).

**20.24.072 Type 3 decisions by the examiner, appealable to the council.**

A. The examiner shall receive and examine available information, conduct open record public hearings and prepare records and reports thereof, and issue decisions on Type 3 land use permit applications, including findings and conclusions, based on the issues and evidence in the record. The decision of the examiner on Type 3 land use permit applications shall be appealable to the Council on the record established by the examiner as provided by K.C.C. 20.24.210D.

B. The examiner's decision may be to grant or deny the application, or the examiner may grant the application with such conditions, modifications and restrictions as the examiner finds necessary to carry out applicable state laws and regulations, including chapter 43.21C RCW, and the regulations, policies, objectives and goals of the comprehensive plan, the community plan, subarea or neighborhood plans, the zoning code, the subdivision code and other official laws, policies and objectives of King County. In case of any conflict between the King County Comprehensive Plan and a community, subarea or neighborhood plan, the Comprehensive Plan shall govern. (Ord. 12196 § 25, 1996).

**20.24.080 Final decisions by the examiner.**

A. The examiner shall receive and examine available information, conduct open record public hearings and prepare records and reports thereof, and issue final decisions, including findings and conclusions, based on the issues and evidence in the record, which shall be appealable as provided by K.C.C. 20.24.240, or to other designated authority in the following cases:

1. Appeals of SEPA decisions, as provided in K.C.C. 20.44.120 and public rules adopted under K.C.C. 20.44.075;
2. Appeals of all Type 2 land use decisions, with the exception of appeals of shoreline permits, including shoreline variances and conditional uses, which are appealable to the state shoreline hearings board;
3. Appeals of citations, notices and orders, notices of noncompliance and stop work orders issued pursuant to K.C.C. Title 23 or Title 1.08 of the rules and regulations of the King County board of health;
4. Appeals of decisions regarding the abatement of a nonconformance;
5. Appeals of decisions of the director of the department of natural resources and parks on requests for rate adjustments to surface and storm water management rates and charges;
6. Appeals of department of public safety seizures and intended forfeitures, when properly designated by the chief law enforcement officer of that department as provided in RCW 69.50.505;
7. Appeals of notices and certifications of junk vehicles to be removed as a public nuisance as provided in K.C.C. Title 21A and K.C.C. chapter 23.10;
8. Appeals of the department's final decisions regarding transportation concurrency, mitigation payment system and intersection standards provisions of K.C.C. Title 14;
9. Appeals of decisions of the interagency review committee created under K.C.C. 21A.37.070 regarding sending site applications for certification pursuant to K.C.C. chapter 21A.37; and
10. Appeals of other applications or appeals that the council prescribes by ordinance.

B. The examiner's decision may be to grant or deny the application or appeal, or the examiner may grant the application or appeal with such conditions, modifications and restrictions as the examiner finds necessary to make the application or appeal compatible with the environment and carry out applicable state laws and regulations, including chapter 43.21C RCW, and the regulations, policies, objectives and goals of the comprehensive plan, the community plans, subarea or neighborhood plans, the zoning code, the subdivision code and other official laws, policies and objectives of King County. In case of any conflict between the King County Comprehensive Plan and a community, subarea or neighborhood plan, the King County Comprehensive Plan shall govern. (Ord. 15969 § 8, 2007: Ord. 14449 § 3, 2002: Ord. 14199 § 227, 2001: Ord. 14190 § 24, 2001: Ord. 13625 § 18, 1999: Ord. 13277 § 1, 1998: Ord. 13263 § 58, 1998: Ord. 12962 § 1, 1998: Ord. 12196 § 26, 1996: Ord. 11620 § 6, 1994: Ord. 11502 § 3, 1994: Ord. 11016 § 15, 1993: Ord. 9614 § 122, 1990: Ord. 8804 § 2, 1989: Ord. 7990 § 34, 1987: Ord. 7846 § 12, 1986: Ord. 7714 § 11, 1986: Ord. 7590 § 10, 1986: Ord. 7543 § 1, 1986: Ord. 7246 § 3, 1985: Ord. 6949 § 17, 1984: Ord. 5570 § 6, 1981: Ord. 5002 § 16, 1980: Ord. 4461 § 2, 1979).

**20.24.085 Appeals of permit fee estimates and billings by department of development and environmental services - duties.**

A. As provided in K.C.C. chapter 27.50, on appeals of permit fee estimates and billings by the department of development and environmental services, the examiner shall receive and examine the available information, conduct public hearings and issue final decisions, including findings and conclusions, based on the issues and evidence.

B. The examiner that conducts the appeal hearing or hearings under K.C.C. chapter 27.50 of a permit fee estimate and/or permit fee billing related to a development permit application by the department of development and environmental services shall not have conducted and shall not conduct the hearing on any other component of that development permit application. (Ord. 16026 § 2, 2008).

**20.24.090 Notice of appeal to examiner - filing.**

A. Except as otherwise provided in this section, a notice of appeal shall be filed with the county department or division issuing the original decision with a copy provided by the department or division to the office of the hearing examiner. The notice of appeal, together with the required appeal fee, shall be filed within the prescribed appeal period. Except as otherwise provided in K.C.C. chapter 27.50, the appeal period shall be fourteen calendar days and shall commence on the third day after the mailing of the notice of decision. In cases of appeals of Type 2 land use decisions made by the director, if WAC 197-11-340(2)(a) applies the notice of appeal shall be filed within twenty-four days after the mailing of the notice of decision.

B. A notice of appeal of the recommendation to deny vacation of a county road by the department of transportation shall be filed along with the required two-hundred-dollar administrative fee with the clerk of the county council within thirty days of an issuance of the denial.

C. \*Except in the case of an appeal of citation under K.C.C. chapter 23.20, \*[and e]xcept as otherwise provided in K.C.C. chapter 27.50, if a notice of appeal has been filed within the applicable time period [provided in this section]\*\*, the appellant shall file a statement of appeal with the county department or division issuing the original decision or action within seven days after the filing deadline for the notice of appeal. A statement of appeal is not required for an appeal of a citation issued under K.C.C. chapter 23.30. Department or division staff shall:

1. Be available within a reasonable time to persons wishing to file a statement of appeal subsequent to an agency ruling, and to respond to queries concerning the facts and process of the county decision; and

**20.24.100 Condition, modification and restriction examples.** The examiner is authorized to impose conditions, modifications and restrictions, including but not limited to setbacks, screenings in the form of landscaping or fencing, covenants, easements, road improvements and dedications of additional road right-of-way and performance bonds as authorized by county ordinances. (Ord. 12196 § 30, 1996: Ord. 263 Art. 5 § 7(part), 1969).

**20.24.110 Quasi-judicial powers.** The examiner may also exercise administrative powers and such other quasi-judicial powers as may be granted by county ordinance. (Ord. 163 Art. 5 § 8, 1969).

**20.24.120 Freedom from improper influence.** Individual councilmembers, county officials or any other person, shall not interfere with or attempt to interfere with the examiner or deputy examiner in the performance of his or her designated duties. (Ord. 12196 § 31, 1996: Ord. 263 Art. 5 § 9, 1969).

**20.24.130 Public hearing.** When it is found that an application meets the filing requirements of the responsible county department or an appeal meets the filing rules, it shall be accepted and a date assigned for public hearing. If for any reason testimony on any matter set for public hearing, or being heard, cannot be completed on the date set for such hearing, the matter shall be continued to the soonest available date. A matter should be heard, to the extent practicable, on consecutive days until it is concluded. For purposes of proceedings identified in K.C.C. 20.24.070 and 20.24.072, the public hearing by the examiner shall constitute the hearing by the council. (Ord. 12196 § 32, 1996: Ord. 11502, § 5, 1994: Ord. 4461 § 4, 1979).

**20.24.140 Consolidation of hearings.** Whenever a project application includes more than one county permit, approval or determination for which a public hearing is required or for which an appeal is provided pursuant to this chapter, the hearings and any such appeals may be consolidated into a single proceeding before the hearing examiner pursuant to K.C.C. 20.20.020. (Ord. 12196 § 33, 1996: Ord. 11502 § 6, 1994: Ord. 4461 § 5, 1979).

**20.24.145 Pre-hearing conference.** A pre-hearing conference may be called by the examiner pursuant to this chapter upon the request of a party, or on the examiner's own motion. A pre-hearing conference shall be held in every appeal brought pursuant to this chapter if timely requested by any party.

The pre-hearing conference shall be held at such time as ordered by the examiner, but not less than fourteen days prior to the scheduled hearing on not less than seven days notice to those who are then parties of record to the proceeding. The purpose of a pre-hearing conference shall be to identify to the extent possible, the facts in dispute, issues, laws, parties and witnesses in the case. In addition the pre-hearing conference is intended to establish a timeline for the presentation of the case. The examiner shall establish rules for the conduct of pre-hearing conferences.

Any party who does not attend the pre-hearing conference, or anyone who becomes a party of record after notice of the pre-hearing conference has been sent to the parties, shall nevertheless be entitled to present testimony and evidence to the examiner at the hearing. (Ord. 12196 § 34, 1996: Ord. 11502 § 12, 1994).

**20.24.150 Report by department.** When an application or appeal has been set for public hearing, the responsible county department shall coordinate and assemble the reviews of other departments and governmental agencies having an interest in the application or appeal and shall prepare a report summarizing the factors involved and the department findings and recommendation or decision. At least fourteen calendar days prior to the scheduled hearing, the report, and in the case of appeals any written appeal arguments submitted to the county, shall be filed with the examiner and copies thereof shall be mailed to all persons of record who have not previously received said materials. (Ord. 12196 § 35, 1996: Ord. 4461 § 6, 1979: Ord. 263 Art. 5 § 11, 1969).

**20.24.160 Notice.**

A. Notice of the time and place of any hearing on an application before the hearing examiner pursuant to this chapter shall be mailed by first class mail at least fourteen calendar days prior to the scheduled hearing date to all persons who commented or requested notice of the hearing. The notice of decision or recommendation required by K.C.C. Title 20 may be combined with the notice of hearing required hereby.

B. Notice of the time and place of any appeal hearing before the hearing examiner pursuant to this chapter shall be mailed to all parties of record by first class mail at least fourteen calendar days prior to the scheduled hearing date.

C. If testimony cannot be completed prior to adjournment on the date set for a hearing, the examiner shall announce prior to adjournment the time and place said hearing will be continued. (Ord. 12196 § 36, 1996; Ord. 11502 § 7, 1994; Ord. 4461 § 7, 1979; Ord. 263 Art. 5 § 12, 1969).

**20.24.170 Rules and conduct of hearings.**

A.1. The examiner shall adopt rules, including any amendments to the rules, for the conduct of hearings and for any mediation process consistent with this chapter.

2. The hearing examiner may propose amendments to the rules by filing a draft of the amendments and a draft of a motion approving the amendments in the office of the clerk of the council, for distribution to all councilmembers for review. At the same time as the filing of the draft, the hearing examiner shall also distribute for comment a copy of the proposed amendments to any county department that has appeared before the examiner in the year before the filing of proposed amendments and to any other parties who have requested to be notified of proposed amendments to the rules. Comments to the proposed amendments may be filed with the clerk of the council for distribution to all councilmembers for sixty days after the proposed amendments are distributed for comment. The amendments shall take effect when they have been approved by the council by motion.

3. The hearing examiner shall publish the rules and any amendments to the rules and make them available to the public in printed and electronic forms and shall post the rules and any amendments to the Internet.

B. The examiner shall have the power to issue summons and subpoena to compel the appearance of witnesses and production of documents and materials, to order discovery, to administer oaths and to preserve order.

C. To avoid unnecessary delay and to promote efficiency of the hearing process, the examiner shall limit testimony, including cross examination, to that which is relevant to the matter being heard, in light of adopted county policies and regulations and shall exclude evidence and cross examination that is irrelevant, cumulative or unduly repetitious. The examiner may establish reasonable time limits for the presentation of direct oral testimony, cross examination and argument.

D. Any written submittals will be admitted only when authorized by the examiner under pertinent and promulgated administrative rules. (Ord. 15048 § 1, 2004; Ord. 11502 § 8, 1994; Ord. 4461 § 8, 1979; Ord. 263 Art. 5 § 13, 1969).

**20.24.175 Case management techniques.** In all matters heard by the examiner, the examiner shall use case management techniques to the extent reasonable including:

A. Limiting testimony and argument to relevant issues and to matters identified in the pre-hearing order;

B. Pre-hearing identification and submission of exhibits (if applicable);

C. Stipulated testimony or facts;

D. Pre-hearing dispositive motions (if applicable);

E. Use of pro tempore examiners;

F. Voluntary mediation and complainant appeal mediation; and

G. Other methods to promote efficiency and to avoid delay. (Ord. 16278 § 28, 2008; Ord. 11502 § 13, 1994).

**20.24.180 Examiner findings.** When the examiner renders a decision or recommendation, he or she shall make and enter findings of fact and conclusions from the record which support the decision and the findings and conclusions shall set forth and demonstrate the manner in which the decision or recommendation is consistent with, carries out and helps implement applicable state laws and regulations and the regulations, policies, objectives and goals of the comprehensive plan, subarea or community plans, the zoning code, the land segregation code and other official laws, policies and objectives of King County, and that the recommendation or decision will not be unreasonably incompatible with or detrimental to affected properties and the general public. (Ord. 12196 § 37, 1996; Ord. 4461 § 9, 1979).

**21A.06.705 Livestock, small.** Livestock, small: hogs, excluding pigs weighing under 120 lbs. and standing 20 inches or less at the shoulder which are kept as household pets or small animals, sheep, goats, miniature horses, llamas, alpaca and other livestock generally weighing under 500 pounds. (Ord. 10870 § 181, 1993).

**21A.06.710 Livestock sales.** Livestock sales: the sale of livestock but not including auctions. (Ord. 10870 § 182, 1993).

**21A.06.715 Loading space.** Loading space: a space for the temporary parking of a vehicle while loading or unloading cargo or passengers. (Ord. 10870 § 183, 1993).

**21A.06.720 Log storage.** Log storage: a facility for the open or enclosed storage of logs which may include repair facilities for equipment used on-site or operations offices. (Ord. 10870 § 184, 1993).

**21A.06.725 Lot.** Lot: a physically separate and distinct parcel of property, which has been created pursuant to K.C.C. Title 19, Subdivision. (Ord. 10870 § 185, 1993).

**21A.06.730 Lot line, interior.** Lot line, interior: lot lines that delineate property boundaries along those portions of the property which do not abut a street. (Ord. 10870 § 186, 1993).

**21A.06.731 Maintenance.** Maintenance: the usual acts to prevent a decline, lapse or cessation from a lawfully established condition without any expansion of or significant change from that originally established condition. Activities within landscaped areas within areas subject to native vegetation retention requirements may be considered "maintenance" only if they maintain or enhance the canopy and understory cover. "Maintenance" includes repair work but does not include replacement work. When maintenance is conducted specifically in accordance with the Regional Road Maintenance Guidelines, the definition of "maintenance" in the glossary of those guidelines supersedes the definition of "maintenance" in this section. (Ord. 15051 § 73, 2004).

**21A.06.732 Manufactured home or mobile home.** Manufactured home or mobile home: a structure, transportable in one or more sections, that in the traveling mode is eight body feet or more in width or thirty-two body feet or more in length; or when erected on site, is three-hundred square feet or more in area; which is built on a permanent chassis and is designated for use with or without a permanent foundation when attached to the required utilities; which contains plumbing, heating, air-conditioning and electrical systems; and shall include any structure that meets all the requirements of this section, or of chapter 296-150M WAC, except the size requirements for which the manufacturer voluntarily complies with the standards and files the certification required by the federal Department of Housing and Urban Development. The term "manufactured home" or "mobile home" does not include a "recreational vehicle." (Ord. 15606 § 6, 2006; Ord. 15051 § 74, 2004).

**21A.06.734 Mapping partner.** Mapping partner: any organization or individual that is involved in the development and maintenance of a draft flood boundary work map, Preliminary Flood Insurance Rate Map or Flood Insurance Rate Map. (Ord. 15051 § 75, 2004).

**21A.06.735 Marina.** Marina: an establishment providing docking, moorage space and related activities limited to the provisioning or minor repair of pleasure boats and yachts; and accessory facilities including, but not limited to:

- A. Showers;
- B. Toilets; and
- C. Self-service laundries. (Ord. 10870 § 187, 1993).

**21A.06.740 Material error.** Material error: substantive information upon which a permit decision is based that is submitted in error or is omitted at the time of permit application. (Ord. 10870 § 188, 1993).

**21A.06.742 Materials processing facility.** Materials processing facility: a site or establishment, not accessory to a mineral extraction or sawmill use, that is primarily engaged in crushing, grinding, pulverizing or otherwise preparing earth materials, vegetation, organic waste, construction and demolition materials or source separated organic materials and that is not the final disposal site. (Ord. 15032 § 6, 2004)

(King County 6-2009)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

**21A.08.020 Interpretation of land use tables.**

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

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

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

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

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

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

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

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

**21A.08.050 General services land uses.**

**A. General services land uses.**

KEY P-Permitted Use C-Conditional Use S-Special Use	Z O N E	RESOURCE			RESIDENTIAL				COMMERCIAL/INDUSTRIAL						
		A G R I C U L T U R E	F O R E S T	M I N E R A L	R U R A L	U R B A N	R E S E R V E	U R B A N	R E S I D E N T I A L	N E I G H B O R H O O D	B U S I N E S S	C O M M U N I T Y	B U S I N E S S	R E G I O N A L	B U S I N E S S
SIC#	SPECIFIC LAND USE	A	F	M	RA	UR	R1-8	R12-48	NB	CB	RB	O	I		
	<b>PERSONAL SERVICES:</b>														
72	General Personal Service						C25 C37	C25 C37*	P	P	P	P3	P3		
7216	Drycleaning Plants												P		
7218	Industrial Launderers												P		
7261	Funeral Home/Crematory					C4	C4	C4		P	P				
*	Cemetery, Columbarium or Mausoleum				P24 C5 and 31	P24 C5	P24 C5	P24 C5	P24	P24	P24 C5	P24			
*	Day Care I	P6			P6	P6	P6	P	P	P	P	P7	P7		
*	Day Care II				P8 C	P8 C	P8 C	P8 C	P	P	P	P7	P7		
074	Veterinary Clinic	P9			P9 C10 and 31	P9 C10			P10	P10	P10		P		
753	Automotive Repair (1)								P11	P	P		P		
754	Automotive Service								P11	P	P		P		
76	Miscellaneous Repair	C33			P32 C33	P32	P32	P32	P32	P	P		P		
866	Church, Synagogue, Temple				P12 C27 and 31	P12 C	P12 C	P12 C	P	P	P	P			
83	Social Services (2)				P12 C13 and 31	P12 C13	P12 C13	P12 C13	P13	P	P	P			
0752	Animal specialty services				C P35 P36	C			P	P	P	P	P		
*	Stable	P14 C			P14 C31	P14 C	P 14 C								
*	Kennel or Cattery	P9			C	C				C	P				
*	Theatrical Production Services									P30	P28				
*	Artist Studios				P28	P28	P28	P28	P	P	P	P29	P		
*	Interim Recycling Facility				P21	P21	P21	P21	P22	P22	P	P21	P		
*	Dog training facility	C34			C34	C34			P	P	P		P		
	<b>HEALTH SERVICES:</b>														
801-04	Office/Outpatient Clinic				P12 C13	P12 C13	P12 C13 C37	P12 C13 C37	P	P	P	P	P		
805	Nursing and Personal Care Facilities						C			P	P				
806	Hospital						C13	C13		P	P	C			
807	Medical/Dental Lab									P	P	P	P		
808-09	Miscellaneous Health									P	P	P	P		
	<b>EDUCATION SERVICES:</b>														
*	Elementary School				P15 and 31		P	P	P		P16c	P16c	P16c		
*	Middle/Junior High School				P16 C15 and 31		P	P	P		P16c	P16c	P16c		

*	Secondary or High School				P16 C15 and 26 and 31	P26	P26	P26		P16c C	P16c C	P16c	
*	Vocational School				P13 C31	P13 C	P13 C	P13 C			P	P17	P
*	Specialized Instruction School				P19 C20 and 31	P19 C20	P19 C20	P19 C20	P	P	P	P17	P
*	School District Support Facility		P18		P16 C15 and 23 and 31	P23 C	P23 C	P23 C	C	P	P	P	P
<b>GENERAL CROSS REFERENCES:</b>					Land Use Table Instructions, see K.C.C. 21A.08.020 and 21A.02.070; Development Standards, see K.C.C. chapters 21A.12 through 21A.30; General Provisions, see K.C.C. chapters 21A.32 through 21A.38; Application and Review Procedures, see K.C.C. chapters 21A.40 through 21A.44; (*)Definition of this specific Land Use, see K.C.C. chapter 21A.06.								

B. Development conditions.

1. Except SIC Industry No. 7534-Tire Retreading, see manufacturing permitted use table.
2. Except SIC Industry Group Nos.:
  - a. 835-Day Care Services, and
  - b. 836-Residential Care, which is otherwise provided for on the residential permitted land use table.
3. Limited to SIC Industry Group and Industry Nos.:
  - a. 723-Beauty Shops;
  - b. 724-Barber Shops;
  - c. 725-Shoe Repair Shops and Shoeshine Parlors;
  - d. 7212-Garment Pressing and Agents for Laundries and Drycleaners; and
  - e. 217-Carpet and Upholstery Cleaning.
4. Only as an accessory to a cemetery, and prohibited from the UR zone only if the property is located within a designated unincorporated Rural Town.
5. Structures shall maintain a minimum distance of one hundred feet from property lines adjoining residential zones.
6. Only as an accessory to residential use, and:
  - a. Outdoor play areas shall be completely enclosed by a solid wall or fence, with no openings except for gates, and have a minimum height of six feet; and
  - b. Outdoor play equipment shall maintain a minimum distance of twenty feet from property lines adjoining residential zones.
7. Permitted as an accessory use. See commercial/industrial accessory, K.C.C. 21A.08.060.A.
8. Only as a reuse of a public school facility subject to K.C.C. chapter 21A.32, or an accessory use to a school, church, park, sport club or public housing administered by a public agency, and:
  - a. Outdoor play areas shall be completely enclosed by a solid wall or fence, with no openings except for gates and have a minimum height of six feet;
  - b. Outdoor play equipment shall maintain a minimum distance of twenty feet from property lines adjoining residential zones;
  - c. Direct access to a developed arterial street shall be required in any residential zone; and
  - d. Hours of operation may be restricted to assure compatibility with surrounding development.

9.a. As a home occupation only, but the square footage limitations in K.C.C. chapter 21A.30 for home occupations apply only to the office space for the veterinary clinic, office space for the kennel or office space for the cattery, and:

- (1) Boarding or overnight stay of animals is allowed only on sites of five acres or more;
- (2) No burning of refuse or dead animals is allowed;
- (3) The portion of the building or structure in which animals are kept or treated shall be soundproofed. All run areas, excluding confinement areas for livestock, shall be surrounded by an eight-foot-high solid wall and the floor area shall be surfaced with concrete or other impervious material; and
- (4) The provisions of K.C.C. chapter 21A.30 relative to animal keeping are met.

b. The following additional provisions apply to kennels or catteries in the A zone:

- (1) Impervious surface for the kennel or cattery shall not exceed twelve thousand square feet;
- (2) Obedience training classes are not allowed except as provided in subsection B.34. of this section; and
- (3) Any buildings or structures used for housing animals and any outdoor runs shall be set back one hundred and fifty feet from property lines.

10.a. No burning of refuse or dead animals is allowed;

b. The portion of the building or structure in which animals are kept or treated shall be soundproofed. All run areas, excluding confinement areas for livestock, shall be surrounded by an eight-foot-high solid wall and the floor area shall be surfaced with concrete or other impervious material; and

c. The provisions of K.C.C. chapter 21A.30 relative to animal keeping are met.

11. The repair work or service shall only be performed in an enclosed building, and no outdoor storage of materials. SIC Industry No. 7532-Top, Body, and Upholstery Repair Shops and Paint Shops is not allowed.

12. Only as a reuse of a public school facility subject to K.C.C. chapter 21A.32.

13.a. Except as otherwise provided in 13.b of this subsection, only as a reuse of a surplus nonresidential facility subject to K.C.C. chapter 21A.32.

b. Allowed for a social service agency on a site in the NB zone that serves transitional or low-income housing located within three hundred feet of the site on which the social service agency is located.

14. Covered riding arenas are subject to K.C.C. 21A.30.030 and shall not exceed twenty thousand square feet, but stabling areas, whether attached or detached, shall not be counted in this calculation.

15. Limited to projects that do not require or result in an expansion of sewer service outside the urban growth area, unless a finding is made that no cost-effective alternative technologies are feasible, in which case a tightline sewer sized only to meet the needs of the public school, as defined in RCW 28A.150.010, or the school facility and serving only the public school or the school facility may be used. New public high schools shall be permitted subject to the review process in K.C.C. 21A.42.140.

16.a. For middle or junior high schools and secondary or high schools or school facilities, only as a reuse of a public school facility or school facility subject to K.C.C. chapter 21A.32. An expansion of such a school or a school facility shall be subject to approval of a conditional use permit and the expansion shall not require or result in an extension of sewer service outside the urban growth area, unless a finding is made that no cost-effective alternative technologies are feasible, in which case a tightline sewer sized only to meet the needs of the public school, as defined in RCW 28A.150.010, or the school facility may be used.

b. Renovation, expansion, modernization or reconstruction of a school, a school facility, or the addition of relocatable facilities, is permitted but shall not require or result in an expansion of sewer service outside the urban growth area, unless a finding is made that no cost-effective alternative technologies are feasible, in which case a tightline sewer sized only to meet the needs of the public school, as defined in RCW 28A.150.010, or the school facility may be used.

c. In CB, RB and O, for K-12 schools with no more than one hundred students.

17. All instruction must be within an enclosed structure.

18. Limited to resource management education programs.

19. Only as an accessory to residential use, and:

a. Students shall be limited to twelve per one-hour session;

b. Except as provided in subsection c. of this subsection, all instruction must be within an enclosed structure;

c. Outdoor instruction may be allowed on properties at least two and one-half acres in size. Any outdoor activity must comply with the requirements for setbacks in K.C.C. chapter 21A.12; and

d. Structures used for the school shall maintain a distance of twenty-five feet from property lines adjoining residential zones.

20. Subject to the following:
- a. Structures used for the school and accessory uses shall maintain a minimum distance of twenty-five feet from property lines adjoining residential zones;
  - b. On lots over two and one-half acres:
    - (1) Retail sale of items related to the instructional courses is permitted, if total floor area for retail sales is limited to two thousand square feet;
    - (2) Sale of food prepared in the instructional courses is permitted with Seattle-King County department of public health approval, if total floor area for food sales is limited to one thousand square feet and is located in the same structure as the school; and
    - (3) Other incidental student-supporting uses are allowed, if such uses are found to be both compatible with and incidental to the principal use; and
  - c. On sites over ten acres, located in a designated Rural Town and zoned any one or more of UR, R-1 and R-4:
    - (1) Retail sale of items related to the instructional courses is permitted, provided total floor area for retail sales is limited to two thousand square feet;
    - (2) Sale of food prepared in the instructional courses is permitted with Seattle-King County department of public health approval, if total floor area for food sales is limited to one thousand seven hundred fifty square feet and is located in the same structure as the school;
    - (3) Other incidental student-supporting uses are allowed, if the uses are found to be functionally related, subordinate, compatible with and incidental to the principal use;
    - (4) The use shall be integrated with allowable agricultural uses on the site;
    - (5) Advertised special events shall comply with the temporary use requirements of this chapter; and
    - (6) Existing structures that are damaged or destroyed by fire or natural event, if damaged by more than fifty percent of their prior value, may reconstruct and expand an additional sixty-five percent of the original floor area but need not be approved as a conditional use if their use otherwise complies with development condition B.20.c. of this section and this title.
21. Limited to drop box facilities accessory to a public or community use such as a school, fire station or community center.
22. With the exception of drop box facilities for the collection and temporary storage of recyclable materials, all processing and storage of material shall be within enclosed buildings. Yard waste processing is not permitted.
23. Only if adjacent to an existing or proposed school.
24. Limited to columbariums accessory to a church, but required landscaping and parking shall not be reduced.
25. Not permitted in R-1 and limited to a maximum of five thousand square feet per establishment and subject to the additional requirements in K.C.C. 21A.12.230.
- 26.a. New high schools shall be permitted in the rural and the urban residential and urban reserve zones subject to the review process in K.C.C. 21A.42.140.
- b. Renovation, expansion, modernization, or reconstruction of a school, or the addition of relocatable facilities, is permitted.
27. Limited to projects that do not require or result in an expansion of sewer service outside the urban growth area. In addition, such use shall not be permitted in the RA-20 zone.
28. Only as a reuse of a surplus nonresidential facility subject to K.C.C. chapter 21A.32 or as a joint use of an existing public school facility.
29. All studio use must be within an enclosed structure.
30. Adult use facilities shall be prohibited within six hundred sixty feet of any residential zones, any other adult use facility, school, licensed daycare centers, parks, community centers, public libraries or churches that conduct religious or educational classes for minors.
31. Subject to review and approval of conditions to comply with trail corridor provisions of K.C.C. chapter 21A.14 when located in an RA zone.
32. Limited to repair of sports and recreation equipment:
  - a. as an accessory to a large active recreation and multiuse park in the urban growth area; or
  - b. as an accessory to a park, or a large active recreation and multiuse park in the RA zones, and limited to a total floor area of seven hundred fifty square feet.

33. Accessory to agricultural or forestry uses provided:
- a. the repair of tools and machinery is limited to those necessary for the operation of a farm or forest.
  - b. the lot is at least five acres.
  - c. the size of the total repair use is limited to one percent of the lot size up to a maximum of five thousand square feet unless located in a farm structure, including but not limited to barns, existing as of December 31, 2003.
34. Subject to the following:
- a. the lot is at least five acres.
  - b. in the A zones, area used for dog training shall be located on portions of agricultural lands that are unsuitable for other agricultural purposes, such as areas within the already developed portion of such agricultural lands that are not available for direct agricultural production or areas without prime agricultural soils.
  - c. structures and areas used for dog training shall maintain a minimum distance of seventy-five feet from property lines.
  - d. all training activities shall be conducted within fenced areas or in indoor facilities. Fences must be sufficient to contain the dogs.
35. Limited to animal rescue shelters and provided that:
- a. the property shall be at least four acres;
  - b. buildings used to house rescued animals shall be no less than fifty feet from property lines;
  - c. outdoor animal enclosure areas shall be located no less than thirty feet from property lines and shall be fenced in a manner sufficient to contain the animals;
  - d. the facility shall be operated by a nonprofit organization registered under the Internal Revenue Code as a 501(c)(3) organization; and
  - e. the facility shall maintain normal hours of operation no earlier than 7 a.m. and no later than 7 p.m.
36. Limited to kennel-free dog boarding and daycare facilities, and:
- a. the property shall be at least five acres;
  - b. buildings housing dogs shall be no less than seventy-five feet from property lines;
  - c. outdoor exercise areas shall be located no less than thirty feet from property lines and shall be fenced in a manner sufficient to contain the dogs;
  - d. the number of dogs allowed shall be limited to twenty-five, consistent with the provisions for hobby kennels as outline in K.C.C. 11.04.060.B;
  - e. training and grooming are ancillary services which may be provided only to dogs staying at the facility;
  - f. the facility shall maintain normal hours of operation no earlier than 7 a.m. and no later than 7 p.m.; and
  - g. no new facility shall be permitted to be established after one year from June 17, 2007.
37. Not permitted in R-1 and subject to the additional requirements in K.C.C. 21A.12.250. (Ord. 16594 § 1, 2009; Ord. 16267 § 21, 2008; Ord. 15974 § 7, 2007; Ord. 15816 § 1, 2007; Ord. 15606 § 13, 2006; Ord. 15245 § 4, 2005; Ord. 15032 § 12, 2004; Ord. 14807 § 5, 2003; Ord. 14678 § 1, 2003; Ord. 14429 § 1, 2002; Ord. 14045 § 12, 2001; Ord. 13278 § 4, 1998; Ord. 13022 § 12, 1998; Ord. 12642 § 1, 1997; Ord. 12596 § 5, 1997; Ord. 12588 § 1, 1997; Ord. 12374 § 1, 1996; Ord. 11621 § 36, 1994; Ord. 11157 § 12, 1993; Ord. 11113 § 9, 1993; Ord. 10870 § 332, 1993).

\*Reviser's note: Language added but not underlined in Ordinance 16267. See K.C.C. 1.24.075.

**21A.08.080 Manufacturing land uses.**

**A. Manufacturing land uses.**

KEY		RESOURCE			RESIDENTIAL				COMMERCIAL/INDUSTRIAL									
P-Permitted Use C-Conditional Use S-Special Use		Z O N E	A G R I C U L T U R E	F O R E S T	M I N E R A L	R U R A L	U R B A N	R E S E R V E	U R B A N	R E S I D E N T I A L	N E I G H B O R H O O D	B U S I N E S S	C O M M U N I T Y	B U S I N E S S	R E G I O N A L	B U S I N E S S	O F F I C E	I N D U S T R I A L
SIC #	SPECIFIC LAND USE		A	F	M	RA	UR	R1-8	R12-48	NB	CB	RB	O	I (11)				
20	Food and Kindred Products	P1 C1	P1		P1 C1	P1										C		P2C
*2082	Winery/Brewery	P3 C12			P3 C12	P3										C		P
*	Materials Processing Facility	P13	P14 C	P15 C16	P17 C													P
22	Textile Mill Products																	C
23	Apparel and other Textile Products															C		P
24	Wood Products, except furniture	P4	P4 C5		P4, C5	P4										C6		P
25	Furniture and Fixtures															C		P
26	Paper and Allied Products																	C
27	Printing and Publishing										P7	P7	P7C	P7C				P
28	Chemicals and Allied Products																	C
2911	Petroleum Refining and Related Industries																	C
30	Rubber and Misc. Plastics Products																	C
31	Leather and Leather Goods															C		P
32	Stone, Clay, Glass and Concrete Products											P6		P9				P
33	Primary Metal Industries																	C
34	Fabricated Metal Products																	P
35	Industrial and Commercial Machinery																	P
351-55	Heavy Machinery and Equipment																	C
357	Computer and Office Equipment															C	C	P
36	Electronic and other Electric Equipment															C		P
374	Railroad Equipment																	C
376	Guided Missile and Space Vehicle Parts																	C
379	Miscellaneous Transportation Vehicles																	C
38	Measuring and Controlling Instruments															C	C	P
39	Miscellaneous Light Manufacturing															C		P
*	Motor Vehicle and Bicycle Manufacturing																	C
*	Aircraft, Ship and Boat Building																	P10C
7534	Tire Retreading															C		P
781-82	Movie Production/Distribution															P		P

**GENERAL CROSS REFERENCES:**

Land Use Table Instructions, see K.C.C. 21A.08.020 and 21A.02.070;  
 Development Standards, see K.C.C. chapters 21A.12 through 21A.30;  
 General Provisions, see K.C.C. chapters 21A.32 through 21A.38  
 Application and Review Procedures, see K.C.C. chapters 21A.40 through 21A.44;  
 (\*)Definition of this specific land use, see K.C.C. chapter 21A.06

## B. Development conditions.

- 1.a. Excluding wineries and SIC Industry No. 2082-Malt Beverages;
  - b. In the A zone, only allowed on sites where the primary use is SIC industry Group No. 01-Growing Harvesting Crops or No. 02-Raising Livestock and Small Animals.
  - c. In the RA and UR zones, only allowed on lots of at least four and one-half acres and only when accessory to an agricultural use;
  - d.(1) Except as provided in subsection B.1.d.(2) and B.1.d.(3) of this section, the floor area devoted to all processing shall not exceed three thousand five hundred square feet, unless located in a building designated as historic resource under K.C.C. chapter 20.62;
  - (2) With a conditional use permit, up to five thousand square feet of floor area may be devoted to all processing; and
  - (3) In the A zone, on lots thirty-five acres or greater, the floor area devoted to all processing shall not exceed seven thousand square feet, unless located in a building designated as historic resource under K.C.C. chapter 20.62;
  - e. Structures and areas used for processing shall maintain a minimum distance of seventy-five feet from property lines adjoining residential zones, unless located in a building designated as historic resource under K.C.C. chapter 20.62;
  - f. Processing is limited to agricultural products and sixty percent or more of the products processed must be grown in the Puget Sound counties. At the time of initial application, the applicant shall submit a projection of the source of products to be produced;
  - g. In the A zone, structures used for processing shall be located on portions of agricultural lands that are unsuitable for other agricultural purposes, such as areas within the already developed portion of such agricultural lands that are not available for direct agricultural production, or areas without prime agricultural soils; and
  - h. Tasting of products produced on site may be provided. The area devoted to tasting shall be included in the floor area limitation in subsection B.1.d. of this section.
2. Except slaughterhouses.
  - 3.a. Limited to wineries and SIC Industry No. 2082-Malt Beverages;
  - b. In the A zone, only allowed on sites where the primary use is SIC Industry Group No. 01-Growing and Harvesting Crops or No. 02-Raising Livestock and Small Animals;
  - c. In the RA and UR zones, only allowed on lots of at least four and one-half acres;
  - d. The floor area devoted to all processing shall not exceed three thousand five hundred square feet, unless located in a building designated as historic resource under K.C.C. chapter 20.62.
  - e. Structures and areas used for processing shall maintain a minimum distance of seventy-five feet from property lines adjoining residential zones, unless located in a building designated as historic resource under K.C.C. chapter 20.62;
  - f. Sixty percent or more of the products processed must be grown in the Puget Sound counties. At the time of the initial application, the applicant shall submit a projection of the source of products to be produced; and
  - g. Tasting of products produced on site may be provided. The area devoted to tasting shall be included in the floor area limitation in subsection B.3.c. of this section.
4. Limited to rough milling and planing of products grown on-site with portable equipment.
  5. Limited to SIC Industry Group No. 242-Sawmills. For RA zoned sites, limited to RA-10 on lots at least ten acres in size and only as accessory to forestry uses.
  6. Limited to uses found in SIC Industry No. 2434-Wood Kitchen Cabinets and No. 2431-Millwork, (excluding planing mills).
  7. Limited to photocopying and printing services offered to the general public.
  8. Only within enclosed buildings, and as an accessory use to retail sales.
  9. Only within enclosed buildings.
  10. Limited to boat building of craft not exceeding forty-eight feet in length.
  11. For I-zoned sites located outside the urban growth area designated by the King County Comprehensive Plan, uses shown as a conditional use in the table of K.C.C. 21A.08.080.A. shall be prohibited, and all other uses shall be subject to the provisions for rural industrial uses as set forth in K.C.C. chapter 21A.12.

12. Limited to wineries and SIC Industry No. 2082-Malt Beverages;
- b.(1) Except as provided in subsection B.12.b.(2) of this section, the floor area of structures for wineries and breweries and any accessory uses shall not exceed a total of eight thousand square feet. The floor area may be increased by up to an additional eight thousand square feet of underground storage that is constructed completely below natural grade, not including required exits and access points, if the underground storage is at least one foot below the surface and is not visible above ground; and
- (2) On Vashon-Maury Island, the total floor area of structures for wineries and breweries and any accessory uses may not exceed six thousand square feet, including underground storage;
- c. Wineries and breweries shall comply with Washington state Department of Ecology and King County board of health regulations for water usage and wastewater disposal. Wineries and breweries using water from exempt wells shall install a water meter;
- d. Off-street parking is limited to one hundred and fifty percent of the minimum requirement for wineries or breweries specified in K.C.C. 21A.18.030;
- e. Structures and areas used for processing shall be set back a minimum distance of seventy-five feet from property lines adjacent to residential zones, unless the processing is located in a building designated as historic resource under K.C.C. chapter 20.62;
- f. The minimum site area is four and one-half acres. If the total floor area of structures for wineries and breweries and any accessory uses exceed six thousand square feet, including underground storage:
- (1) the minimum site area is ten acres; and
- (2) a minimum of two and one-half acres of the site shall be used for the growing of agricultural products;
- g. The facility shall be limited to processing agricultural products and sixty percent or more of the products processed must be grown in the Puget Sound counties. At the time of the initial application, the applicant shall submit a projection of the source of products to be processed; and
- h. Tasting of products produced on site may be provided. The area devoted to tasting shall be included in the floor area limitation in subsection B.12.b of this section.
13. Limited to source separated organic waste processing facilities at a scale appropriate to process the organic waste generated in the agricultural zone.
14. Only on the same lot or same group of lots under common ownership or documented legal control, which includes, but is not limited to, fee simple ownership, a long-term lease or an easement:
- a. as accessory to a primary forestry use and at a scale appropriate to process the organic waste generated on the site; or
- b. as a continuation of a sawmill or lumber manufacturing use only for that period to complete delivery of products or projects under contract at the end of the sawmill or lumber manufacturing activity.
15. Only on the same lot or same group of lots under common ownership or documented legal control, which includes, but is not limited to, fee simple ownership, a long-term lease or an easement:
- a. as accessory to a primary mineral use; or
- b. as a continuation of a mineral processing use only for that period to complete delivery of products or projects under contract at the end of mineral extraction.
16. Continuation of a materials processing facility after reclamation in accordance with an approved reclamation plan.
17. Only a site that is ten acres or greater and that does not use local access streets that abut lots developed for residential use. (Ord. 16028 § 1, 2008; Ord. 15974 § 10, 2007; 15032 § 15, 2004; Ord. 14781 § 2, 2003; Ord. 14045 § 15, 2001; Ord. 12596 § 8, 1997; Ord. 11621 § 38, 1994; Ord. 10870 § 335, 1993).

**21A.22.010 Purpose.** The purpose of this chapter is to establish standards that minimize the impacts of mineral extraction and materials processing operations upon surrounding properties by:

- A. Ensuring adequate review of operating aspects of mineral extraction and materials processing sites;
- B. Requiring project phasing on large sites to minimize environmental impacts;
- C. Requiring minimum site areas large enough to provide setbacks and mitigations necessary to protect environmental quality; and
- D. Requiring periodic review of mineral extraction and materials processing operations to ensure compliance with the approved operating standards. (Ord. 15032 § 23, 2004; Ord. 11157 § 20, 1993; Ord. 10870 § 439, 1993).

**21A.22.020 Applicability of chapter.** This chapter shall only apply to uses or activities that are mineral extraction or materials processing operations. (15032 § 24, 2004; Ord. 10870 § 440, 1993).

**21A.22.030 Grading permits required.** Extractive operations and materials processing operations shall commence only after issuance of a grading permit. (15032 § 25, 2004; Ord. 10870 § 441, 1993).

*[Grading: See K.C.C. chapter 16.82]*

**21A.22.035 Community meeting.**

A. Not later than thirty days after the department provides the notice of application to the public required by K.C.C. 20.20.060 on a mineral extraction or materials processing site or for an expansion of an existing mineral extraction or materials processing site or operation beyond the scope of the prior environmental review, the applicant shall hold a community meeting. The notice of application shall include notification of the date, time and location of the community meeting. At the meeting, the applicant shall provide information relative the proposal, including information on existing residences and lot patterns within one-quarter mile of potential sites and on alternative haul routes. The applicant shall also provide a preliminary evaluation at the meeting of any alternative routes that have been provided to the applicant in writing at least five days in advance of the meeting. The applicant shall provide to the department within fourteen days after the community meeting a written list of meeting attendees and documentation of the meeting.

B. Public notice of the community meeting required by this section shall be prepared, posted and distributed in accordance with K.C.C. 20.20.060 at least two weeks before the community meeting. In addition, the department shall:

1. Publish a notice of the meeting in a local newspaper of general circulation in the affected area;
2. Mail the notice of the meeting to the unincorporated area council serving the area where the site is located; and
3. Mail the notice of the meeting to all property owners within one-quarter mile of the proposed or expanded site or to at least twenty of the property owners nearest to the site, whichever is greater; and
4. Mail the notice of the meeting to all property owners within five hundred feet of any proposed haul route from the site to the nearest arterial. (15032 § 26, 2004)

**21A.22.040 Nonconforming mineral extraction operations.** To the maximum extent practicable, nonconforming mineral extraction operations shall be brought into conformance with the operating conditions and performance standards of this chapter during permit renewal. The department

**21A.24.220 Erosion hazard areas — development standards and alterations.** The following development standards apply to development proposals and alterations on sites containing erosion hazard areas:

- A. Clearing in an erosion hazard area is allowed only from April 1 to October 1, except that:
  - 1. Clearing of up to fifteen-thousand square feet within the erosion hazard area may occur at any time on a lot;
  - 2. Clearing of noxious weeds may occur at any time; and
  - 3. Forest practices regulated by the department are allowed at any time in accordance with a clearing and grading permit if the harvest is in conformance with chapter 76.09 RCW and Title 222 WAC;
- B. All subdivisions, short subdivisions, binding site plans or urban planned developments on sites with erosion hazard areas shall retain existing vegetation in all erosion hazard areas until building permits are approved for development on individual lots. The department may approve clearing of vegetation on lots if:
  - 1. The clearing is a necessary part of a large scale grading plan; and
  - 2. It is not feasible to perform the grading on an individual lot basis; and
- C. If the department determines that erosion from a development site poses a significant risk of damage to downstream wetlands or aquatic areas, based either on the size of the project, the proximity to the receiving water or the sensitivity of the receiving water, the applicant shall provide regular monitoring of surface water discharge from the site. If the project does not meet water quality standards established by law or public rules, the county may suspend further development work on the site until such standards are met. (Ord. 15051 § 160, 2004; Ord. 10870 § 469, 1993).

**21A.24.230 Flood hazard areas — components.**

- A. A flood hazard area consists of the following components:
  - 1. Floodplain;
  - 2. Zero-rise flood fringe;
  - 3. Zero-rise floodway;
  - 4. FEMA floodway; and
  - 5. Channel migration zones.
- B. The department shall delineate a flood hazard area after reviewing base flood elevations and flood hazard data for a flood having a one percent chance of being equaled or exceeded in any given year, often referred to as the "one-hundred-year flood." The department shall determine the base flood for existing conditions. If a basin plan or hydrologic study including projected flows under future developed conditions has been completed and approved by King County, the department shall use these future flow projections. Many flood hazard areas are mapped by FEMA in a scientific and engineering report entitled "The Flood Insurance Study for King County and Incorporated Areas." When there are multiple sources of flood hazard data for flood plain boundaries, regulatory floodway boundaries, base flood elevations, or flood cross sections, the department may determine which data most accurately classifies and delineates the flood hazard area. The department may utilize the following sources of flood hazard data for floodplain boundaries, regulatory floodway boundaries, base flood elevations or cross sections when determining a flood hazard area:
  - 1. Flood Insurance Rate Maps;
  - 2. Flood Insurance Studies;
  - 3. Preliminary Flood Insurance Rate Maps;
  - 4. Preliminary Flood Insurance Studies;
  - 5. Draft flood boundary work maps and associated technical reports;
  - 6. Critical area reports prepared in accordance with FEMA standards contained in 44 C.F.R. Part 65 and consistent with the King County Surface Water Design Manual provisions for floodplain analysis;
  - 7. Letter of map amendments;
  - 8. Letter of map revisions;
  - 9. Channel migration zone maps and studies;

10. Historical flood hazard information;
11. Wind and wave data provided by the United States Army Corps of Engineers; and
12. Any other available data that accurately classifies and delineates the flood hazard area or base flood elevation.

C. A number of channel migration zones are mapped by the county for portions of river systems. These channel migration zones and the criteria and process used to designate and classify channel migration zones are specified by public rule adopted by the department. An applicant for a development proposal may submit a critical area report to the department to determine channel migration zone boundaries or classify channel migration hazard areas on a specific property if there is an apparent discrepancy between the site-specific conditions or data and the adopted channel migration zone maps. (Ord. 16686 § 2, 2009; Ord. 15051 § 161, 2004; Ord. 10870 § 470, 1993).

**21A.24.240 Zero-rise flood fringe — development standards and alterations.** The following development standards apply to development proposals and alterations on sites within the zero-rise flood fringe:

A. Development proposals and alterations shall not reduce the effective base flood storage volume of the floodplain. A development proposal shall provide compensatory storage if grading or other activity displaces any effective flood storage volume. Compensatory storage is not required for grading or fill placed within the foundation of an existing residential structure to bring the interior foundation grade to the same level as the lowest adjacent exterior grade. Compensatory storage shall:

1. Provide equivalent volume at equivalent elevations to that being displaced. For this purpose, equivalent elevations means having similar relationship to ordinary high water and to the best available ten-year, fifty-year and one-hundred-year water surface profiles;
2. Hydraulically connect to the source of flooding;
3. Provide compensatory storage in the same construction season as when the displacement of flood storage volume occurs and before the flood season begins on September 30 for that year; and
4. Occur on the site. The director may approve equivalent compensatory storage off the site if legal arrangements, acceptable to the department, are made to assure that the effective compensatory storage volume will be preserved over time. The director may approve off site compensatory storage through a compensatory storage bank managed by the department of natural resources and parks;

B. A structural engineer shall design and certify all elevated buildings and submit the design to the department;

C. A civil engineer shall prepare a base flood depth and base flood velocity analysis and submit the analysis to the department. A base flood depth and base flood velocity analysis is not required for agricultural structures that will not be used for human habitation. The director may waive the requirement for a base flood depth and base flood velocity analysis for agricultural structures that are not used for human habitation. Development proposals and alterations are not allowed if the base flood depth exceeds three feet and the base flood velocity exceeds three feet per second, except that the director may approve development proposals and alterations in areas where the base flood depth exceeds three feet and the base flood velocity exceeds three feet per second for the following projects;

1. Agricultural accessory structures;
2. Roads and bridges;
3. Utilities;
4. Surface water flow control or surface water conveyance systems;
5. Public park structures; and
6. Flood hazard mitigation projects, such as, but not limited to construction, repair or replacement of flood protection facilities or for building elevations or relocations;

D. Subdivisions, short subdivisions, urban planned developments and binding site plans shall meet the following requirements:

1. New building lots shall include five thousand square feet or more of buildable land outside the zero-rise floodway;
2. All utilities and facilities such as sewer, gas, electrical and water systems are consistent with subsections E., F. and I. of this section;
3. A civil engineer shall prepare detailed base flood elevations in accordance with FEMA guidelines for all new lots;
4. A development proposal shall provide adequate drainage in accordance with the King County Surface Water Design Manual to reduce exposure to flood damage; and

**23.20.080 Violation contest hearing - notice - conduct - determination - finding.**

A. If a person requests a hearing in response to a citation to contest the finding that a violation occurred or to contest that the person issued the citation is responsible for the violation, the department shall notify the hearing examiner that a contested hearing has been requested. The office of the hearing examiner shall:

1. Schedule a hearing to be held within sixty days after the department provides notice of the request; and

2. At least twenty days before the date of the hearing, provide notice of the time, place and date of the hearing by first class mail to the address provided in the request for hearing.

B. Except as otherwise provided in this section, contested hearings shall be conducted pursuant to K.C.C. 20.24.170 and the rules of procedure of the King County hearing examiner. The hearing examiner may issue subpoenas for witnesses and order limited discovery. The requirements of K.C.C. 20.24.145 relating to pre-hearing conferences do not apply to the contested hearing.

C. If the rights of the alleged violator to receive notice that meets due process requirements are not prejudiced:

1. A citation shall not be deemed insufficient by reason of formal defects or imperfections, including a failure to contain a detailed statement of the facts constituting the specific violation which the person cited is alleged to have committed; and

2. A citation may be amended prior to the conclusion of the hearing so as to conform to the evidence presented.

D. The burden of proof is on the county to establish by a preponderance of the evidence that the violation was committed. The hearing examiner shall consider the citation and any other written report made as provided in RCW 9A.72.085, submitted by the person who issued the citation or whose written statement was the basis for the issuance of the citation in lieu of that person's personal appearance at the hearing as prima facie evidence that a violation occurred and that the person cited is responsible. The statement and any other evidence accompanying the report shall be admissible without further evidentiary foundation. Any additional certification or declarations authorized under RCW 9A.72.085 shall also be admissible without further evidentiary foundation. The person cited may rebut the evidence and establish that the violation did not occur or that the person contesting the citation is not responsible for the violation.

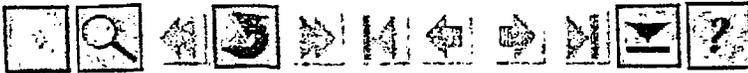
E. If the citation is sustained at the hearing, the hearing examiner shall enter an order finding that the person cited committed the violation. If an ongoing violation remains uncorrected, the hearing examiner shall impose the applicable penalty. The hearing examiner may reduce the penalty as provided in K.C.C. 23.20.070 if the violation has been corrected. If the hearing examiner finds by a preponderance of the evidence that the violation did not occur, an order shall be entered dismissing the citation.

F. The hearing examiner decision is a final agency action.

G. A cited person's failure to appear for a scheduled hearing shall result in an order being entered that the person cited is the person responsible for code compliance and assessing the applicable civil penalty and if applicable, cleanup restitution payment. (Ord. 16278 § 18, 2008).

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**APPENDIX C**  
**Seattle Municipal Code 23.42.102**  
P. 338



## City of Seattle Legislative Information Service

### Seattle Municipal Code

*Information retrieved July 26, 2010 2:42 PM*

Title 23 - LAND USE CODE  
Subtitle III Land Use Regulations  
Division 2 Authorized Uses and Development Standards  
Chapter 23.42 - General Use Provisions

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#### SMC 23.42.102 Establishing nonconforming status.

A. Any use that does not conform to current zoning regulations, but conformed to applicable zoning regulations at any time and has not been discontinued as set forth in Section 23.42.104 is recognized as a nonconforming use or development. Any residential development in a residential, commercial or downtown zone that would not be permitted under current Land Use Code regulations, but which existed prior to July 24, 1957, and has not been discontinued as set forth by Section 23.42.104, is recognized as a nonconforming use or development. A recognized nonconforming use shall be established according to the provisions of subsections B through D of this section.

B. Any use or development for which a permit was obtained is considered to be established.

C. A use or development which did not obtain a permit may be established if the Director reviews and approves an application to establish the nonconforming use or development for the record.

D. For a use or development to be established pursuant to subsection C above, the applicant must demonstrate that the use or development would have been permitted under the regulations in effect at the time the use began, or, for a residential use or development, that the use or development existed prior to July 24, 1957 and has remained in continuous existence since that date. Residential development shall be subject to inspection for compliance with minimum standards of the Housing and Building Maintenance Code. (Chapters 22.200 through 22.208). Minimum standards of the Housing and Building Maintenance Code must be met prior to approval of any permit to establish the use and/or development for the record.

E. Nonconforming uses commenced after July 24, 1957 and not discontinued (Section 23.42.104) are also subject to approval through the process of establishing use for the record, if not established by permit. Residential nonconforming uses are subject to inspection under the Housing and Building Maintenance Code if in existence before January 1, 1976. Conformance to the Seattle Building Code in effect at the time a use first began is required if the use first existed after January 1, 1976.

**Federal  
And  
Out of State Cases**

Westlaw.

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(Cite as: 493 F.Supp. 1059)

C

United States District Court, W.D. Michigan,  
Southern Division.

Percy BEASLEY, Charles Morris, Albert Holloway  
and Beasley-Morris Asphalt Paving Corporation,  
Plaintiffs,

v.

Dale POTTER, Frank Sharp, Burton Stencil, Arthur  
Smith, Frank Stout, Edwin Nash, A. C. Barley, Har-  
old Bennett, Homer Cowels, Henry Nelson, Alex  
Sibley, and F. Wayne Sprague, Defendants.

No. G74-48 CA5.  
July 29, 1980.

Plaintiffs, three black men, and former officers and sole shareholders of Michigan corporation in business of asphalt paving brought action against members of county board of commissioners claiming that defendants, acting in concert and under color of state law, retroactively imposed zoning ordinance on their corporation, threatened criminal enforcement if they operated in violation of ordinance, interfered with their business relations and that these actions violated their constitutional rights to equal protection of law, to due process, and to nonimpairment of obligations of their contracts. The District Court, Douglas W. Hillman, J., held that: (1) adoption of zoning ordinance which affected proposed erection of asphalt plant was not based on fact that owners of plant were black but, rather, opposition from residents of neighborhood was based on nature of asphalt plant and had begun well before anyone was aware that asphalt plant was to be owned by black businessmen and, thus, plaintiffs failed to establish denial of their right to equal protection; (2) even if plaintiffs did have protected interest in a nonconforming use of land, where they had full notice and opportunity to appear before zoning commission, not once, but several times, to plead their case and voice any objections, defendants did not deny plaintiff businessmen due process; and, (3) zoning ordinance was valid

exercise of county's police power and did not unreasonably or substantially impair obligation of their contracts.

Order entered.

West Headnotes

[1] **Constitutional Law 92** ⚡ 3251

92 Constitutional Law  
92XXVI Equal Protection  
92XXVI(B) Particular Classes  
92XXVI(B)8 Race, National Origin, or  
Ethnicity  
92k3251 k. Intentional or purposeful  
action. Most Cited Cases  
(Formerly 92k215)

Official action will not be held unconstitutional solely because it results in racially disproportionate impact; aggrieved parties must prove a racially discriminatory intent or purpose as well. U.S.C.A.Const. Amend. 14.

[2] **Constitutional Law 92** ⚡ 3251

92 Constitutional Law  
92XXVI Equal Protection  
92XXVI(B) Particular Classes  
92XXVI(B)8 Race, National Origin, or  
Ethnicity  
92k3251 k. Intentional or purposeful  
action. Most Cited Cases  
(Formerly 92k215)

By its very nature, a racially discriminatory purpose for challenged act is unlikely to be expressed on the record; discriminatory intent, if it exists, necessarily must be inferred by court from totality of evidence, whether direct, indirect, or circumstantial. U.S.C.A.Const. Amend. 14.

[3] **Constitutional Law 92** ⚡ 3261

92 Constitutional Law  
92XXVI Equal Protection

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92XXVI(B) Particular Classes  
92XXVI(B)8 Race, National Origin, or  
Ethnicity  
92k3257 Property in General  
92k3261 k. Zoning and land use.  
Most Cited Cases  
(Formerly 92k215.2)

Facts of case showed that adoption of zoning ordinance which affected proposed erection of asphalt plant was not based on fact that owners of plant were black but, rather, opposition from residents of neighborhood was based on nature of asphalt plant and had begun well before anyone was aware that asphalt was to be owned by black businessmen and, thus, former officers and sole shareholders of asphalt paving corporation were unable to show that county board of commissioners, acting under color of state law, denied them equal protection of the laws. U.S.C.A.Const. Amend. 14.

**[4] Constitutional Law 92 ↪ 3867**

92 Constitutional Law  
92XXVII Due Process  
92XXVII(B) Protections Provided and  
Deprivations Prohibited in General  
92k3867 k. Procedural due process in  
general. Most Cited Cases  
(Formerly 92k277(1), 92k254.1)

In order to invoke due process protection, parties must identify a constitutionally protected liberty or property interest and then assess the appropriate measure of procedural protection. U.S.C.A.Const. Amend. 14.

**[5] Constitutional Law 92 ↪ 2642**

92 Constitutional Law  
92XXI Vested Rights  
92k2642 k. Zoning and land use. Most Cited  
Cases  
(Formerly 92k93(1))

As a general principle, under Michigan law, no one has a vested right in existing zoning, for zoning is not a contract which forecloses subsequent amendment. U.S.C.A.Const. Art. 1, § 1 et seq.

**[6] Constitutional Law 92 ↪ 2642**

92 Constitutional Law  
92XXI Vested Rights  
92k2642 k. Zoning and land use. Most Cited  
Cases  
(Formerly 92k93(1))

A party has limited protection against application of new ordinance to previously unzoned land.

**[7] Constitutional Law 92 ↪ 2642**

92 Constitutional Law  
92XXI Vested Rights  
92k2642 k. Zoning and land use. Most Cited  
Cases  
(Formerly 92k93(1))

A party does not acquire a protected interest in a nonconforming use of property unless he can show nonconformance in a reasonably substantial manner.

**[8] Constitutional Law 92 ↪ 2632**

92 Constitutional Law  
92XXI Vested Rights  
92k2631 Property in General  
92k2632 k. In general. Most Cited Cases  
(Formerly 92k101)

In light of relevant Michigan law, it was highly doubtful that owners of asphalt corporation who had moved equipment onto leased land and begun to erect plant but lacked essential pollution control equipment and never operated at the site had a constitutionally protected interest. U.S.C.A.Const. Amend. 14.

**[9] Zoning and Planning 414 ↪ 1302**

414 Zoning and Planning  
414VI Nonconforming Uses  
414k1302 k. Existence of use in general.  
Most Cited Cases  
(Formerly 414k323)

Evaluation of whether or not a preexisting, nonconforming use is substantial is necessarily subjective and varies from case to case.

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**[10] Zoning and Planning 414 ↪1680**

414 Zoning and Planning  
 414X Judicial Review or Relief  
 414X(C) Scope of Review  
 414X(C)3 Presumptions and Burdens  
 414k1680 k. Decisions of boards or of-  
 ficers in general. Most Cited Cases  
 (Formerly 414k676)  
 As a general rule, official actions come cloaked  
 with a rebuttable presumption that public officers  
 have applied a zoning ordinance in a regular and  
 lawful manner.

**[11] Zoning and Planning 414 ↪1628**

414 Zoning and Planning  
 414X Judicial Review or Relief  
 414X(C) Scope of Review  
 414X(C)1 In General  
 414k1627 Arbitrary, Capricious, or  
 Unreasonable Action  
 414k1628 k. In general. Most Cited  
 Cases  
 (Formerly 414k608.1, 414k608)  
 If a classification of property for zoning pur-  
 poses is not unreasonable or arbitrary, but fairly de-  
 batable, it will be upheld by a court.

**[12] Constitutional Law 92 ↪4096**

92 Constitutional Law  
 92XXVII Due Process  
 92XXVII(G) Particular Issues and Applica-  
 tions  
 92XXVII(G)3 Property in General  
 92k4091 Zoning and Land Use  
 92k4096 k. Proceedings and re-  
 view. Most Cited Cases  
 (Formerly 92k278.2(2))

Even if owners of asphalt plant did have pro-  
 tected interests in their nonconforming use of land,  
 where they had full notice and opportunity to ap-  
 pear before zoning commission, not once but sever-  
 al times, to plead their case and voice any objec-  
 tions, members of county board of commissioners

did not deny plaintiffs due process. U.S.C.A.Const.  
 Amend. 14.

**[13] Constitutional Law 92 ↪2672**

92 Constitutional Law  
 92XXII Obligation of Contract  
 92XXII(A) In General  
 92k2672 k. Police power; purpose of reg-  
 ulation. Most Cited Cases  
 (Formerly 92k117)

Contract clause does not prevent a state or its  
 subdivisions from exercising its police power to  
 protect the lives, health, morals, comfort and gener-  
 al welfare of the public. U.S.C.A.Const. Art. 1, § 1  
 et seq.

**[14] Constitutional Law 92 ↪2671**

92 Constitutional Law  
 92XXII Obligation of Contract  
 92XXII(A) In General  
 92k2671 k. Existence and extent of  
 impairment. Most Cited Cases  
 (Formerly 92k115)

Court, in determining constitutionality under  
 contract clause, must determine whether state law  
 has operated as substantial impairment of contrac-  
 tual relationship. U.S.C.A.Const. Art. 1, § 1 et seq.

**[15] Constitutional Law 92 ↪2672**

92 Constitutional Law  
 92XXII Obligation of Contract  
 92XXII(A) In General  
 92k2672 k. Police power; purpose of reg-  
 ulation. Most Cited Cases  
 (Formerly 92k117)

**Zoning and Planning 414 ↪1122**

414 Zoning and Planning  
 414II Validity of Zoning Regulations  
 414II(B) Particular Matters  
 414k1122 k. Other particular uses. Most  
 Cited Cases  
 (Formerly 414k76)

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Application of zoning ordinance which affected proposed erection of asphalt plant was valid exercise of county's police power and did not unreasonably or substantially impair obligation of owners' contracts, including lease for both excavation of gravel and manufacture of asphalt and other leases. U.S.C.A.Const. Art. 1, § 1 et seq.

\*1060 Wilfred A. Dupuis, John W. Davis, Lansing, Mich., Theodore G. Albert, Iron River, Mich., for plaintiffs.

Grant J. Gruel, Grand Rapids, Mich., for defendants.

#### OPINION

DOUGLAS W. HILLMAN, District Judge.

This is a civil rights action for money damages arising out of the enforcement of a zoning ordinance against a black-owned business in Ionia County, Michigan, and the subsequent denial of a variance by the Ionia County Zoning Commission, in 1972 and 1973. Plaintiffs Percy Beasley, Charles Morris, and Albert Holloway are three black men, and the former officers and sole shareholders of a Michigan corporation, Beasley-Morris Asphalt Paving Corporation (hereinafter B-M Corp.), now apparently dissolved. Defendants Dale Potter, Frank Sharp, Burton Stencil, Arthur Smith, Frank Stout, and Edwin Nash were members of the Ionia County Board of Commissioners at the time of the actions which form the basis of this lawsuit. Defendants Edwin Nash, A. C. Barley, Harold Bennett, Homer Cowels, Henry Nelson, and Alex Sibley were members of the Ionia County Zoning \*1061 Commission, and defendant F. Wayne Sprague was Ionia County Zoning Administrator during this same time. All are white men.

Defendants are sued in their official capacity as former county officials, pursuant to 42 U.S.C. s 1983.[FN1] Jurisdiction is founded on 28 U.S.C. ss 1343 [FN2] and also 1331.[FN3] The amount in controversy exceeds \$10,000.00. Plaintiffs' complaint alleges that defendants, acting in concert and

under color of state law, retroactively imposed the zoning ordinance on their corporation; threatened criminal enforcement if they operated in violation of the ordinance; interfered with their business relations by writing to their bank and to state agencies from which plaintiffs were seeking permits, and wrongfully denied their application for a special use permit. Plaintiffs allege these actions were taken in accordance with a common scheme, the purpose of which was to exclude plaintiffs from operating an asphalt plant in Ionia County because they are black. They conclude that defendants deprived them of their rights to leased land, thereby damaging their business, and violated their constitutional rights to equal protection of the laws, to due process, and to non-impairment of the obligations of their contracts. As a result of defendants' actions, plaintiffs claim they were denied the profits from such business, their credit rating was destroyed, the assets of B-M Corp. were lost through foreclosure, and plaintiffs became personally liable for the deficits resulting from the foreclosure sale. They seek damages of \$750,000.00.[FN4]

FN1. Section 1983 reads as follows:

s 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

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FN2. Section 1343 reads as follows:

s 1343. Civil rights and elective franchise

(a) The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

(1) To recover damages for injury to his person or property, or because of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in section 1985 of Title 42;

(2) To recover damages from any person who fails to prevent or to aid in preventing any wrongs mentioned in section 1985 of Title 42 which he had knowledge were about to occur and power to prevent;

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

(b) For purposes of this section

(1) the District of Columbia shall be considered to be a State; and

(2) any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

FN3. Section 1331 reads as follows:

s 1331. Federal question; amount in controversy; costs

(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of \$10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States except that no such sum or value shall be required in any such action brought against the United States, any agency thereof, or any officer or employee thereof in his official capacity.

(b) Except when express provision therefor is otherwise made in a statute of the United States, where the plaintiff is finally adjudged to be entitled to recover less than the sum or value of \$10,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of interests and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff.

FN4. This suit was initiated in then Chief Judge Fox's court in 1974. Following Judge Fox's elevation to senior status in January, 1980, the case was reassigned to Judge Gibson, who subsequently withdrew, and then to me. By order of February 21, 1978, Judge Fox permitted plaintiffs to add the Beasley-Morris Asphalt Corp. as a plaintiff and further ruled that plaintiffs, as individuals, were proper parties for the purpose of vindicating the rights of the corporation. Before trial, defendants waived further objection to the standing of plaintiffs and to the sufficiency of their pleadings.

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\*1062 Defendants deny all allegations of conspiracy and discriminatory motive, and maintain their actions were taken in proper discharge of their duties and responsibilities as public officials.

The case was tried to the court without a jury. With the agreement of counsel, I bifurcated the action, reserving the matter of damages until after determination of liability. During the course of the six-day trial, the parties offered the testimony of 14 witnesses and 36 exhibits for consideration by the court. At the close of plaintiffs' proofs, I dismissed defendants Dale Potter, Frank Sharp, Burton Stencil, Arthur Smith, and Frank Stout from the case. There was no evidence whatsoever that these defendants, acting as the Ionia County Board of Commissioners, had violated plaintiffs' rights by enacting the Interim Zoning Ordinance, and no evidence connecting them with the alleged actions of the other defendants.[FN5] The defendants remaining in the case then proceeded to put in their defense.

FN5. The only contact of the Board of Commissioners with plaintiffs' business occurred at a meeting on July 10, 1972, when it received petitions from citizens opposed to the establishment of the B-M Corp.'s asphalt plant at the site chosen by plaintiffs. In response, the board unanimously approved a motion to write the state Air Pollution Control Commission asking it to revoke its permission for installation of pollution control equipment at the plant. Pl. Ex. 4. Plaintiffs did not base their claims on this action by the board. Instead they pointed to the board's adoption on August 14, 1972, of the county-wide Interim Zoning Ordinance. *Id.* There was simply no evidence, however, that the board adopted this ordinance because of complaints about plaintiffs' business or because plaintiffs were black. On the contrary, as noted *infra*, the zoning ordinance had long been in the works. Moreover, the members of the community opposed to the asphalt

plant only met Percy Beasley and learned B-M Corp. was black-owned subsequent to the August 14 meeting. I concluded that enactment of the ordinance had nothing to do with plaintiffs or their business.

Upon careful consideration of all of the evidence, I now conclude that plaintiffs have failed to sustain their burden of proof on each of the claims against the remaining defendants. For the reasons given below, I find in favor of defendants and dismiss this action with prejudice.

#### DISCUSSION

The court's findings of fact and conclusions of law are contained in the following discussion. Because of the age of the case and the elusiveness of some of plaintiffs' claims, it must be noted at the outset that it was difficult at times to discern all of the elements of this action. Nevertheless, the findings and conclusions herein represent the court's best and most accurate determination of the tangled facts of the case, based on all of the testimony and exhibits.

##### 1. Background.

Plaintiffs, three black men, incorporated in Michigan on February 21, 1971, under the name Beasley-Morris Asphalt Paving Corporation for the purpose of manufacturing, selling, distributing and laying asphalt. Plaintiffs were the sole shareholders and officers of the corporation. On or about July 13, 1971, plaintiffs bought a portable plant consisting of equipment for the production of asphalt from Williams Brothers Asphalt Paving Co. (Williams Bros.), a white-owned company based in the City of Ionia, Ionia County. The purchase was financed by a \$50,000.00 loan, guaranteed by the Small Business Administration, from Michigan National Bank in Lansing. The plant was then located on a rural site in Eagle Township in Clinton County, where Williams Bros. had operated for several years, apparently to the displeasure of many residents of the area. When B-M Corp. applied to the Clinton County Zoning Commission for renewal of the plant's special\*1063 use permit, residents wrote let-

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ters and submitted petitions to the zoning authorities complaining that the manufacture of asphalt had created excessive smoke, fumes, noxious odors, and noise and that heavy truck traffic to and from the site had damaged unimproved roads and was a safety hazard. The Eagle Township Board unanimously recommended denial of the permit. During this same time, the Air Pollution Control Section, Division of Occupational Health, of the State Department of Public Health warned plaintiffs that they needed approved emission control equipment before they could operate. Def. Ex. 3. On February 22, 1972, the Clinton County Zoning Commission voted 3-0 to deny the permit, citing public concern and "poor road servicing and health hazards". Def. Ex. 6.

Thereafter, plaintiffs decided to move the corporation's plant to a site in nearby Ionia County, which had no zoning ordinance at the time. Percy Beasley located a five-acre rural site near the corner of Cutler and Clintonia Roads in Portland Township, Ionia County. Clintonia Road runs north and south, forming the boundary between Ionia County to the west and Clinton County to the east. Cutler Road runs east into Clinton County and west into Ionia County at the intersection. This area was largely agricultural but recently had begun to attract people moving out from cities and towns. Near the intersection were several single-family homes.

Because of his previous experience, Mr. Beasley was aware that he needed permission from the state pollution control agencies in order to operate the asphalt plant. On May 5, 1972, B-M Corp. applied to the Air Pollution Control Section for a state permit to install an "air washer" pollution control system on an asphalt plant to be located on the Clintonia Road property. Pl. Ex. 12. On May 8, B-M Corp. executed a notarized lease with Edward G. Bond, Sr., and Dorothy E. Bond, owners of this site, which granted the corporation exclusive rights to take gravel from the premises and to establish an asphalt plant for a term of three years "or until the gravel is depleted from said parcel, whichever oc-

curs first." The sole consideration mentioned in the lease is \$.25 per yard of all gravel excavated and used. The lease was filed with the Ionia County Register of Deeds on May 11, 1972. Pl. Ex. 1. Also on May 8, before the same notary public who witnessed the lease, plaintiff executed a certificate of co-ownership in the name of B-M Corp., for filing in Ionia County.[FN6] Def. Ex. 16.

FN6. The lease and the certificate of co-partnership are the only official filings by B-M Corp. in Ionia County until its application for a special use permit on November 30, 1972. Nevertheless, throughout the proceedings Mr. Beasley insisted that he had received express authorization from Ionia County in the spring of 1972 to operate his asphalt plant, in the form of a permit of some kind. He described going to the county courthouse with Mr. Williams of Williams Bros., applying, and then returning to pick up two copies of the alleged permit. He stated the fee was between \$20 and \$30, which he paid with a check and that he received a receipt. The permit, Mr. Beasley claimed, was presented to an officer at Michigan National Bank for inclusion in the loan file. Despite the sincerity of his testimony, plaintiffs were unable to produce the permit mentioned by Mr. Beasley or the cancelled check or the receipt. Moreover, it is unknown what the alleged permit could be, since none was authorized or required under the laws or ordinances of the county at that time.

On May 16, the Air Pollution Control Section issued B-M Corp. a permit to install the air washer. Def. Ex. 21, Pl. Ex. 12. By its terms, however, the permit did not approve actual operation of the asphalt plant. Approval to operate required tests after the pollution control equipment was installed. Around this time, plaintiffs moved their equipment onto the Clintonia Road site and began setting up

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the plant. On May 22, B-M Corp. filed a Statement of New or Increased Use of Waters of the State for Waste Disposal Purposes with the Water Resources Commission of the State Department of Natural Resources, seeking approval for its proposed water pollution control system at the asphalt plant. Def. Ex. 14.

Sometime in early June, 1972, residents in the area of the intersection of Cutler and Clintonia Roads, including Mr. and Mrs. Harry Doehne, observed equipment on the \*1064 land and became alarmed by the prospect of an asphalt plant near their homes and farms. The Doehnes and other concerned residents soon mounted a campaign of active opposition to the asphalt plant. At first they did not know the equipment was owned by B-M Corp., but rather thought the equipment belonged to Williams Bros. When the Doehnes sought legal assistance to oppose the siting of the plant, a local attorney, accepting their belief as to the ownership of the equipment, declined to represent them because he was a lawyer for Williams Bros. and would have had a conflict of interest. By the end of June, they learned that B-M Corp. was the true owner, but still did not know the company was black-owned.

Opposition to the asphalt plant swelled over the next several months. In late June and July, residents circulated petitions for signatures urging the Ionia County Board of Commissioners to prevent establishment of the plant on the grounds it was incompatible with the agricultural and residential character of the area, would be likely to pollute, and would be a safety hazard. On July 10, 16 citizens from Portland and Danby Townships, with Mr. Doehne as spokesperson, presented 25 petitions to the Board of Commissioners. As noted, *supra* at fn. 5, the Board unanimously resolved to write the Air Pollution Control Section to ask it to revoke the B-M Corp. installation permit. Pl. Ex. 4.

During the same time, the citizens contacted other government agencies and residents, prompting them to write letters opposing the asphalt plant. For example, on July 3, the Clinton County Road

Commission wrote the Ionia County authorities expressing concern over the ability of Cutler and Clintonia Roads to handle increased truck traffic anticipated as a result of the corporation's business. On July 6, the Ionia County Road Commission wrote B-M Corp. directly, warning it of the possible hazard created by increased traffic on "narrow and rolling" Clintonia Road, and noting that the bridge on Cutler Road, approximately one-half mile west of the site, could not be crossed by heavy loads. On July 12, the Portland Public Board of Education wrote the Air Pollution Control Section expressing concern that its school buses would be meeting trucks during their seven daily runs over Cutler and Clintonia Roads, which it described as "narrow and hilly". The letter reported the board's unanimous request for revocation of the B-M Corp. installation permit "because it creates a situation which is hazardous to the safety of many Portland school students." Similarly, Westphalia and Eagle Townships wrote the air pollution agency, opposing the plant on grounds of pollution and safety. Def. Ex. 13.

The air pollution agency acknowledged this outpouring of public opposition in a registered letter to B-M Corp. on August 3. Because "many persons have made known to the Commission and Commission staff their concern," the letter stated, it would hold a public meeting in Lansing to decide whether to rescind its previous approval of the installation permit. Copies of this letter were sent to plaintiffs' attorney, the Ionia County Board of Commissioners, the Portland Board of Education, the Townships of Portland, Eagle and Westphalia, and Harry Doehne, among others.

On August 15, the Air Pollution Control Section held an open hearing on the B-M Corp. plant, which both Mr. Beasley and the Doehnes attended. It was Mrs. Doehne's uncontroverted testimony that it was not until meeting Mr. Beasley at this hearing that the leaders of the opposition learned B-M Corp. was black-owned. For nearly two months prior to August 15, they had vigorously opposed es-

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establishment of the asphalt plant because they believed it would pollute the area and create a hazard on local roads. The evidence establishes that the citizens opposed the plant for neutral reasons and not because of plaintiffs' race, which had been unknown to them. In fact, the realization that Mr. Beasley was black mitigated against their opposition and momentarily weakened their resolve. As Mrs. Doehne testified, she and her husband believe strongly in equal rights and opportunity for black people, and it made her uncomfortable knowing they were opposing a \*1065 black-owned business. Nevertheless, they continued to oppose the plant on the grounds of safety and health.

## 2. The Zoning Ordinance.

In the spring of 1972, when B-M Corp. moved onto the Clintonia Road site, Ionia County had no county zoning ordinance. State law, however, had long authorized the establishment of county-wide zoning under the County Rural Zoning Act, Pub. Act 1943, No. 183, M.C.L.A. s 125.201, et seq. With the help of a grant from the federal Department of Housing and Urban Development, the Ionia County Board of Commissioners was at that time culminating four years of preparation towards a master land-use plan and a county zoning ordinance. A year earlier, on May 10, 1971, the board appointed a zoning committee for the county Planning Commission. On July 6, 1971, the board adopted a comprehensive land-use plan. Def. Ex. 9. On February 7, 1972, before B-M Corp. had moved into Ionia County, the zoning committee recommended that the board adopt the proposed zoning ordinance. Finally, on August 14, 1972, after plaintiffs had moved into Ionia County, the Board of Commissioners adopted the Interim Zoning Ordinance for Ionia County. Def. Ex. 8.

The ordinance divided Ionia County into zoning districts. The B-M Corp. site was in a district classified "agricultural". The ordinance stated that the primary purposes of the district were farming and idle land, and the secondary purpose was low-density, single-family residential lots. Art. VI, Sec.

6.2(A). A special use permit was required for a variety of non-conforming uses, including the operation of a "blacktop manufacturing plant". Sec. 6.2(B)(7)(e). The ordinance set forth, in Art. VII, regulations governing the issuance of special use permits to be administered by a zoning commission and a non-voting zoning administrator.[FN7]

FN7. Section 7.2 of the ordinance states:

### Section 7.2 Basis of Determination

The Zoning Commission shall review the proposed special use in terms of the standards stated within this Ordinance and shall find adequate evidence that such use in the proposed location:

- A. Will be harmonious with and in accordance with the general and specific objectives of the IONIA COUNTY LAND USE PLAN.
- B. Will be designed, constructed, operated and maintained so as to be harmonious with the existing or intended character of the general vicinity and that such a use will not change the essential character of the area in which it is proposed to be located.
- C. Will not be hazardous or disturbing to existing or future nearby uses.
- D. Will be equal to or an improvement in relation to property in the immediate vicinity and to the county as a whole.
- E. Will be served adequately by essential public services and facilities or that the persons responsible for the establishment of the proposed use will provide adequately any such service or facility.
- F. Will not create excessive additional public costs and will not be detrimental to the economic welfare of the county.

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G. Will be consistent with the intent and purposes of this Ordinance.

The state enabling statute expressly protects nonconforming uses of property in existence at the time a county zoning ordinance is enacted. M.C.L.A. s 125.216. Accordingly, the Ionia County ordinance contained a "grandfather clause" which specifically provided, in Art. VIII, Sec. 8.0:

"The lawful use of any premises existing at the time of the adoption of this ordinance may be continued although such use does not conform to the provisions hereof . . . ."

The Interim Zoning Ordinance became effective upon publication on August 24, 1972.[FN8]

FN8. Ionia County no longer has a county zoning ordinance. The ordinance described herein was repealed in a public referendum on February 25, 1975, by a margin of 3-1.

### 3. Official Actions Under the Ordinance.

On September 18, the Ionia County Board of Commissioners hired defendant F. Wayne Sprague as County Zoning Administrator. The zoning ordinance, Art. X, directed Mr. Sprague to receive and process applications for permits, inspect premises, and institute proceedings for enforcement of the ordinance's provisions. Sometime in \*1066 early November, he became aware that B-M Corp. had moved equipment onto the Clintonia Road site. Plaintiffs now maintain the new ordinance did not apply to them because the partial erection of equipment before August 24 constituted a prior lawful use of the premises within the grandfather clause. But Mr. Sprague thought otherwise and decided B-M Corp. was covered by the ordinance. He wrote plaintiffs on November 14, as follows:

"It is my understanding that you plan to erect an asphalt plant on the Ed Bond property located in the SE 1/4 of the SE 1/4 of Section 36 Portland Township Ionia County, Michigan.

"It is my duty to inform you that you are in vi-

olation of the Ionia County Interim Zoning Ordinance. Enacted August 24, 1972. Due to the fact that you have moved equipment on this property without a Zoning Permit.

"A Special Use Permit is required for this type of operation and can be issued only after the Board of Appeals (effaced) Zoning Comm Acts on the request of such.

"I would be glad to discuss this further in my office which is located in the Court House Annex Building in Ionia, Michiga (sic)." Pl. Ex. 2.

Defendant Sprague testified that he had determined plaintiffs were not exempt from the requirement of a special use permit, by virtue of the ordinance's grandfather clause, because he knew they were not yet "doing business" on the property. Since he had not visited the site at the time he wrote the letter, the clear implication is that he was informed about the plant by the citizens opposed to it.

This inference is confirmed by the circumstances surrounding another letter written two days later by Mr. Sprague. Mr. Beasley testified that B-M Corp. had pending at this time an application for a second loan from Michigan National Bank to cover operating expenses. On November 16, defendant Sprague wrote to Don Monnette, small business loan officer at the bank. The letter states:

"I have been informed that you are processing a small business loan to a Beasley Morris Corp. for the purpose of erecting an Asphalt Plant in Section 36 of the Portland Township, Ionia County, Michigan. I have recently informed them by certified letter that they are in violation of the Ionia County Zoning Ordinance, in that they have not requested a special use permit for that purpose. Since this area is Zoned Agriculture they must do this to conform with the Ordinance.

"I am sure you should have this information or at least would like to know of the situation.

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"It has also been brought to my attention that the County Road Commission has a bridge with a three ton load limit within a very short distance of the proposed location and all damaged (sic) sustained by same would be their responsibility. They have written Beasley Morris of this situation with no response (sic) from them." Pl. Ex. 3.

Under questioning at trial, Mr. Sprague denied that his purpose in writing this letter was to discourage the bank from making a loan to B-M Corp. He stated it was his duty to inform people if they were in violation of the ordinance, but could not recall other cases in which he had supplied this information to third parties. He took this apparently unusual step, he testified, at the request of "interested people" who lived in the area where the plant was to be erected because he believed it was his duty to comply with citizens' requests.

The Ionia County file includes a copy of another letter to Mr. Monnette written by Mr. Doehne on November 27. It states that it is a follow-up to a telephone conversation of November 16, the date that Mr. Sprague wrote his letter to the bank. Mr. Doehne enclosed letters and petitions, like those described supra, which voiced "safety, health, land use and nuisance" objections to the asphalt plant. On the bottom of the letter is a handwritten note, initialed by Mr. Doehne, which reads:

\*1067 "Phoned Wayne Sprague re this on 11/16 suggesting as a concerned taxpayer that SBA & MNB be made aware of the situation. HAD" Def. Ex. 13.

It is apparent that Mr. Sprague's original interest in the B-M Corp. site and his letter to Michigan National Bank on November 16 were prompted by Mr. Doehne and other citizens who opposed establishment of the plant. The natural and probable effect of the zoning administrator's letter was to discourage the bank from making a further loan to plaintiffs, and it can be inferred this was its purpose. Mr. Beasley testified that B-M Corp. did

not receive the second loan and consequently was unable to buy needed pollution control equipment or to move its plant to another site. Despite the suggestiveness of Mr. Sprague's actions, however, no evidence was offered to the court which would indicate why the second loan was not approved. No letters or documents from the bank were produced and no witnesses from the bank testified. It is not known whether the county zoning situation was even a factor in the decision.

The balance of Mr. Sprague's actions during this period appear to have been impartial and in fulfillment of his duties under the ordinance. On November 30, Mr. Beasley came to Mr. Sprague's office and made application for a special use permit to operate the asphalt plant. Def. Ex. 1. He paid Mr. Sprague an application fee of \$25.00 on December 4. Def. Ex. 2. Plaintiff did not contest the application of the ordinance to his corporation and did not claim a pre-existing use under the grandfather clause at the time.

In conversation with Mr. Beasley, Mr. Sprague explained that operation without the permit was punishable by fine or jail term under the ordinance. Mr. Beasley assured him the corporation was not operating. In fact, the plant was not yet fully assembled at this time. Plaintiffs' application stated the estimated completion date of construction was "3/73", three months later, and Mr. Beasley testified that after meeting with the zoning administrator, he continued to assemble the plant. Although plaintiffs argue that defendant Sprague's letter and conversation conveyed a threat which prevented them from operating the plant, I believe Mr. Sprague's comments were reasonable in light of his judgment of the facts and within his discretion. Assuming arguendo they were meant to intimidate plaintiffs, the evidence nevertheless indicates that the plant could not have been operated at that time because construction was not complete, the plant did not have necessary pollution control equipment and permits from the state, and plaintiffs lacked operating capital. Furthermore, Mr. Beasley testified that the as-

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phalt business was largely seasonal, operating in the warm months of the year, and it was then the beginning of December.

Mr. Sprague promptly presented plaintiffs' application for a special use permit to the zoning commission at its next meeting on December 5. The minutes show that the application was tabled while Mr. Sprague researched the "Special Use Requirements" of Clinton and other counties. Def. Ex. 12. At the next meeting on December 18, the zoning commission scheduled a public hearing on the application for the evening of January 15, 1973, at the Ionia Courthouse. Mr. Sprague was directed to advertise the hearing, write property owners within 300 feet of the proposed plant, research "requirements on pollution", and contact the state Air Pollution Section, the state Department of Natural Resources, and the county Health Department "for thier (sic) requirements". Id. He wrote the letters as directed, including one to B-M Corp.

Also on December 18, the Air Pollution Control Section informed B-M Corp. it was voiding the permit to install issued on May 16 because the pollution device had not been installed and operated as proposed. Def. Ex. 23. The Water Resources Commission of the Dept. of Natural Resources wrote B-M Corp. on January 5, 1973, informing it the commission would not approve the waste disposal proposed in the statement of May 22 because such disposal would endanger ground supplies in the area. Pl. Ex. 9.

\*1068 On January 15, the public hearing was held before an audience of about 35 persons. Mr. Beasley was present and spoke in favor of his permit application. Mr. Doehne and others, including fellow residents and the supervisors of Portland and Danby Townships, spoke in opposition. Letters and resolutions expressing fears about pollution, health problems, and traffic hazards were entered on the record. Because not all members of the zoning commission were able to attend, the meeting was tape-recorded at the request of the acting chairperson, defendant Harold Bennett.

Plaintiffs' application for a special use permit came up for decision at the zoning commission's regular meeting on January 30, 1973. By this time, several of the defendants had visited the site of the B-M Corp. plant, including Mr. Sprague, Mr. Bennett, Mr. Nash, and Mr. Sibley. Negative information and opinions from local townships, schools, the Department of Natural Resources, the Michigan State Police, and residents had been received and deposited in the commission file. At the meeting, the entire tape of the January 15 hearing was played for the commission. Mr. Beasley was present and sat at the same table with the defendant commissioners. During a discussion lasting over one hour, Mr. Beasley answered questions about the operation of the proposed plant and its site and six people spoke in opposition. At no time in any of the meetings of the zoning commission did defendant Sprague, the zoning administrator, make a recommendation about the disposition of plaintiffs' application nor did he vote. And at no time did defendant members of the commission discuss the application among themselves outside the meeting. As members of the new commission, representing diverse parts of the county, they did not know each other well and had had little or no occasion to meet apart from official business.

At the conclusion of the open discussion, and without consultation among themselves, the commission members voted to deny the B-M Corp. application for a special use permit by a vote of 5-2. The reason given was that the plant would not be adequately served by essential public services and facilities, under Sec. 7.2(E) of the ordinance, because the roads were unsafe for heavy truck traffic. Def. Ex. 13. Defendants Bennett, Barley, Nash, Nelson and Sibley comprised the majority.[FN9] Def. Ex. 7.

FN9. No vote was recorded for defendant Homer Cowels.

Within the next six weeks following the vote, the Water Resources Commission formally denied the B-M Corp. request for waste disposal and the

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Air Pollution Control Division reported Mr. Beasley's plans to move the plant to a new site in Clinton County. Def. Ex. 4, 24. Apparently, the plant was never moved or operated and Michigan National Bank eventually foreclosed on the equipment in partial satisfaction of the corporation's debt, leaving the individual plaintiffs liable for the deficit.

#### 4. Plaintiffs' Claims.

Plaintiffs make three constitutional claims under Sec. 1983. The major charge is that defendants prevented them from doing business in Ionia County because they are black, while another asphalt plant owned by whites was permitted to operate unimpeded, thereby denying plaintiffs equal protection of the laws.

[1] It is by now axiomatic that official action will not be held unconstitutional solely because it results in a racially disproportionate impact. Aggrieved parties must prove a racially discriminatory intent or purpose as well. *Washington v. Davis*, 426 U.S. 229, 239, 242, 96 S.Ct. 2040, 2047, 2049, 48 L.Ed.2d 597 (1976). This requirement has been interpreted in subsequent opinions. Thus, in a recent zoning case, *Village of Arlington Heights v. Metropolitan Housing Authority*, 429 U.S. 252, 265, 97 S.Ct. 555, 563, 50 L.Ed.2d 450 (1977), the Court stated:

"Davis does not require a plaintiff to prove that the challenged action rested solely on racially discriminatory purposes. Rarely can it be said that a legislature or \*1069 administrative body operating under a broad mandate made a decision motivated solely by a single concern, or even that a particular purpose was the 'dominate' or 'primary' one."

And, in *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256, 279, 99 S.Ct. 2282, 2296, 60 L.Ed.2d 870 (1979), the Court stated:

" 'Discriminatory purpose' . . . implies more than intent as volition or intent as awareness of consequences . . . It implies that the decision-maker,

in this case a state legislature, selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." (Citations and footnotes omitted.)

[2] The courts have frequently noted the difficult and sensitive task of ascertaining the intent behind official actions. See, e. g., *Davis*, supra, 426 U.S. at 253, 96 S.Ct. at 2054 (Stevens, J., concurring). By its very nature a racially discriminatory purpose for challenged acts is unlikely to be expressed on the record. Discriminatory intent, if it exists, necessarily must be inferred by the court from the totality of the evidence, whether direct, indirect, or circumstantial. The district court is assisted in this subtle task by its opportunity to observe the demeanor of defendants under cross-examination at trial.

In the instant case, plaintiffs have failed to carry their burden of proving that racially discriminatory intent was a motivating factor in defendants' actions. At trial, defendants Bennett, Nash, Nelson and Sibley each testified he voted against the B-M Corp. application because he believed increased truck traffic caused by the asphalt plant on narrow, unimproved Cutler and Clintonia Roads would constitute an unacceptable safety hazard to school buses. All emphatically denied that defendants' race was ever mentioned during their deliberations or had anything to do with their decision.

[3] I have had the opportunity to study the record available to defendants at the time and to observe them on the witness stand. With due consideration for the difficulty of proving discriminatory intent, I nevertheless believe defendants told the truth and that race was not a factor in denying the permit. Plaintiffs argue that the vehemence of some of the denials is what one expects from the guilty and confirms their charges. ("The lady doth protest too much, methinks." *Hamlet*, Act III, Scene ii.) But they utterly fail to bolster this contention with evidence and I must accept defendants' statements for what they are: expressions of honest outrage at un-

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provable and unpleasant allegations.

Furthermore, plaintiffs' characterization of the unequal treatment of Williams Bros., the white-owned company, and themselves is faulty. Zoning is by nature specific to a particular location and time. Denial of special permission to operate the B-M Corp. asphalt plant in an agricultural district is not comparable to Williams Bros.'s operation in a non-agricultural district. Plaintiffs have not compared two businesses similarly located whose only distinction was the race of the owners. In fact, the zoning ordinance did not apply to Williams Bros. at all, Mr. Nash testified, because the company had been in business for many years on land leased from the state and was not subject to county zoning.

Finally, it was not true that the zoning commission denied plaintiffs the right to operate their asphalt plant anywhere in Ionia County. Contrary to plaintiffs' assertions, the Clintonia Road site was not the only place they could do business and denial of a permit for that property did not restrict them from relocating to a district zoned industrial. Several witnesses testified that this suggestion was made to Mr. Beasley at the January 30 meeting. Mr. Beasley, in turn, explained that the plant was not moved because it would have cost approximately \$2,500.00 and the corporation lacked operating funds. The facts do not support plaintiffs' contention that denial of the permit destroyed their business.

\*1070 The only suggestion of a racially discriminatory motive for imposing the new ordinance on plaintiffs and ultimately denying them a permit, came from defendants Sprague and Barley. Plaintiffs offered the friendly testimony of Theodore Ferris, one of the two members of the zoning commission who voted to grant the permit. Mr. Ferris, a self-confessed opponent of zoning in principle, testified that at the January 30 meeting, Mr. Sprague said, "If we let one in, they will all come in." Although a seemingly obvious racist comment referring to black persons, under repeated questioning by plaintiffs' attorneys, Mr. Ferris

steadfastly maintained that he believed it referred to blacktop manufacturing plants.

Mr. Sprague himself testified that after the vote, Mr. Beasley complained the permit had been denied because of his race. Mr. Sprague said he replied, "I hope you don't think you were denied because you are black." Plaintiffs would have the court interpret this statement for a meaning exactly opposite to the one expressed on its face. Instead of expressing concern that no misunderstanding exist, they argue it indicates a guilty conscience. I disagree. There is simply no evidence that Mr. Sprague was motivated by plaintiffs' race when he adjudged them in violation of the ordinance and wrote the bank in November, or subsequently as he gathered information for presentation to the zoning commission. As noted supra, he was responding with some zeal to requests from citizens opposing the plant and, subsequently, the commission. None of his actions overstepped the limits of his job, with the possible exception of the letter to the bank. But not even this was motivated by racial animus and there is no evidence it had any effect whatsoever. In this context, I conclude that his statement to Mr. Beasley was innocent and did not reveal a racially discriminatory intent behind defendants' actions.

The remaining suggestion came from the testimony of defendant A. C. Barley. On cross-examination, Mr. Barley was asked about the reasoning behind the decision to deny the B-M Corp.'s permit. He replied:

"... I think that most people felt that it was it sounds like you are talking to a child, but it was probably in his better interest to do this. I think let me expand that a little bit, if I can recall. I think they had the feeling that this was a market and I use it, I put quotation marks on that word 'market' that was not very fertile. Really there wasn't well, it's small, let's put it that way. Then we come to the fact that he was a black man in a county predominantly white, and I think they thought that he wasn't he might not succeed for that reason even though he might be very good in

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what he did. And let's say it was a little unusual for that kind of a county.

I don't really think it could be classified as a determination where everything was reviewed, pro and con, and all of the data that we could possibly get on the decision was brought in. I think it was, as I remember the discussion of it, was that it probably wasn't in the best interest of the gentleman to come into that area because he wasn't too well known and he was coming into an area which was mostly farm. And from that point on I just I remember that it went to the fact that, 'Gee, why doesn't he go someplace where he is probably going to be able to make more money anyway.' And I don't what I am saying is and I think this was valid and sincere that his wanting to come into that area was not good business. There wasn't a business there in the first place, and there may have been a few blacks there, but I didn't know who they were. On the other hand, if he had gone into one of the larger cities or near it and I still believe this might have happened he might have been very, very successful."

In other words, Mr. Barley determined that a black business could not prosper without black customers, that there were not enough blacks in Ionia County to support the B-M Corp. plant, and that it would be in plaintiffs' best interest not to receive a special use permit. This paternalistic reasoning was clearly racist and improper.

\*1071 The question remains, however, whether it reflected the thinking of the rest of the defendants or only Mr. Barley. Although Mr. Barley suggested there was a consensus, under questioning he admitted he could not remember if others felt as he did. Moreover, Mr. Barley proved to be an unreliable witness. He was unable to remember any conversation at the January 30 meeting. He also could not recall Harold Bennett's name or the fact Mr. Bennett was acting chairperson on January 30 or even his face, although Mr. Bennett was present in the courtroom. He did not remember if he had attended the January 15 hearing. An elderly man, Mr. Barley

finally stated, "Well, as I prefaced this meeting (sic) right here, one of my great failings is my memory. . . ." On the stand, he appeared to be reconstructing the events surrounding the vote in an attempt to help the other defendants. Mr. Barley obviously thought his misplaced solicitude for plaintiffs was exculpatory and was offering it to convince the court defendants' motives were benign. Mr. Barley's casual suggestion that the racially discriminatory intent behind his vote characterized the votes of the other defendants was flatly contradicted by testimony that they did not consider race and did not discuss their thinking among themselves. Consequently, I find that only Mr. Barley's vote was tainted by racial bias. There is no evidence that a conspiracy existed among the defendant members of the zoning commission to deny plaintiffs a permit because they are black. Even though Mr. Barley's vote was improper, a majority of four commission members still voted down the permit for neutral reasons. Accordingly, I hold that plaintiffs are unable to show that defendants, acting under color of state law, denied them equal protection of the laws.

[4] Plaintiffs' second charge is that defendants denied them due process by applying the ordinance against a lawful, pre-existing use.[FN10] In order to invoke due process protection, parties must identify a constitutionally protected liberty or property interest and then assess the appropriate measure of procedural protection. See, *Colm v. Vance*, 567 F.2d 1125 (D.C.Cir.1977). The existence and extent of protected interests are defined by the controlling state law. *Arnett v. Kennedy*, 416 U.S. 134, 94 S.Ct. 1633, 40 L.Ed.2d 15 (1974). Although nowhere spelled out by plaintiffs, they apparently believe their liberty and property interests are embodied in the lease of the Clintonia Road site, the use of the land, and their prospective ability to take advantage of business opportunities.

FN10. Plaintiffs do not attack the validity of the zoning ordinance itself nor do they allege an unconstitutional taking of their

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property.

[5][6][7][8] As a general principle, however, under Michigan law, no one has a vested right in existing zoning, for zoning is not a contract which forecloses subsequent amendment. *City of Ann Arbor v. Northwest Park Const. Co.*, 280 F.2d 212, 216 (6th Cir. 1960). Similarly, a party has limited protection against the application of a new ordinance to previously unzoned land. A party does not acquire a protected interest in a nonconforming use of property unless he can show nonconformance in a reasonably substantial manner. *Township of Fruitport v. Baxter*, 6 Mich.App. 283, 148 N.W.2d 888 (1967). Mere preliminary operations do not give rise to a vested right. Thus, it was insufficient to order plans, survey land, and remove old buildings to establish a nonconforming gravel mine, *Bloomfield Township v. Beardslee*, 349 Mich. 296, 84 N.W.2d 537 (1957), or to knock down an old shed, put up a sign, and erect some fences to establish a nonconforming junk yard, *Warholak v. Northfield Township Supervisor*, 57 Mich.App. 360, 225 N.W.2d 767 (1975). Cf. *Dingeman Advertising, Inc. v. Algoma Township*, 393 Mich. 89, 223 N.W.2d 689 (1974), in which the staking out of a billboard and installation of a transformer and powerline were deemed to confer a vested right to use property for a nonconforming billboard. In the instant case, B-M Corp. had moved its equipment onto leased land and begun to erect its \*1072 plant, but it lacked essential pollution control equipment and never operated at the site. Plaintiffs did not use the site in a reasonably substantial manner either before or after enactment of the ordinance. In light of the relevant Michigan law, it is highly doubtful they had a constitutionally protected interest.

[9][10][11][12] Evaluation of whether or not a pre-existing, nonconforming use is substantial is necessarily subjective and varies from case to case. As a general rule, official actions come cloaked with a rebuttable presumption that public officers have applied a zoning ordinance in a regular and lawful manner. See generally, *Kropf v. City of Ster-*

*ling Heights*, 391 Mich. 139, 215 N.W.2d 179 (1974); *Sun Oil Co. v. City of Madison Heights*, 41 Mich.App. 47, 199 N.W.2d 525 (1972); 82 Am.Jur.2d, *Zoning and Planning*, s 354, at 936. If a classification of property for zoning purposes is not unreasonable or arbitrary, but fairly debatable, it will be upheld by a court. *Brae Burn, Inc. v. City of Bloomfield Hills*, 350 Mich. 425, 86 N.W.2d 166 (1957); *Tocco v. Atlas Township*, 55 Mich.App. 160, 222 N.W.2d 264 (1974). I believe defendant Sprague's judgment that plaintiffs were not exempt from the requirements of the ordinance, because they were not yet in business but merely assembling equipment, was reasonable. Moreover, even if plaintiffs did have protected interests in their nonconforming use of the land, and the zoning administrator was wrong, they had full notice and opportunity to appear before the zoning commission, not once but several times, to plead their case and voice any objections. I hold defendants did not deny plaintiffs due process.

Although not argued at trial, the third charge made by plaintiffs' complaint is that defendants impaired the obligations of their "lease, mortgages and other contracts" by enacting the zoning ordinance and enforcing it against them, in derogation of their rights under the "contract clause" of Art. I and the Fourteenth Amendment of the U.S. Constitution. As noted supra at fn. 10, plaintiffs do not challenge the validity of the ordinance itself and I have ruled that the enactment of the ordinance by the Board of Commissioners was not wrongful. As a result, the basis that remains for this charge is narrow.

[13] The modern Supreme Court has not construed the contract clause as a literal injunction against all state laws which abridge existing contractual relationships. See, *Home Bldg. and Loan Assn. v. Blaisdell*, 290 U.S. 398, 54 S.Ct. 231, 78 L.Ed. 413 (1934). The clause does not prevent a state or its subdivisions from exercising its police power to protect the lives, health, morals, comfort and general welfare of the public. *Manigault v.*

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Springs, 199 U.S. 473, 26 S.Ct. 127, 50 L.Ed. 274 (1905). Zoning is, of course, a legitimate exercise of the police power. *Agins v. City of Tiburon*, 447 U.S. 255, 100 S.Ct. 2138, 65 L.Ed.2d 106 (1980); *Penn. Central Transp. Corp. v. New York City*, 438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978); *City of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 47 S.Ct. 114, 71 L.Ed. 303 (1926).

[14][15] The contract clause continues to impose some limits on state power. The cases instruct the reviewing court to evaluate the reasonableness of the legislation. The court must determine whether the state law has operated as a substantial impairment of the contractual relationship. *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 244, 98 S.Ct. 2716, 2723, 57 L.Ed.2d 727 (1978); see also, *U.S. Trust Co. v. New Jersey*, 431 U.S. 1, 97 S.Ct. 1505, 52 L.Ed.2d 92 (1977); *City of El Paso v. Simmons*, 379 U.S. 497, 85 S.Ct. 577, 13 L.Ed.2d 446 (1965). Using this test in the instant case, I find that enactment and application of the zoning ordinance did not substantially impair plaintiffs' contracts. The lease of the Clintonia Road site was for both the excavation of gravel and the manufacture of asphalt, and rent was calibrated to the volume of gravel taken alone. Plaintiffs could still derive substantial value from the lease, although deprived of the highest intended use of the land. As for their contractual relationship with the bank, plaintiffs had the benefit of their investment in the equipment,\*1073 which could be moved to another site and operated there. Requiring a permit for the Clintonia Road site and then denying the corporation's application did not impair its obligation to repay the loan but only incidentally burdened plaintiffs by making it necessary to move to a properly zoned location. The inability of plaintiffs to ultimately repay the loan was due to a combination of factors, of which the zoning ordinance was only one.

I conclude that application of the zoning ordinance to plaintiffs was a valid exercise of the county's police power. It did not unreasonably or substantially impair the obligation of their con-

tracts.

#### CONCLUSION

It is not hard to feel tremendous sympathy for Mr. Beasley and his partners as one watches them slowly enveloped by the manifold coils of state and local bureaucracy. Plaintiffs demonstrated great patience and determination in seeking to comply with the requirements of the various statutes to which their business was subject. As they met one frustrating barrier after another, it is understandable that they might conclude they were being systematically discriminated against, and that they should vindicate their rights in court.

The federal judiciary plays a vital role in safeguarding the rights of all persons. But in fulfilling that role, a court has a responsibility to judge impartially and to treat all fairly. A judge must thrust aside his natural sympathies to find the true facts in a case and to do justice to all parties. Although plaintiffs may have had grounds to suspect discrimination, they were, nevertheless, attempting to set up a business whose pollution, stench, and other undesirable features are well-known. To attempt to erect an asphalt plant in an agricultural area where there were homes valued in excess of \$50,000 is bound to bring about protest, regardless of the race of the owners. In view of the public outcry in Clinton County, plaintiffs could hardly have been surprised at the reaction in Ionia County. In this case, I believe defendants, as public servants, acted reasonably and for neutral reasons in enforcing the zoning ordinance. The results, undeniably, were detrimental to plaintiffs' interests, but they were untainted by racial animus. As public officials, defendants were influenced by a well-organized group of local citizens opposed to the asphalt plant, but under our system of government it is certainly not unconstitutional to lobby officials for a particular point of view. Again, there was no hint of bias in that opposition.

In conclusion, I hold that plaintiffs have failed to prove that defendants acted in concert to deprive them of their constitutional rights. I find in favor of

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defendants on all counts and dismiss this suit with prejudice. Each side is to assume its own fees and costs.

IT IS SO ORDERED.

D.C.Mich., 1980.  
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person challenging the ordinance to establish the contrary.

**[4] Zoning and Planning 414 ↪1076**

414 Zoning and Planning

414II Validity of Zoning Regulations

414II(B) Particular Matters

414k1074 Residence Districts

414k1076 k. Uses permitted or excluded. Most Cited Cases

(Formerly 414k72, 268k625)

Presence of an adjacent city park to southeast of defendant's property and existence of city plan to extend it to include defendant's property did not amount to an attempted appropriation of defendant's property, which was zoned for single residence use only, when there was no evidence of zoning for purpose of depressing values and thereby enabling city to make a less expensive acquisition of the property for its purposes, and the ordinance was not unreasonable and not unconstitutional as applied to defendant's property.

**[5] Zoning and Planning 414 ↪1077**

414 Zoning and Planning

414II Validity of Zoning Regulations

414II(B) Particular Matters

414k1074 Residence Districts

414k1077 k. Validity of districting.

Most Cited Cases

(Formerly 414k72, 268k626)

Where lands immediately to north and south of defendant's property were zoned residential and contained a number of residences and defendant's land was bounded on the east by a railroad right of way beyond and industrial uses were permitted a block to the north or south beyond the tracks, zoning ordinance limiting use of defendant's property to single residences only was not discriminatory.

**[6] Zoning and Planning 414 ↪1300**

414 Zoning and Planning

414VI Nonconforming Uses

414k1300 k. In general. Most Cited Cases  
 (Formerly 414k321, 268k625)

Existing nonconforming use of defendant's property was a factor in determining reasonableness of ordinance zoning the land for single residence use only, but the nonconforming use did not itself render the zoning unreasonable.

**[7] Estoppel 156 ↪62.5**

156 Estoppel

156III Equitable Estoppel

156III(A) Nature and Essentials in General

156k62 Estoppel Against Public, Government, or Public Officers

156k62.5 k. Acts of officers or boards.

Most Cited Cases

(Formerly 156k62(5))

A city cannot be estopped to enforce its valid ordinances by acts of its officers in violation thereof.

**[8] Estoppel 156 ↪62.4**

156 Estoppel

156III Equitable Estoppel

156III(A) Nature and Essentials in General

156k62 Estoppel Against Public, Government, or Public Officers

156k62.4 k. Municipal corporations in general. Most Cited Cases

(Formerly 156k62(4))

Where defendant's property was zoned for single residence use only, fact that city had issued defendant a license to operate his scrapyard on his property did not bar city from seeking an injunction enjoining defendant from using his property for that purpose.

**[9] Injunction 212 ↪108**

212 Injunction

212III Actions for Injunctions

212k108 k. Conditions precedent. Most Cited Cases

Where property owner had sought no variance

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to avoid unnecessary hardships and city desired no variance but only wanted to have zoning ordinance enforced, city was not required to exhaust administrative remedies by appeal to board of zoning appeals before bringing suit to enjoin violation of ordinance by property owner.

#### [10] Injunction 212 ↪130

##### 212 Injunction

###### 212III Actions for Injunctions

###### 212k130 k. Trial or hearing. Most Cited Cases

Where there was no application presented by city or property owner for a zoning variance, court, in taking jurisdiction of action by city to enjoin defendant from operating scrapyards in residential zone, was not required to determine whether a variance should have been granted.

#### [11] Zoning and Planning 414 ↪1126

##### 414 Zoning and Planning

###### 414II Validity of Zoning Regulations

###### 414II(C) Procedural Requirements

###### 414k1126 k. Map. Most Cited Cases

(Formerly 414k132)

Fact that original map as presented at hearing on proposed zoning ordinance and approved by council was not left in record of ordinances but returned to city engineer did not have effect of invalidating the ordinance.

#### [12] Evidence 157 ↪387(6)

##### 157 Evidence

###### 157XI Parol or Extrinsic Evidence Affecting Writings

###### 157XI(A) Contradicting, Varying, or Adding to Terms of Written Instrument

###### 157k387 Official Records and Documents

157k387(6) k. Municipal records or proceedings. Most Cited Cases

In action by city to restrain operation of a scrapyards in violation of city ordinance on property of defendant, who claimed that ordinance was not

validly enacted, parol evidence was admissible to show that a public hearing on ordinance was had as required by law.

#### [13] Zoning and Planning 414 ↪1305

##### 414 Zoning and Planning

###### 414VI Nonconforming Uses

###### 414k1305 k. Legality or illegality of use.

Most Cited Cases.

(Formerly 414k326)

Where, at time defendant's property was zoned for single residence use only, property was being used for gathering, storing and shipping of scrap metal, use of property after ordinance for processing of scrap metal, which involved use of metal crushing or grinding or chopping machine and equipment for processing scrap metal, was not a permitted nonconforming use.

#### [14] Nuisance 279 ↪3(5)

##### 279 Nuisance

###### 279I Private Nuisances

###### 279I(A) Nature of Injury, and Liability Therefor

279k3 What Constitutes Nuisance in General

279k3(5) k. Mills, foundries, and other establishments. Most Cited Cases

Where operation of metal machine and equipment for processing scrap metal on land zoned for use in family residence caused vibrations and loud noises which disturbed peace and quiet of neighborhood and burning of materials caused smoke and odors offensive to neighbors, and such uses of property were not permitted nonconforming uses, such operations constituted a private nuisance as well as a public nuisance.

\*380 \*\*469 Butzel, Levin, Winston & Quint, Detroit, for defendant-appellant.

Harvey W. Moes, Hillsdale, for plaintiff-appellee City of Hillsdale.

Dimmers, MacRitchie & Moes, Hillsdale, for indi-

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vidual plaintiffs-appellees.

Kenneth W. Huggett, Hillsdale, of counsel, for plaintiffs-appellees.

Before the Entire Bench.

DETHMERS, Chief Justice.

Defendant appeals from decree restraining it from operating its scrap yard in a residential zone in plaintiff city in a manner held to constitute an extension of a permitted nonconforming use and a nuisance. We affirm. The individual plaintiffs occupy neighboring residences.

[1] Defendant's first main contention is that the zoning ordinance in question is, as applied to its property, unreasonable and unconstitutional for a number of reasons, which we consider seriatim.

\*381 (1) The ordinance zones defendant's property and the area around it for single residence use only. It also provides that no lot shall be used for a dwelling unless \*\*470 it abuts for its full frontage upon a street or place. A place is defined as an open, unoccupied space, 30 feet or more in width, used for purpose of access to abutting property. Defendant's property is 247 feet wide north and south, and 660 feet long east and west. It does not abut on a street on any side, but a street ends at about the center of its north boundary. An extension thereof across the center of defendant's property was dedicated but never constructed. Defendant bought subject to the easement thereof. The street continues again somewhat south therefrom. Defendant objects to application of the ordinance to its property as unreasonable on the ground that its landlocked condition makes its use for residential purposes impossible under the above noted street or 'place' frontage requirement of the ordinance. There is, of course, nothing to prevent defendant from laying out streets or 'places' on its property, connecting with the street to the north. The dimensions of the property would permit this to be done in a manner making it usable for several dwelling lots in con-

formity with the ordinance. There is no merit to this objection.

[2][3] (2) Defendant says the character and location of the site make it unsuited to residential development. The lands immediately to the north and south are zoned residential and contain a number of residences of a value ranging from \$2,000 to \$22,000. On the west is a high hill and undeveloped area. A railroad right of way bounds the property on the east and beyond that is a street and along its east side some substandard dwellings. East of the tracks there is industrial activity about a block north and also a block south of defendant's property. The railroad right of way forms a clear line of demarcation\*382 between land used for desirable residential purposes on the west and less desirable residential, commercial and industrial on the east. Not yet has it been held here that the proximity of a railroad right of way alone will automatically render zoning for residential purposes arbitrary and unreasonable. The ordinance is presumed to be reasonable and constitutional and the burden is on defendant to establish the contrary. *Portage Township v. Full Salvation Union*, 318 Mich. 693, 29 N.W.2d 297. Other than proofs as to uses of property in the vicinage as above outlined, there is no evidence on the subject. It is not shown that the property cannot reasonably be used for residential purposes, that it has no economic value for that purpose, or even that limiting it thereto would occasion defendant great financial loss. The fact is that the neighboring properties west of the tracks, and some east of them, now are being so used and there is nothing to indicate any peculiarity about defendant's property, also west of the railway, making it less suitable therefor.

[4] (3) Despite the presence of an adjacent city park to the southeast and existence of a city plan to extend it to include defendant's property, this is not, as defendant suggests, a case of attempted expropriation like *Grand Trunk Western Railroad Co. v. City of Detroit*, 326 Mich. 387, 40 N.W.2d 195, because there is no evidence here, as there, of zoning

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for the purpose of depressing values and thereby enabling the city to make a less expensive acquisition of the property for its purposes. Neither is there the testimony here, as in that case, of 'clanging bells, dirt, noises and smoke from passing trains and switch engines', except those coming from defendant's violation of the ordinance, making the area unfit for residential use. Here the record shows that but one train passes by per day.

\*383 [5] (4) Neither is discriminatory action presented on this record as in *Laramie & Son, Inc. v. Southfield Township*, 326 Mich. 410, 40 N.W.2d 205, where an adjacent owner was permitted a use denied the plaintiff. Here the neighboring properties lying, as does defendant's, west of the railroad are zoned and, where developed, used for residential purposes. What is permitted a block to the north or south, east of the \*\*471 tracks does not establish discrimination as to defendant's property lying west of the tracks amidst residences. A line has to be drawn somewhere and the tracks seem to present a reasonable one under the existing conditions.

[6] (5) Defendant suggests a novel theory, which we do not adopt, that the existing nonconforming use of its property itself renders the zoning unreasonable. It is a factor in determining reasonableness, to be sure, but under the facts in this case the permitted continuing nonconforming use, in the midst of the neighboring residences, gives defendant all it is entitled to on that score.

Defendant's next major contention is that prior administrative proceedings bar this suit. We consider arguments under that heading in the order presented.

[7][8] (1) The city council had granted defendant a permit to build a building to be used for permitted residence and office purposes. Defendant used it as an office and scale house, in a manner held by the court to be an extension of the nonconforming use. The city had also issued defendant a license to operate a scrap yard. This is not shown to be inconsistent with the permitted nonconforming

use. Defendant says the city is, thereby, barred from seeking an injunction and the court may not enjoin its use for that purpose, even though that use is exercised in a manner violative of the ordinance. The city cannot be estopped to enforce its valid ordinance by acts of \*384 its officers in violation thereof. *Fass v. City of Highland Park*, 326 Mich. 19, 39 N.W.2d 336. See, also, *West Bloomfield Township v. Chapman*, 351 Mich. 606, 88 N.W.2d 377, in which a building permit was obtained for a permitted purpose and, after its construction, the building was used for another purpose violative of the ordinance.

[9] (2) Defendant says the city, before bringing this suit to enjoin violation of the ordinance, must exhaust its administrative remedies by appeal to the board of zoning appeals, which, by provisions of the ordinance, has power to vary its terms in order to avoid unnecessary hardships to the property owner. Here defendant had sought no such variance. The city desired none. The object of the city was to have the ordinance enforced, not varied. That required no previous proceeding before the board to consider a possible variance.

[10] (3) There was no application presented by the parties on either side for a variance and, hence, defendant is mistaken in its position that the court, in taking jurisdiction of the case, was required to determine whether a variance should have been granted.

[11][12] Defendant says the ordinance was not validly enacted. Its claim is, first, that the ordinance refers to and makes an attached map a part thereof, but no map was attached to the text as enrolled in the record of ordinances. Minutes from the journal of the common council disclose that the notice of public hearing on the proposed ordinance contained the statement that a copy of the ordinance and its accompanying map were on file for public inspection at the city hall. Testimony disclosed the presence of the map at that hearing and that thereafter tracings were made from it and printed and published with the ordinance in booklet form,

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whereupon the original map was returned to the engineer who had prepared it. No question is raised as to the accuracy of the \*385 printed maps. The following testimony of that engineer appears in the record:

'The tracing which I identified as Exhibit E is a copy of the original which the city engineer gave me. It is a brownprint made direct from the tracing. The map that is in that ordinance is an official map according to the terms of the ordinance and my understanding of it.'

The fact that the original map, as presented at the hearing and approved by the council, \*\*472 was not left in the record of ordinances but returned to the engineer could not have the effect of invalidating the ordinance. *Stevenson v. Bay City*, 26 Mich. 44. Although the journal does not record it, there is ample parol evidence that a public hearing on the ordinance was had as required by law. The parol evidence was admissible for that purpose. *Township of North Star v. Cowdry*, 212 Mich. 7, 179 N.W. 259.

[13] Holding the ordinance, as we do, to have been lawfully adopted, reasonable, constitutional and enforceable as applied to defendant's property, we reach the question whether defendant's use of the property at the time suit was commenced was a permitted nonconforming use. Defendant admits that through the erection of certain buildings and installation of certain machinery and equipment, as well as a spur railroad track, the operation of the scrap yard has become more mechanized and intensified, since the effective date of the ordinance. Testimony establishes that before the ordinance the business carried on at the location in question was largely storage of scrap metal. Since then a metal crushing or grinding or chopping machine and equipment for processing scrap metal have been operated there. The court found, on competent evidence, that since effective date of the ordinance, the operations \*386 changed from gathering and storing and shipping of scrap to processing of scrap metal, to burning of automobile tires and bodies

causing large amounts of dense smoke and flames and offensive odors which annoyed the neighborhood and to smashing and crushing automobile bodies and other large pieces of metal, which created loud and disturbing noises and vibrations within neighboring dwelling houses. Defendant says this mechanization and modernization and extension of its operations from storage to processing is necessary to enable it to meet competition. Plaintiffs say it amounts to a change in and an unlawful extension of the nonconforming use. In this plaintiffs are supported by *Austin v. Older*, 283 Mich. 667, 278 N.W. 727, and *Cole v. City of Battle Creek*, 298 Mich. 98, 298 N.W. 466. The trial court's decree was correct in prohibiting and enjoining the use and maintenance of machinery, equipment and buildings placed on the premises after effective date of the ordinance and used for processing metal and for operations which constitute an extension of the nonconforming use.

[14] The court also found that the operation of machinery so as to cause vibrations and loud noises which disturb the peace and quiet of the neighborhood and the burning of materials causing smoke and odors offensive to neighbors was a nuisance and enjoined the same. Despite defendant's urging to the contrary, we think a private nuisance was adequately pleaded and proved, as well as a public nuisance in operations violative of the ordinance, namely, those being in extension of the permitted nonconforming use. Defendant cites authority for the proposition that the natural or inherent annoyances of a legitimate business, lawfully conducted, are not the subject for injunctive relief. Here the operations complained of and enjoined are not lawful, but, on the contrary, violate the ordinance because they are not within the permitted nonconforming use.

\*387 The decree does not, as complained, go too far, nor is it lacking in specificity.

Decree affirmed. Costs to plaintiffs.

CARR, KELLY, SMITH, BLACK, EDWARDS,

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VOELKER and KAVANAGH, JJ., concur.

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Westlaw.

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**C**

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NY,2006.

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2005099, 2006 N.Y. Slip Op. 05791

In the Matter of Gary McDonald, Appellant  
v  
Zoning Board of Appeals of Town of Islip, Re-  
spondent.  
Supreme Court, Appellate Division, Second De-  
partment, New York

July 18, 2006

CITE TITLE AS: Matter of McDonald v Zoning  
Bd. of Appeals of Town of Islip

HEADNOTE

Municipal Corporations  
Zoning  
Nonconforming Use

Determination that mulching and/or recycling pro-  
cessing facility operating on portion of subject  
property was impermissible expansion and altera-  
tion that exceeded scope of legal nonconforming  
use of property as landscaping and excavation busi-  
ness was not illegal, arbitrary or capricious, or ab-  
use of discretion.

In a proceeding pursuant to CPLR article 78 to re-  
view so much of a determination of the Zoning  
Board of Appeals of the Town of Islip, dated  
September 30, 2003, made after a hearing, as  
denied that branch of the petitioner's application  
which was to establish a legal nonconforming use  
of his property as a mulching/recycling business,  
including outdoor storage of certain materials, the  
petitioner appeals from a judgment of the Supreme  
Court, Suffolk County (Henry, J.), entered Decem-

ber 22, 2004, which denied the petition and dis-  
missed the proceeding.

Ordered that the judgment is affirmed, with costs.

It is undisputed that for three generations, dating  
back to the 1930's, the petitioner's family operated a  
landscaping and excavation business on a 2.6-acre  
parcel of property located within an area now des-  
ignated for industrial I use in the Town of Islip.  
The petitioner seeks review of so much of a deter-  
mination of the Zoning Board of Appeals of the  
Town of Islip (hereinafter the ZBA) as denied that  
branch of his application which was to establish a  
legal nonconforming use of the property as a  
mulching/recycling business, including outdoor  
storage of certain materials.

Judicial review of a determination of an adminis-  
trative agency is limited to whether the action taken  
by the agency was illegal, arbitrary and capricious,  
or an abuse of discretion (*see Matter of Ifrah v  
Utschig*, 98 NY2d 304 [2002];\*\*2*Matter of Urban  
Forest Prods. v Zoning Bd. of Appeals for Town of  
Haverstraw*, 300 AD2d 498 [2002]). A use of prop-  
erty that existed before the enactment of a zoning  
restriction that prohibits the use is a legal noncon-  
forming use, but the right to maintain a noncon-  
forming use does not include the right to extend or  
enlarge that\*643 use (*see Matter of P.M.S. Assets v  
Zoning Bd. of Appeals of Vil. of Pleasantville*, 98  
NY2d 683, 684-685 [2002];*Matter of Rudolf Steiner  
Fellowship Found. v De Luccia*, 90 NY2d 453,  
458 [1997];*Matter of Toys "R" Us v Silva*, 89  
NY2d 411, 417 [1996];*Matter of Urban Forest  
Prods. v Zoning Bd. of Appeals for Town of Haver-  
straw, supra*). "Further, in keeping with the sound  
public policy of eventually extinguishing all non-  
conforming uses, the courts will enforce a municip-  
ality's reasonable circumscription of the right to ex-  
pand the volume or intensity of a prior noncon-  
forming use" (*Incorporated Vil. of Laurel Hollow v  
Owen*, 247 AD2d 585, 586 [1998];*see Matter of  
Urban Forest Prods. v Zoning Bd. of Appeals for*

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*Town of Haverstraw, supra; Matter of Rudolf Steiner Fellowship Found. v De Luccia, supra).*

Contrary to the petitioner's contention, the determination of the ZBA that the mulching and/or recycling processing facility operating on the northeast portion of the subject property was an impermissible expansion and alteration that exceeded the scope of the legal nonconforming use of the property as a landscaping and excavation business was not illegal, arbitrary or capricious, or an abuse of discretion (*see Matter of 550 Halstead Corp. v Zoning Bd. of Appeals of Town/Vil. of Harrison*, 1 NY3d 561 [2003]; *Matter of McCabe v. Town of Clarkstown Bd. of Appeals*, 31 AD3d 451 [2006]; *Matter of P.M.S. Assets v Zoning Bd. of Appeals of Vil. of Pleasantville, supra* at 684-685; *Matter of Rudolf Steiner Fellowship Found. v De Luccia, supra*; *Matter of Watral v Scheyer*, 223 AD2d 711 [1996]). The ZBA's reliance on aerial photographs of the property maintained by the Town was proper under the circumstances, since the ZBA provided clear notice at the public hearing of its intention to review such photographs, and the petitioner neither objected to the procedure nor sought an opportunity to submit further evidence in rebuttal (*see Matter of Surawala v Casey*, 172 AD2d 613 [1991]; *Matter of Russo v Stevens*, 7 AD2d 575, 578 [1959]). Accordingly, the Supreme Court properly denied the petition and dismissed the proceeding. Santucci, J.P., Krausman, Mastro and Skelos, JJ., concur.

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Matter of McDonald v Zoning Bd. of Appeals of Town of Islip

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**H**

Urban Forest Products, Inc. v. Zoning Bd. of Appeals for Town of Haverstraw  
300 A.D.2d 498, 751 N.Y.S.2d 581  
N.Y.A.D.,2002.

300 A.D.2d 498751 N.Y.S.2d 581, 2002 WL 31831558, 2002 N.Y. Slip Op. 09439

In the Matter of Urban Forest Products, Inc., et al.,  
Appellants,  
v.

Zoning Board of Appeals for Town of Haverstraw et al., Respondents, and Paul E. Hultberg et al., Intervenors-Respondents.

Supreme Court, Appellate Division, Second Department, New York

(December 16, 2002)

CITE TITLE AS: Matter of Urban Forest Prods. v Zoning Bd. of Appeals for Town of Haverstraw

In a proceeding pursuant to CPLR article 78 to review a determination of the Zoning Board of Appeals of the Town of Haverstraw, dated September 12, 2001, made after a hearing, which denied the petitioners' application for review of an administrative decision of the Chief Code Enforcement Officer of the Town of Haverstraw that determined that the petitioners were illegally operating\*499 a commercial business in a residential zone, and for certification of an existing nonconforming use, the petitioners appeal from a judgment of the Supreme Court, Rockland County (O'Rourke, J.), dated February 11, 2002, which denied the petition and dismissed the proceeding.

Ordered that the judgment is affirmed, with costs.

The subject of this CPLR article 78 proceeding is a commercial landscaping and mulching business operated by the petitioners at 229 Quaker Road (hereinafter the property) in an R-25 residential zone in the Town of Haverstraw. Prior to 1990 the

property was zoned for planned industrial use, and used mainly for the storage and maintenance of commercial vehicles. In 1990 the Town of Haverstraw zoning code was amended and the property was rezoned as residential. The previous owner, who used the property solely for vehicle storage at that time, was allowed to continue his operation pursuant to well-settled law "that nonconforming uses or structures, in existence when a zoning ordinance is enacted, are, as a general rule, constitutionally protected and will be permitted to continue, notwithstanding the contrary provisions of the ordinance" (*People v Miller*, 304 NY 105, 107).

In 2000 the petitioners acquired the property and established a landscaping and mulching business, which involved processing trees and stumps through industrial wood chippers, and stirring large piles of mulch with bulldozers. Although the Chief Code Enforcement Officer of the Town of Haverstraw (hereinafter the CCEO) originally determined that the petitioners' operation was a protected legal nonconforming use, in May 2001 he issued a notice of violation to the petitioners for operating a commercial mulching business in a residential-zoned area. After extensive hearings, the Zoning Board of Appeals of the Town of Haverstraw (hereinafter the Board) rejected the petitioners' application to review the CCEO's determination, based, among other things, on its finding that the previous nonconforming use (vehicle storage) could not be altered to a use which did not exist at the time of the amendment, such as the subject landscaping and mulching operation.

It is well settled that judicial review of administrative agency determinations is limited to whether the action taken by the agency was illegal, arbitrary and capricious, or an abuse of discretion (*see Matter of McNair v Board of Zoning Appeals of Town of Hempstead*, 285 AD2d 553). Thus, a zoning board's determination will be upheld if it had a rational basis and is supported by the record (*see Matter of Sasso v Osgood*, 86 NY2d 374).\*500

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Here, the petitioners clearly had the right to continue to use the property as it had been used through the 1990 amendment, but that right did not carry with it the attendant right to alter the use (*see Matter of Rudolf Steiner Fellowship Found. v De Lucia*, 90 NY2d 453, 458; *Matter of Lindstrom v Zoning Bd. of Appeals of Town of Warwick*, 225 AD2d 626, 627; *Matter of Smith v Board of Appeals of Town of Islip*, 202 AD2d 674). Thus, we agree with the Supreme Court that the petitioners' landscaping and mulching operation was an illegal nonconforming use because it did not predate the zoning amendment. The Board therefore properly denied the petitioners' application.

The petitioners' remaining contentions are without merit.

S. Miller, J.P., Krausman, Luciano and Cozier, JJ., concur.

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N.Y.A.D., 2002.

*Matter of Urban Forest Prods. v Zoning Bd. of Appeals for Town of Haverstraw*

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