

66432-8

66432-8

NO. 66432-8

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION 1

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

Appellants,

v.

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

Respondent.

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KING COUNTY WASHINGTON  
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**RESPONDENT KING COUNTY DEPARTMENT OF  
DEVELOPMENT AND ENVIRONMENTAL SERVICES'  
CONSOLIDATED RESPONSE BRIEF**

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**ORIGINAL**

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## I. INTRODUCTION

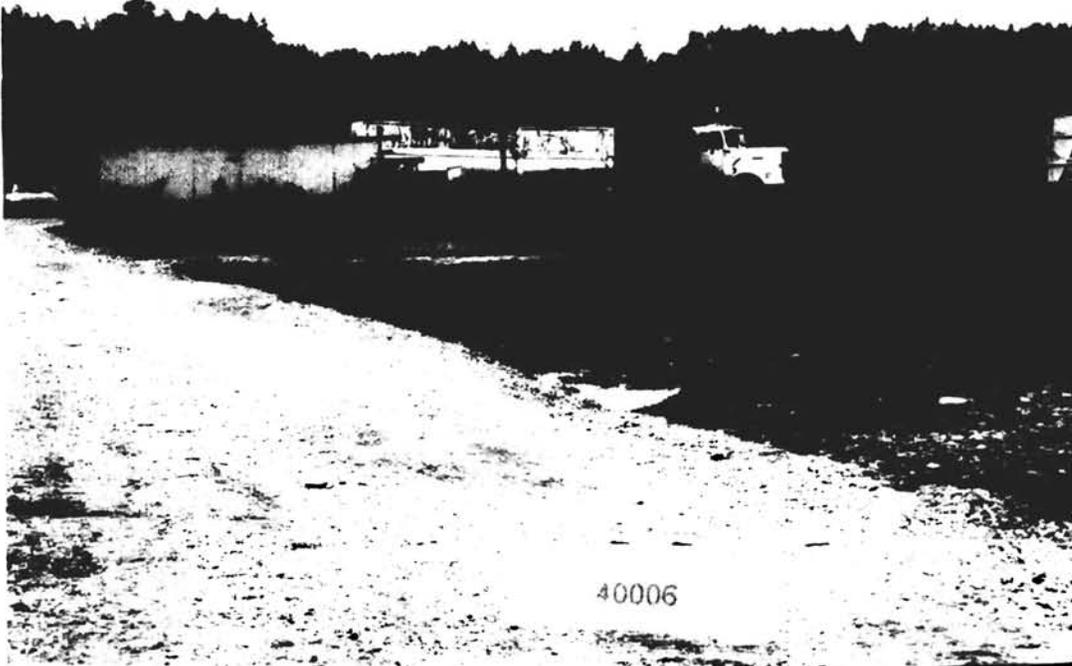
This case involves review of the straightforward enforcement action<sup>1</sup> of a King County executive agency. The King County Department of Development and Environmental Services (DDES) is mandated to enforce King County's Zoning and Critical Areas Codes throughout unincorporated King County. DDES uses a citizen complaint-based enforcement system.

In this case DDES started receiving a variety of complaints about illegal grading on the agriculturally zoned subject parcel in 2005, followed later by pleas for help from a farmer immediately to the south. The farmer complained of significant odors, dust, and water impacts generated by appellant Shear's newly established materials processing facility on appellant Spencer's parcel. On May 13, 2005 DDES issued a stop work order requiring a grading permit. At that time the subject parcel looked like this:



Excerpt from Exhibit 45, Sub #18

<sup>1</sup> The Notice and Order at issue here is attached as Appendix A.



Excerpt from Exhibit 46, Sub #18

Appellants Shear and Spencer completely ignored the stop work order. Then in October of 2006 the DDES Code Enforcement section issued a Notice and Order. See Appendix A. At that time the subject parcel looked like this:

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Excerpt from Exhibit 2, Sub #18

The Notice and Order alleged operation of a materials processing facility in critical areas without required permits and grading in a critical area without required permits. Appellants Shear and Spencer appealed every aspect of the Notice and Order, based in part on a legal nonconforming use theory. After extensive pretrial proceedings, including exhaustive discovery, discovery motions, dispositive motions, intervention and then withdrawal by the neighboring farmer, a successful motion by appellant Shear requesting that former Examiner James O'Conner recuse himself, an unsuccessful Superior Court writ action brought by appellant Shear against Examiner Stafford Smith, two necessary extensive continuances based upon Examiner Smith's calendar, one necessary extensive continuance based upon the appearance of new counsel for appellant Shear, eight days of hearings, and the submission of multiple post-hearing briefs

discussing a wide variety of regulatory and constitutional issues, Examiner Smith issued his 33-page Report and Decision in January of 2010. By then the subject parcel looked like this:



Excerpt from Exhibit 2, Sub #18

In his decision the Examiner denied Shear and Spencer's appeal regarding both the simple grading permit requirement and the operational materials processing permit requirement, granted Shear and Spencer's appeal regarding DDES' wetland allegation despite finding their wetland expert not credible, refused to apply King County flood hazard area regulations despite acknowledging that every FEMA map and the County's state-of-the art FEMA challenge map all show Shear's operation to be in the Flood Hazard Area, and severely limited DDES' permit review and decision authority in violation of the plain language of the King County Code and the State Environmental Protection Act. The Examiner also found, in violation of clear code language and

appellate authority, that appellant Shear's prospective intent to establish a materials processing use on the subject parcel was sufficient to establish a legal nonconforming use (avoiding a zoning-code scale limitation). The Examiner did find that appellant Shear's extremely intensified use of the parcel triggered an additional conditional use permit (CUP) requirement, but again placed severe restrictions on DDES' Code-mandated permit review procedures and decision-making authority.

Faced with the Hobson's choice of either violating the King County Code or violating the Examiner's conditions DDES appealed the Examiner's decision to the Superior Court. The Superior Court granted DDES' appeal on all issues, concluding that a prospective intent is insufficient to establish a legal nonconforming use, that the Examiner had committed legal error by refusing to impose flood hazard regulations, and that the Examiner exceeded his jurisdiction when he placed conditions on DDES' permit review procedures and decision-making authority. Shear, Spencer and the Hearing Examiner then filed the instant appeal.

## II. ISSUES ON APPEAL

- A. **Does the King County Department of Development and Environmental Services have standing to appeal a King County Hearing Examiner decision under the plain language of RCW 36.70C et seq?**
  - i. **Is DDES an aggrieved person with standing under RCW 36.70C.020(4) and RCW 36.70C.060(2)?**
  - ii. **Under the plain language of RCW 36.70.080 did the Examiner waive his right to challenge DDES' standing to appeal by failing to raise the issue before the Superior Court?**
- B. **Did DDES meet its burden to prove Examiner error on each issue considered by the Superior Court under the standards set forth in RCW 36.70C.130?**
- C. **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 Shear established a legal nonconforming materials processing use on the subject parcel?**

**i. Did the Hearing Examiner erroneously apply the King County Code to the facts when he concluded that no legal nonconforming materials processing use was established on the subject parcel?**

**ii. Did the Hearing Examiner erroneously apply the common law to the facts when he concluded that no legal nonconforming materials processing use was established on the subject parcel?**

**D. Did the Hearing Examiner commit legal error and exceed his jurisdiction when he refused to enforce King County flood hazard regulations?**

**E. Did the Hearing Examiner exceed his jurisdiction when he denied Shears' and Spencer's Notice and Order appeal but placed conditions directing DDES' discretionary permit processes?**

**i. Did the Examiner's conditions exceed his jurisdiction under the plain language of the King County Code?**

**ii. Does this Court's previous decision In re King County Hearing Examiner preclude the action taken by the Examiner in this case?**

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

In this case the facts found by the Examiner have not been challenged by any party. While DDES objects to the characterizations of the proceedings below set forth by appellants the administrative record speaks for itself. Specific facts are discussed in the body of this brief where applicable to the legal analysis.

### **IV. ARGUMENT**

The Superior Court's decision should be affirmed in its entirety. The Hearing Examiner Smith's good intentions notwithstanding, both he and DDES are bound to enforce the same Codes. Because the Hearing Examiner declined to apply clear Code language and ordered DDES to do the same the Superior Court correctly reversed his decision.

A. **The King County Department of Development and Environmental Services has standing to appeal a King County Hearing Examiner decision under the plain language of RCW 36.70C et seq.**

As a public agency DDES is an aggrieved person as defined by the Land Use Petition Act (LUPA, RCW 36.70C *et seq*), and therefore has standing to appeal the decision at issue here. DDES is also a "person" as defined in King County Code, which does not conflict with LUPA. Furthermore, under LUPA the Examiner waived his right to challenge DDES' standing by failing to raise the issue before the Superior Court.

i. **DDES is an aggrieved person with standing under RCW 36.70C.020(4) and RCW 36.70C.060(2).**

The Hearing Examiner argues that DDES lacks standing to appeal his, and in fact any, examiner decision. This argument should be rejected. Not only is it contrary to the plain language of the King County Code and the LUPA statute, taken to its logical conclusion it would set the dangerous precedent of making an appointed government official's opinions regarding the limits of his own authority above challenge.

The DDES is a King County executive agency. KCC 2.16.055<sup>2</sup>. As such it is a "person" as defined by LUPA. Under LUPA, person "means an individual, partnership, corporation, association, public or private organization, or governmental entity or agency." RCW 36.70C.020(4). A person who is not an applicant or owner of property has standing to bring a land use petition under LUPA if they are aggrieved or adversely affected by the decision at issue. RCW 36.70C.060(2). A person is aggrieved if:

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<sup>2</sup> All King County Code sections are attached at Appendix B.

- (a) The land use decision has prejudiced or is likely to prejudice that person;
- (b) That person's asserted interests are among those that the local jurisdiction was required to consider when it made the land use decision;
- (c) A judgment in favor of that person would substantially eliminate or redress the prejudice to that person caused or likely to be caused by the land use decision; and
- (d) The petitioner has exhausted his or her administrative remedies to the extent required by law.

West's RCWA 36.70C.060(2)(a)-(d). DDES was prejudiced by the Examiner's decisions overturning its Notice and Order and limiting its executive and regulatory authority. Examiner Smith was required to consider the DDES' enforcement mandate when he made his decision, a judgment in DDES' favor would eliminate the prejudice to DDES and DDES exhausted its administrative remedies by defending its Notice and Order at the Examiner level. Therefore DDES is "aggrieved" as defined by LUPA, and has standing to appeal under its plain language.

The King County Code does not conflict with LUPA. Under KCC 23.02.010(J) "person" means "any individual, association, partnership, corporation or legal entity, public or private, and the agents and assigns of the individual, association, partnership, corporation or legal entity." Because DDES is a public legal entity it is a "person" as defined by the Code. Pursuant to KCC 20.24.240(B) examiner decisions become final unless appealed to Superior Court by an "aggrieved person." The KCC contains no further discussion of the phrase "aggrieved person," and does not presume to opine on issues of Superior Court standing. Thus, this Court should reject the Examiner's argument that DDES lacks standing to appeal his decision.

**ii. Did the Examiner waive his right to challenge DDES' standing to appeal by failing to raise the issue before the Superior Court under the plain language of RCW 36.70C.080?**

This Court should also conclude that the Examiner has waived his right to raise a standing defense by failing to timely raise the issue before the Superior Court. The LUPA statutory scheme is intended to expedite review and in that regard sets forth a specific timeline for raising particular issues. One of those issues is lack of standing.

RCW 36.70C.080 provides for an initial hearing between 35-50 days after the LUPA petition is served. RCW 36.70C.080(1). Although the initial hearing may be waived, certain defenses including lack of standing, ". . . are waived if not raised by a timely motion noted to be heard at the initial hearing . . ." RCW 36.70C.080(3). In this case no such motion was raised at any time before the Superior Court, and in fact the initial hearing was waived by the agreement of the parties. See CP, King County DDES Second Supplemental Designation. Thus this Court should decline to consider the Examiner's arguments regarding standing.

**B. DDES met it's burden to prove Examiner error on each issue considered by the Superior Court under the RCW 36.70C.130 standards.**

The standards for granting review on a LUPA appeal are set forth at RCW 36.70C.130(a)-(f). In this case the Superior Court correctly concluded that King County DDES met its burden on each issue considered. Based upon the record and arguments set forth below this Court should come to the same conclusion.

With regard to nonconforming uses the Superior Court concluded: "[t]he Examiner's decision that appellant Shear established a legal nonconforming material

processing use on the Spencer parcel was an erroneous interpretation of law." CP 669. Thus, the Superior Court found that DDES met its burden under RCW 36.70C.130(b). This Court could also affirm on the basis that the Examiner's decision was a "clearly erroneous application of the law to the facts" as described in RCW 36.70C.130(d).

With regard to the Examiner's refusal to enforce KCC flood hazard regulations the Superior Court concluded: "[t]he Examiner's decision that the King County Critical Areas Ordinance does not contain an enforceable flood hazard area standard was an erroneous interpretation of law." Thus, the Superior Court also concluded that DDES met its burden on that issue under RCW 36.70C.130(b). This Court could also affirm the Superior Court's decision on the alternate basis that the Examiner "engaged in unlawful procedure or failed to follow a prescribed process" under RCW 36.70C.130(a) or that he exceeded his jurisdiction by ruling on a constitutional basis under RCW 36.70C.130(e).

Finally, with regard to the Examiner's placement of conditions and direction of the results of DDES' future permit review the Superior Court found: "[t]he Examiner acted in excess of his jurisdiction when he imposed conditions on DDES' permit review processes." Thus, the Superior Court found that DDES met its burden under RCW 36.70C.130(e). On this issue this Court could also affirm on the alternate basis that the Examiner engaged in an unlawful procedure under RCW 36.70C.130(a).

King County met its burden to establish Examiner error under LUPA. The Superior Court's ruling should be affirmed.

**C. The Hearing Examiner's factual findings that crushing and grinding operations did not begin until 2005 preclude his legal conclusion that appellant Shear established a legal nonconforming materials processing use on the subject parcel.**

A party asserting a legal nonconforming use has the burden of proving its lawful existence. Miller v. City of Bainbridge Island, 111 Wash.App, 152, 43 P.3d 1250 (2002), Ferry v. City of Bellingham, 41 Wash.App. 839, 706 P.2d 1103 (1985). The use at issue must have ". . . lawfully existed prior to the enactment of a zoning ordinance. . ." Rhod-A-Zalea & 35<sup>th</sup>, Inc. v. Snohomish Co., 136 Wash.2d 1, 959 P.2d 1024 (1988), citing 1 Robert M. Anderson, American Law of Zoning, § 6.01, Meridian Minerals Co. v. King County, 61 Wash.App. 195, 208, 810 P.2d 31 (1991), *review denied*, 117 Wash.2d 1017, 818 P.2d 1099. A nonconforming use is one which existed prior to the effective date of a zoning restriction. McQuillin, *Municipal Corporations, Zoning*, § 25.180 (emphasis added). A nonconforming use ". . . must be the same before and after the zoning restriction becomes effective." McQuillin, *Municipal Corporations, Zoning*, § 25.188.

In his brief appellant Shear concedes that from his perspective the nonconforming use issue is not the most significant question for purposes of this case. Brief of Appellants Shear and Spencer at 30. The effect of the Examiner's conclusion that appellant Shear's operation qualified as a legal nonconforming use is to relieve Shear of an operational scope limitation, to add a conditional use permit requirement (see KCC 21A.32.065 regarding expansion of legal nonconforming uses), but not to eliminate an operational grading permit requirement (per Rhod-A-Zalea & 35<sup>th</sup>, Inc. v. Snohomish Co., 136 Wash.2d 1, 959 P.2d 1024 (1988) regarding police power authority to regulate legal nonconforming uses).

On the other hand, resolution of the nonconforming use issue is very important to DDES' future application of its Code. Because the Examiner's decision that Shear's

"intent, design, and purpose" to use the subject parcel was sufficient to establish a legal nonconforming use is in direct conflict with the plain language of the Code and the common law the Superior Court was correct to reverse it.

i. **The Hearing Examiner incorrectly applied the King County Code to the facts when he concluded that a legal nonconforming materials processing use was established on the subject parcel.**

King County regulations defining materials processing facilities, such as the one operated by appellant Shear, limiting their scope in agricultural zones, and requiring on-going permit review for such operations were adopted in September of 2004. King County Ordinance No. 15032 § 6, §15, §25<sup>3</sup>. In this case the Examiner erroneously concluded that Shear had established a legal nonconforming use because he had shown the "intent, design, and purpose" to establish his use by the spring of 2004, despite finding that the critical elements of the use were not in place until 2005.

A materials processing facility is "a site or establishment . . . 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." KCC 21A.06.742. The Examiner reached two critical conclusions regarding the establishment of Shear's use on the subject parcel. First he found that

[t]he core element of the materials processing facilities definition focuses on the transformation of raw materials through a crushing, grinding or pulverizing operation. While the preparatory activities certainly occurred before September 2004, **there is no conclusive evidence that actual crushing operations and grinding began before the winter or spring of 2005.** That is when the first complaints came into the DDES office and Mr. Hang, the

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<sup>3</sup> Referenced excerpts of Ord.15032 are attached at Appendix C.

neighbor to the south testified to first being concerned about offsite dust impacts.

CP 34. Next he found that ". . . it is also clear that the full implementation of that use, including materials grinding and trucking operations and their attendant impacts, was only completely manifested in 2005 and thereafter." CP 34 (emphasis added). These Findings and Conclusions regarding the 2005 establishment of Shear's operations on the subject parcel preclude the Examiner's legal conclusion that Shear established a legal nonconforming use under the plain language of the King County Code.

The Code defines a nonconformance based upon the regulations in place at the time of establishment. A nonconformance is:

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.

KCC 21A.06.800 (emphasis added). "A use is . . . **considered permanently established when that use will or has been in continuous operation for a period exceeding sixty days.** . . . KCC 21A.08.010 (emphasis added). Thus, under the plain language of the Code Shear's early 2004 prospective intent was insufficient to establish his materials processing use and therefore the limitation on his scope of use, which was in place as of September of 2004, applies to the crushing, grinding and trucking operations that did not begin until 2005.

The Examiner relied upon additional language gleaned from KCC 21A.08.010 in support of his conclusion that Shear established a legal nonconforming use. KCC 21A.08.010 reads in its entirety:

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.

The Examiner reasoned, "the prospective purpose required by KCC 21A.08.010 was established . . . [by] April 25, 2004 . . . which was more than 60 days before the adoption of Ordinance 15032." CP 32.

The Examiner's decision was erroneous because although under KCC 21A.08.010 a use may be "defined" by ". . . the activity for which [a parcel] is intended, designed, arranged, occupied, or maintained . . ." the Code is crystal clear that a use is not "established" until it is actually in operation for 60 days, and under KCC 21A.06.800 the regulations applicable to a nonconformance are determined at the time it is "established." Additionally, KCC 21A.08.010 is contained in and applicable to all of KCC Chapter 21A.08, which contains the King County Zoning Code use tables, therefore it serves a variety of purposes. The Examiner committed legal error because he ignored KCC 21A.06.800 and focused too narrowly on the first clause of KCC 21A.08.010.

Statutory construction is a question of law, which courts review de novo under the error of law standard. Wenatchee Sportsmen Ass'n v. Chelan County, 141 Wash.2d 169, 175, 4 P.3d 123 (2000). The same rules of construction apply to state statutes and municipal ordinances. Sandona v. City of Cle Elum, 37 Wash.2d 831, 836-37, 226 P.2d 889(1951). The aim of statutory construction is to effectuate the legislature's intent.

To discern the legislature's intent, the court begins by looking at the plain language and ordinary meaning of the statute, but also considers the legislative enactment as a whole. Richards v. City of Pullman, 134 Wash.App. 876, 881, 142 P.3d 1121, 1123 (internal citations omitted). "Statutes must be interpreted and construed so that all the language used is given effect, with no portion rendered meaningless or superfluous." Davis v. Dep't of Licensing, 137 Wash.2d 957, 963, 977 P.2d 554 (1999) (quoting Whatcom County v. City of Bellingham, 128 Wash.2d 537, 546, 909 P.2d 1303 (1996)). In this case the Examiner's interpretation of KCC 21A.08.010 failed to give effect to the requirement that a use must be "in operation" for in excess of sixty days to be established.

The Code does not define the phrase "in operation," but the American Heritage Dictionary defines the word "operation" as:

- (1) An act, process, or way of operating.
- (2) **The condition of being operative or functioning: *in operation*.**
- (3) A process or series of acts performed to effect a certain purpose or result: *the operation of preparing a meal for 20*.
- (4) A process or method of productive activity. . . .

The American Heritage Dictionary, Second College Ed., Houghton, Mifflin Co., 1985.

(Emphasis added, italics in original.) Funk and Wagnalls' Standard Desk Dictionary similarly defines "operation" as:

1. The act or process of operating.
2. A method of operating; mode of action.
3. A course or series of acts to effect a certain purpose.
3. An act or transaction esp. in the stock market.
4. A course or series of acts to effect a certain purpose: process.
5. **The state of being in action: to be in operation.** ...

Funk and Wagnalls' Standard Desk Dictionary, Volume 2 N-Z, Funk & Wagnalls Publishing Co., 1976. (Emphasis added.) Had the County Council intended that a "prospective purpose" be sufficient to establish a use it would not have required that use to be "in operation" for 60 days. This legislative intent is consistent with the common

law governing establishment of legal nonconforming uses, under which intent and preparation are almost always considered to be insufficient to establish a legal nonconforming use.

The Examiner erred by failing to consider all of KCC 21A.08.010 in light of the establishment requirement of KCC 21A.06.800. Because the Examiner failed to give effect to all of the relevant Code language the Superior Court correctly reversed his decision pursuant to RCW 36.70C.130(b).

**ii. The Hearing Examiner committed legal error under the common law when he concluded that a "prospective intent" was sufficient to establish a legal nonconforming materials processing use on the subject parcel.**

It is well established that a party asserting a legal nonconforming use has the burden of proof. Miller v. City of Bainbridge Island, 111 Wash.App, 152, 43 P.3d 1250 (2002), Ferry v. City of Bellingham, 41 Wash.App. 839, 706 P.2d 1103 (1985). One of the elements of the proponent's common law burden is to prove that "the use was continuous, not occasional or intermittent." Jefferson County v. Lakeside Indus., 106 Wash.App. 380, 385, 23 P.3d 542, 29 P.3d 36 (2001), review denied, 145 Wn.2d 1029 (2002), and see 1 Robert M. Anderson, Zoning sec. 6.32, at 550 (3d ed.1986). To meet their burden the proponent "must show **more than a mere intention or preparation** to engage in the use. Rather, the owner must show the existence of an actual use, evidenced by overt acts." McQuillin, Municipal Corporations, Zoning, § 25.188. (Emphasis added.) "In determining whether a landowner had an existing use prior to enactment of a restrictive ordinance, **preparation for use is not equal to actual use.**" American Law of Zoning and Planning, Nonconforming Uses, § 12:23.

No party has appealed the Examiner's Findings of Fact therefore they are verities on appeal. First Pioneer Trading Co., Inc. v. Pierce County, 146 Wash.App. 606, 617,

191 P.3d 928, 933 (Div. 2, 2008), citing RAP 10.3(g). The Examiner's findings describe the evidence presented in great detail. With regard to Shear's use of the subject parcel the Examiner began by comparing 2004 and 2005 aerial photographs. (Exhibits 67e and 67f.) The Examiner noted that in 2004 an access drive had been significantly expanded, several large mounds had been placed in the northwest corner of the property, and approximately an acre of fresh clearing had occurred immediately north of the existing house and driveway with some storage of vehicles. CP 19. The Examiner described the 2005 aerial which "... shows that a large quantity of vehicles and equipment have been moved into the newly graded area." CP 19. "The quantity and areal expanse of storage increased throughout 2004 and at some point in late 2004 or 2005 the grinding and screening of raw organic materials into the ultimate hog fuel product commenced." CP 20.

These detailed findings disprove Shear's theory that either the Superior Court or the Examiner imposed an improper burden of proof. Although the Examiner found that Shear had not "conclusively" proven that crushing and screening occurred on site prior to 2005 there is no evidence that the Examiner, or subsequently the Superior Court applied this term as a legal standard. The word conclusive means "[p]utting an end to a question, decisive." Funk & Wagnalls Standard Desk Dictionary, Funk and Wagnalls, Inc., New York, 1976. Decisive means "[e]nding uncertainly or dispute, conclusive." *Id.* Thus, because the evidence presented was not sufficient to end uncertainly regarding whether "crushing, grinding, or pulverizing" was occurring on the subject parcel prior to adoption of the current regulations, this Court should simply conclude that Shear failed to meet his

burden of proof. On that basis, the Examiner's conclusion that Shear established a legal nonconforming use should be reversed.

Several exjurisdictional cases<sup>4</sup> apply Washington common law principles in circumstances very similar to those presented here. In City of Hillsdale v. Hillsdale Iron and Metal Company, Inc., a Michigan case, the defendant landowner appealed a decree restraining operation of a scrap yard in a residential zone. 358 Mich. 377, 380, 100 N.W.2d 467 (1960). The evidence showed that before the area was zoned residential the activity on the subject property was "largely storage of scrap metal." Id. at 385. After the ordinance was enacted ". . . a metal crushing or grinding or chopping machine and equipment for processing scrap metal [was] operated there." Id. at 386. The appellate court agreed with the City's argument that defendant's use "was a change in and an unlawful extension of the nonconforming use." Id.

Similarly, in a New York case, the petitioner's family operated a legal nonconforming landscaping and excavation business. The zoning board (ZBA) denied a legal nonconforming use of the property as a mulching/recycling business. McDonald v. Zoning Bd. of Appeals of Town of Islip, 31 A.D.3d 642, 819 N.Y.S.2d 533, 534. The reviewing court upheld ZBA's determination that the mulching and/or recycling processing facility was an impermissible expansion and alteration that exceeded the scope of the legal nonconforming use of the property. Id. at 643.

In another New York case, Urban Forest Products, Inc. v. Zoning Bd. of Appeals for Town of Haverstraw, the court considered whether a nonconforming business which stored and maintained commercial vehicles could engage in a mulching business

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<sup>4</sup> Attached as Appendix D.

involving processing trees and stumps through industrial wood chippers. 300 A.D.2d 498, 499, 751 N.Y.S.2d 581, 582 - 583. The ZBA found that the nonconforming vehicle storage use could not be altered to a use which did not exist when the zoning code changed, such as the mulching operation. The reviewing court concluded "[w]e 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." Id. at 500.

The facts and analysis in Hillsdale, McDonald, and Urban Forests are all similar to those presented here. Like in this case although a related activity was established on the subject parcel, the reviewing courts found that processing was a different use not entitled to legal nonconforming use status. In Hillsdale the court concluded that storage of scrap metal was not the same as processing scrap metal. In McDonald mulching was determined to be a different use than landscaping and excavating, and in Urban Forests, storage and maintenance of commercial vehicles was insufficient to support a nonconforming mulching business.

Prospective intent was similarly found insufficient to establish a nonconforming use in Beasley v. Potter. 493 F.Supp. 1059, 1063-1064 (D.C.Mich., 1980). In that case the Plaintiffs were assembling materials and had applied for a permit to operate an asphalt plant when a preclusive zoning code was adopted. Id. at 1065. The plaintiffs claimed racial bias, but the Federal court dismissed their case. The judge reasoned "I believe [the zoning authority'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." Id. at 1073.

Here, as in Beasley, the Court should conclude that Appellant Shear did not establish a legal nonconforming use because he was not yet in business on the Spencer parcel when current zoning regulations were adopted. His "prospective purpose" was not sufficient to establish a legal nonconforming use under the plain language of the Code or the common law. The Examiner's decision was correctly reversed.

**D. The Hearing Examiner committed legal error and exceeded his jurisdiction when he refused to enforce King County flood hazard regulations.**

Fundamental to concepts of fairness and due process is the idea that the law applies equally to everybody. At the Superior Court level both Shear and the Examiner argued, without any citation to authority, that DDES failed to meet a burden to establish "standards" applicable to Shear. The Superior Court found that the King County Code adequately describes standards applicable to Shear and Spencer and that DDES has no burden to prove standards beyond those described in the Code. This Court should likewise conclude that the Examiner committed legal error and that he exceeded his jurisdiction by refusing to enforce the Code.

In its Notice and Order and before the Examiner DDES alleged violations of specific sections of the King County Code. The King County Code was adopted pursuant to King County Charter § 880. Pursuant to the Charter the regulations in the Code "have the force of law" and are "general in nature." Thus they apply to Shear and Spencer. To the extent that the Examiner's decision was based upon the conclusion that DDES failed to sustain a burden to prove an applicable "standard" it is legally erroneous. The law is set forth in the Code.

In this case the Notice and Order alleged "operation of a materials processing facility in an A-10 zone in a critical area (wetland, flood hazard area)" without required

permits and "clearing, grading, and/or filling within a critical area (wetland, flood hazard area)" without required permits. DDES' burden is to prove that the legal standard "has been met." Rules of Procedure of the King County Hearing Examiner, § XI(B)(8)(b). DDES must prove "by a preponderance of the evidence that the violation was committed." KCC 23.20.080(D). DDES alleged two grading permit violations. App. A. In King County no grading is allowed without first obtaining a permit, unless a specific exemption is set forth in KCC 16.82.051. KCC 16.82.050(B). No permit exemptions exist for grading in a flood hazard area. See table at KCC 16.82.051(B), attached. The definitional sections applicable to the Grading Code, including the definition of a "flood hazard area" are those set forth in KCC 21A.06 *et seq.* See KCC 16.82.051(A) and (B).

KCC 21A.06.475 defines a flood hazard area as "any area subject to inundation by the base flood." The "base flood" is "a flood having a one percent chance of being equaled or exceeded in any given year." KCC 21A.06.080. KCC 21A.06.476 defines FEMA's Flood Hazard Boundary Map or FIRM as "the initial insurance map issued by FEMA that identifies, based on detailed or approximate analysis, the area subject to flooding during the base flood." DDES introduced all of the official FEMA maps into evidence. See Exhibits 47-49. The Examiner found that the Spencer parcel was shown to be within the flood hazard area in all of those FEMA maps. CP 26.

If a permit applicant disagrees with the information contained on the FIRM, FEMA has a formal process recognized in the Code by which the FEMA map can be amended. KCC 21A.24.230(B)(7). No evidence was produced before the Examiner suggesting that Shear or Spencer have taken or ever intend to take advantage of that process. See CP. Regardless, King County presented additional state-of-the-art mapping

to show that even if the FEMA maps are out of date (an issue of limited relevance under the Code), that the subject parcel is still in the flood hazard area. See King County FEMA challenge map, exhibit 44a.

This Court should conclude based upon the above analysis that the Examiner's decision that King County's flood hazard regulations could not be enforced should be reversed as legally erroneous. However, the record also contains sufficient evidence to support affirming the Superior Court's decision on the alternate basis that the Examiner exceeded his jurisdiction under RCW 36.70C.130(e).

Instead of a straight-forward application of the grading and definitional sections of the King County Code to the evidence presented, Examiner Smith engaged in a lengthy critic of King County's critical areas regulations. The Examiner observed that "King County within Title 21A has adopted the FEMA regulatory framework, including standards that exceed minimum FEMA requirements." CP 24. With no citation to legal authority the Examiner opined ". . . the **actual legitimacy of such a refined standard** of course depends on the completeness and accuracy of the underlying data."<sup>5</sup> Id. (Emphasis added). Stating that ". . . the normal procedure by which the county establishes a flood hazard area is through the adoption of a basin plan or some other functional plan . . ." for specific locations. CP 29. The Examiner made an additional apparent reference to constitutional analysis stating that ". . . without such a formal regulatory designation there is no **easily ascertainable adopted county flood hazard area standard applicable to the Spencer parcel**, and the portion of the county's Notice and Order that cites Appellants for conducting materials processing operations and

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<sup>5</sup> Notably the Report and Decision did not take exception to any of the underlying data supporting DDES' evidence.

clearing, grading and filling within a flood hazard area becomes a gesture without legal effect." CP 29-30.

The Examiner acknowledged that the regulatory framework for determining the presence or absence of a flood hazard area is "a thorough and adequate mechanism for purposes of floodplain planning and permit review," but then concluded that "[f]or purposes of code enforcement, the CAO provisions are incomplete."<sup>6</sup> CP 28, 29. The Examiner made a final reference to constitutional due process analysis by stating that ". . . **for enforcement purposes one needs also a clear and intelligible standard.**" *Id.* This action of declaring multiple King County regulations "incomplete" and unenforceable, whether constitutionally based or not, was completely outside the Examiner's jurisdiction as delegated by the King County Code.<sup>7</sup>

"Administrative tribunals are creatures of the legislative body that creates them."

Lejeune and Wright v. Clallam County, et al. 64 Wash.App. 257, 823 P.2d 1144 (1992)

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<sup>6</sup> Although this case involves the King County Grading Code the DDES director is also specifically authorized to enforce the Critical Areas Code through the notice and order enforcement mechanism. KCC 21A.50.020, and see KCC 23.24.010 et seq. The Critical Areas Code severely limits development in flood hazard areas. Under 21A.24.230 a "flood hazard area consists of the following components: floodplain, zero-rise flood fringe, zero-rise floodway, FEMA floodway, and channel migration zones."<sup>6</sup> And see See KCC 21A.24.240 Zero-rise flood fringe - development standards and alterations, KCC 21A.24.250 Zero-rise floodway - development standards and alterations, KCC 21A.24.260, FEMA floodway - development standards and alterations.

<sup>7</sup> DDES provided due process analysis to the Examiner in its closing brief, at his request, while preserving its objection to consideration of constitutional issues. See Department of Development and Environmental Services' Closing Brief, pages 17-21. A statute violates the due process clause if (1) it "does not define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is proscribed" or (2) it "does not provide ascertainable standards of guilt to protect against arbitrary enforcement." State v. Williams, 144 Wash.2d 197, 203, 26 P.3d 890 (2001) (quoting City of Bellevue v. Lorang, 140 Wash.2d 19, 30, 992 P.2d 496 (2000)). A land use ordinance that "provides fair warning and allows a person of common intelligence to understand the law's meaning does not violate a party's constitutional rights." Young v. Pierce County, 120 Wash.App. at 182. The proponent of a vagueness challenge bears a heavy burden to prove the ordinance is unconstitutional beyond a reasonable doubt. *Id.*, Heesan Corp v. City of Lakewood, 118 Wash.App at 352, citing City of Seattle v. Eze, 111 Wash.2d 22, 26, 759 P.2d 366 (1988). Impossible standards of specificity are not required. *Id.* "[A] statute is not unconstitutionally vague merely because a person cannot predict with complete certainty the exact point at which his actions would be classified as prohibited conduct ... nor ... because of possible disagreement on its application." *Id.*

*called into doubt on other grounds* by Dep't of Labor and Indus. v. Fields Corp., 112 Wash.App. 450, 45 P.3d 1121 (2002), *quoting* Jaramillo v. Morris, 50 Wash.App. 822, 829, 750 P.2d 1301 (1988) *review denied*, 110 Wash.2d 1040; State v. Munson, 23 Wash.App. 522, 524, 597 P.2d 440 (1979), Chaussee v. Snohomish County Council, 38 Wash.App. 630, 636, 689 P.2d 1084 (1984). Their power is limited to that which the legislative body grants. *Id. quoting* State ex rel. Public Util. Dist. No. 1 of Okanogan Cy. v. Dep't of Pub. Serv. 21 Wash.2d 201, 208-209, 150 P.2d 709 (1944). The Office of the King County Hearing Examiner is created by the King County Council, a legislative body, for the purpose of "considering and applying adopted county policies and regulations". KCC 20.24.020. The County Council did not and could not delegate the power to "enforce, interpret, or rule on constitutional issues." Exendine v. City of Sammamish, 127 Wash.App. 574, 113 P.3d 494 (2005), *citing* Chaussee v. Snohomish County Council, 38 Wash.App. 630, 636, 689 P.2d 1084 (1984). Instead the Examiner is required to "consider and apply" adopted county policies and regulations. KCC 20.24.020. He exceeded his authority when he refused to apply adopted County regulations.

The Examiner's claim of implicit authority to engage in "regulatory overview" is not supported by the Code. Although the County Council acknowledged the need to "expand the principles of fairness and due process in public hearings" in KCC 20.24.010(C), because no such authority is delegated to him the Examiner may not preclude enforcement of any Code section. Instead he must apply the Code. KCC 20.24.020. It is a well established rule of statutory construction that where one statutory provision deals with a subject in a general way and another provision deals with the same

subject in a specific manner, the latter will prevail. Hama Hama Co. v. Shorelines Hearings Bd., 85 Wash.2d 441, 447, 536 P.2d 157, 161 (1975), citing Knowles v. Holly, 82 Wash.2d 694, 513 P.2d 18 (1973); State ex rel. Phillips v. State Liquor Control Board, 59 Wash.2d 565, 369 P.2d 844 (1962). Whether or not the Examiner believes that King County flood hazard regulations are somehow generally "unfair" his specific duty to apply the Code prevails.

Shear argues that the Examiner's ruling contains an implicit finding that the County failed to meet its burden of proof. The County must prove its case by a preponderance of the evidence. The Examiner's findings and the evidence presented do not support the conclusion that the County failed to meet its evidentiary burden. Instead the Examiner's decision is a rejection of the regulation itself, which as previously argued, exceeds his jurisdiction.

The Examiner observed that

King County's flood plain regulations, based as they are on a non-measurable rise in flood waters from a storm that has only a one percent change of occurring in any given year, are purely mathematical constructs. Unlike a wetland determination, for example, where one can walk onto a piece of property [and make an assessment] there is no way to assess whether a parcel lies within or without the floodplain based on a site visit. Rather it all comes down to questions of regional mapping and modeling, and the data assumptions that underlie that exercise.

CP 25. The Examiner then described the County's evidence, noting that "many and perhaps most of the major floodplain mapping resources for this portion of the Lower Green River Valley have been entered into the hearing record." CP 26. The Examiner first observed that all of the FEMA maps show the Spencer parcel as entirely within the 100-year floodplain. Id. He went on to discuss the "invaluable" information presented by the County's flood plain expert, Andy Levesque with regard to FEMA's current rules,

which show the entire Green River Valley as under water because the Green River levees have not been certified. CP 26.

The Examiner next described the "challenge map," which was submitted to FEMA by King County, Kent, and Auburn. The Examiner noted that "the local technical consensus appears to be that its overall level of topographical data is superior to the FEMA effort and the modeling program employed is a more sophisticated one." CP 26. The Examiner concluded that the challenge map shows "most of the western two-thirds of the Spencer parcel inside the 100-year flood plain." (The challenge map also shows the regulated flood fringe as extending completely over Spencer's parcel to the farmed parcel to the south and that Shear's operation has raised violated "zero-rise" requirements in the floodway.) Ex, 44a, KCC 21A.24.250. The Examiner described as merely "anecdotal" evidence offered by [Shear] and his consultant that S 277<sup>th</sup> Street ". . . operates as an effective barrier to such major flooding events." CP 28. In testimony Shear's consultant conceded that he had neither looked for nor found errors on the challenge map in the area of the Spencer parcel. Neugebauer testimony, 11/12/09 at 2633-2634, 2672, 2679-2680, Sub 16A.

Neither the Examiner's decision nor the record below support the theory that DDES failed to meet its evidentiary burden. In this case DDES' evidence showed the Spencer parcel to be subject to inundation by the base flood as defined by Code. Exhibits 47-49. The Examiner dismissed KCC 21A.24.230(A), which states that a "flood hazard area consists of the following components: floodplain, zero-rise flood fringe, zero-rise floodway, FEMA floodway, and channel migration zones," (all terms defined in Title

21A.06), as "merely descriptive."<sup>8</sup> The Examiner failed to consider the various KCC 21A.06 flood hazard area definitions adopted by reference into the Grading Code. He issued a decision that was legally erroneous and clearly outside his jurisdiction. The Superior Court correctly reversed that decision.

**E. The Hearing Examiner exceeded his jurisdiction when he denied Appellants Shear and Spencer's Notice and Order appeal but placed conditions directing DDES' discretionary permit processes.**

In this case the Examiner found, as DDES alleged, that appellant Shear's grading activities required a permit under KCC 16.82.050, and that his materials processing facility required an operational grading permit under KCC 21A.22. The Examiner also concluded that the huge expansion of Shear's use triggered a CUP requirement. CP 39. Report and Decision, Order at A and B. The Examiner observed that "**[t]he most important questions raised in this proceeding relate to the notice and order's citation of the Spencer property for operation of a materials processing facility in an A-10 zone without required permits and approvals.**" CP 30 (emphasis added). The Examiner ruled that "[t]he appeals are denied with respect to . . . claims that a materials processing operation is not subject to ongoing regulation pursuant to KCC Chapter 21A.22", and that "ordinary clearing and excavation occurred on the eastern third of the Spencer property in volumes sufficient to sustain a grading violation citation under the notice and order." The Examiner then placed severe limitations on DDES' Code-mandated permit processes, in particular by directing the scope of permit review, precluding additional critical areas review in violation of SEPA requirements, and limiting and directing the manner in which DDES would be allowed to exercise its decision-making authority regarding all three permits. CP 40.

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<sup>8</sup> Full text of KCC 21A.24.230 is attached at appendix B.

**i. The Examiner's conditions exceeded his jurisdiction under the plain language of the King County Code.**

Where, as here, the issue is whether an administrative tribunal exceeded its delegated authority, the reviewing court must exercise its jurisdiction to determine the limits of agency jurisdiction because otherwise the administrative tribunal would be the final judge of the existence of its own power. Port Townsend School Dist. No. 50 v. Brouillet, 21 Wash.App. 646, 652-653, 587 P.2d 555, 559 (1978) citing Jaffe, Judicial Review: Constitutional and Jurisdictional Fact, 70 Harv.L.Rev. 953, 959 (1957). This Court should exercise its jurisdiction to enforce the basic principle that agency power is always circumscribed by the authority granted by statute. See id. citing B. Schwartz, Administrative Law, s 146 (1976); Jaffe, The Right to Judicial Review, 71 Harv.L.Rev. 401, 403 (1958).

Actions of an agency in excess of its statutory authority are void. Id. citing Arbogast v. Town of Westport, 18 Wash.App. 4, 7-8, 567 P.2d 244 (1977). Agencies may possess implied or express agency quasi-judicial powers, but those must be accompanied by reasonable standards that define what is to be done and by whom. Lejeune v. Clallam County, 64 Wash.App. 257, 272, 823 P.2d 1144 (1992). In King County the Hearing Examiner's quasi-judicial powers are specifically limited to those "as may be granted by county ordinance," and thus cannot be implied. KCC 20.24.110.

The Examiner relies on KCC 20.24.080(B) and KCC 20.24.100 in support of his claim to prospective authority over DDES' permit review processes. KCC 20.24.080(B) only allows the Examiner to impose conditions in the case that an appeal is granted and only allows the Examiner to grant an appeal with such conditions "as are necessary to make the appeal compatible with the environment" and to "carry out" applicable

regulations. Instead the Examiner ordered DDES to *exempt* appellants from applicable regulations.

For example, under the Code all of the permits the Examiner required are subject to SEPA review. RCW 43.21C.030(c)(i), RCW 43.21C.031, WAC<sup>9</sup> 197-11-800(1)(c)(5), KCC 16.82.055(A)(2), KCC 20.44.040(A)(1)(e). SEPA review requires applicants to prepare environmental impact documents pursuant to the Washington Administrative Code. KCC 20.44.050. DDES may only consider studies from an approved list of consultants when conducting SEPA review. KCC 20.44.050(D). Despite his specific finding that appellants' wetland expert was not even credible, the Examiner nonetheless disallowed further review as required by the WAC. KCC 20.24.080(B) does not support the conclusion that the Examiner may condition DDES' Code-mandated permit review. The Examiner's conditions were outside the scope of his jurisdiction and were correctly reversed.

Neither does KCC 20.24.100 provide the Examiner with the authority he claims. That section authorizes the Examiner to impose a nonexclusive list of conditions including "setbacks, screenings, covenants, easements, road improvements and dedications of additional road right-of-way and performance bonds as authorized by county ordinances." KCC 20.24.100. None of the items listed at KCC 20.24.100 relate to agency decision making processes. Instead they are consistent with his authority over permit applicants.

The ultimate goal of statutory construction is to carry out the intent of the legislature. Port Townsend School Dist. No. 50 v. Brouillet, 21 Wash.App. 646, 655, 587

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<sup>9</sup> Attached as Appendix E.

P.2d 555, 560 (1978). It is a basic tenet of statutory construction that, when the legislature lists various items in a statute but omits others, the courts should assume that the items omitted were left out intentionally. State v. Gamble, 146 Wash.App. 813, 817-818, 192 P.3d 399, 401 (Wash.App. Div. 2,2008). This Court should conclude that had the County Council intended KCC 20.24.100 as a delegation of authority over independent executive agencies it would have said so explicitly. This Court should conclude that KCC 24.20.100 does not provide the Examiner with jurisdiction over DDES' permit processes.

**ii. In re King County Hearing Examiner is on point and controlling.**

In this case the Examiner specifically stated that he was denying Shear's appeal on the issue of whether simple and programmatic grading permits were required, and agreed with DDES that if Shear has a legal nonconforming use that he has vastly expanded it and must apply for a Conditional Use Permit. CP 39. Denial on those issues precludes the conditions the Examiner placed on DDES permit review processes, including those regarding critical areas.

In In re King County Hearing Examiner, 135 Wash.App. 312, 144 P.2d 345 (2006), Division One specifically considered KCC 20.24.080(B) and concluded that the Examiner's imposition of conditions on agency SEPA review exceeded his jurisdiction. In Hearing Examiner the Examiner denied a citizens group's appeal of a SEPA threshold determination regarding a waste processing facility, but nonetheless went on to consider newly discovered information and to order additional investigations and potentially a supplemental EIS. Id. at 316.

Division One granted Wastewater's writ application reasoning:

**The KCC states that the hearing examiner can grant an appeal with conditions, but does not give the examiner the authority to deny an appeal with conditions. [SEPA] vests in the lead agency the authority to determine how to handle newly acquired information, and the hearing examiner here usurped this authority by determining Wastewater's course of action.** On this basis alone, the hearing examiner does not have jurisdiction to hear SKEA's administrative appeal because the hearing examiner exceeded his jurisdiction in ordering the trenching and supplemental EIS in the first place.

Id. at 321-322.

In this case, like in Hearing Examiner, the Examiner denied Shear and Spencer's appeal but placed conditions on the agency. Also like in Hearing Examiner, the Examiner usurped specifically delegated agency authority, this time not just over one minor esoteric SEPA issue, but this time over entire and multiple permit application processes. Division One's decision in Hearing Examiner requires that all of the conditions placed on the DDES permit review process be removed.

In his brief the Examiner attempted to distinguish Hearing Examiner by claiming the all the conditions he imposed on DDES were based on the aspects of the Shear/Spencer appeal that he granted, rather than those that he denied. Examiner's brief at 11. This argument is questionable as the Examiner himself noted that "[t]he most important questions raised in this proceeding relate to the notice and order's citation of the Spencer property for operation of a materials processing facility in an A-10 zone without required permits and approvals." CP 30. Regardless, to the extent that some of the conditions imposed were related to legal nonconforming use and critical areas issues upon which Shear and Spencer prevailed before the Examiner, Hearing Examiner nonetheless specifically precludes those conditions because they usurp otherwise delegated agency authority.

Under conditions (2)A, B and D the Examiner specifically defined the scope of CUP review, required that review procedures "shall not be used to prohibit, directly or indirectly, continued operation of a viable materials processing facility use at the site," and directed that "compatibility with adjacent uses shall be achieved through the buffer and screening requirements provided by KCC 21A.22.070." CP 40. Each condition purports to limit Code-delegated DDES discretion. The Examiner's conditions also fail to take into account DDES' obligation to consider public comments for both SEPA and CUP review. See KCC 20.20.020, KCC 20.20.060. Under the Code DDES may "approve, approve with conditions, or deny development proposals." KCC 21A.42.030(A). CUP applications are subject to the DDES director's review, based upon compliance with KCC chapter 21A.44, which sets forth specific review criteria. DDES may also "approve, condition, or deny [grading] permits," and may "impose conditions on permit approval as needed to mitigate identified project impacts." See KCC 16.82.075.

The Code is also specific with regard to what DDES decisions may be appealed to the Examiner and what the Examiner may review. See table at KCC 20.20.020(E) and KCC 20.24.080(A)(1)-(10). The scope of permit review is not on either list. Thus, were a permit applicant to appeal a DDES decision regarding the scope of permit review the Examiner could not hear that appeal. See id. Instead, the Code directs scoping authority to the DDES director. Under Hearing Examiner usurping agency authority exceeds Examiner jurisdiction.

Condition 2(C) is an even clearer violation. 2(C) states that "DDES shall not require further studies or review of whether the Spencer property is within a flood hazard area or contains a jurisdictional wetland. . . ." Because both the grading permit process

and the CUP process require SEPA review as discussed above, the Examiner's attempt to exempt Shear from further environmental review directly violates the Hearing Examiner Court's analysis.

Doctrines of collateral estoppel and res judicata also are insufficient to excuse the conditions placed on DDES. Issue preclusion only applies if the parties and issues are the same. In this case the fundamental question was whether Shear and Spencer were required to apply for permits. The issue still to be determined is whether they can meet code requirements to obtain those permits, and a potential additional CUP. Future parties are undetermined. Even assuming that the Examiner has quasi-judicial authority to consider collateral estoppel in a future proceeding he cannot apply it prospectively.

This Court should conclude that the Examiner lacks jurisdiction and may not condition DDES discretionary decision making, under the plain language of the Code and as held by Hearing Examiner Court. The Examiner exceeded his jurisdiction by imposing conditions which usurp DDES' specifically delegated authority. The conditions he placed on DDES' permit review processes were in excess of his authority. The Superior Court correctly reversed them.

#### **IV. CONCLUSION**

Examiner Smith committed multiple legal errors and exceeded his jurisdiction in this case. The Superior Court correctly reversed his decisions regarding legal nonconforming uses, the applicability of King County flood hazard regulations, and his claim of authority over future permit review. This Court should adopt the Superior Court ruling in its entirety.

///

Respectfully submitted this 17<sup>th</sup> day of June, 2011.

Respectfully submitted,

DANIEL T. SATTERBERG  
Prosecuting Attorney

By Cristy Craig  
CRISTY CRAIG, WSBA #27451  
Senior Deputy Prosecuting Attorney  
Attorneys for King County

## CERTIFICATE OF SERVICE

I, Diana Cherberg, hereby certify and declare under penalty of perjury under the laws of the state of Washington as follows:

1. I am a legal secretary employed by King County Prosecutor's Office, am over the age of 18, am not a party to this action and am competent to testify herein.
2. On June 17, 2011, I did cause to be delivered in the manner noted below a true copy of *Respondent King County Department of Development and Environmental Service's Consolidated Response Brief* and this Certificate of Service to the following:

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

DATED this 17th day of June, 2011 at Seattle, Washington.



Diana Cherberg, Legal Assistant to

CRISTY CRAIG, WSBA #27451

Deputy Prosecuting Attorney

Attorneys for King County

# APPENDIX A

**KING COUNTY  
DEPARTMENT OF DEVELOPMENT  
AND ENVIRONMENTAL SERVICES**  
900 Oakesdale Avenue Southwest  
Renton, WA 98055-1219

V.

Jeffrey L. Spencer  
6327 S 287th St  
Kent, WA 98032  
and  
Ronald A. Shear  
16601 SE 384<sup>th</sup> St  
Auburn, WA 98092

**NOTICE OF KING COUNTY CODE  
VIOLATION: CIVIL PENALTY ORDER:  
ABATEMENT ORDER:  
NOTICE OF LIEN: DUTY TO NOTIFY**

**CASE NUMBER: E05G0099**

**ZONING: A-10**

**ADDRESS: 28225 West Valley Highway S**

**ACCOUNT: 352204-9051-0**

**LEGAL DESCRIPTION:**

QSTR: SE 35 22 04

N 337.27 FT OF S 667.27 FT OF NE 1/4 OF SE 1/4 LESS N 47.27 FT. OF E 203 FT LESS ST RD # 69

**YOU HAVE BEEN FOUND TO HAVE COMMITTED A CIVIL CODE VIOLATION AND TO BE A PERSON RESPONSIBLE FOR CODE COMPLIANCE, AND YOU ARE HEREBY NOTIFIED AND ORDERED PURSUANT TO KING COUNTY ORDINANCE 14309, AS AMENDED, OF THE FOLLOWING:**

**CIVIL CODE VIOLATIONS (Including KCC Section 23.02.010B):**

The King County Department of Development and Environmental Services has found the above-described location is maintained or used in violation of the King County Code (KCC).

**THEREFORE, YOU ARE ORDERED TO CORRECT THE VIOLATIONS LISTED BELOW IN ACCORDANCE WITH LISTED CODE PROVISIONS AND CODES ADOPTED UNDER THE AUTHORITY OF CHAPTERS 16.02.010, 16.02.100, 16.02.110, 16.02.130, 16.02.140 AND INCLUDING BUT NOT LIMITED TO CHAPTERS 21A.50 AND 23 OF THE KING COUNTY CODE:**

1. Operation of a materials processing facility in an A-10 zone in a Critical Area (Wetland, Flood Hazard Area) without the required permits and/or approvals. (KCC 21A.22.030, KCC 16.82.050)
2. Clearing, grading, and/or filling within a critical area (Wetland, Flood Hazard Area) without the required permits and/or inspections. (KCC 16.82.050, KCC 21A.24)

**TO BRING THIS PROPERTY INTO COMPLIANCE:**

1. Cease the operation of materials processing facility by November 8, 2006 and remove all equipment and appurtenances.
2. Apply for and obtain a valid clearing and grading permit and submit an abatement plan for review and approval by Land Use Services Division by November 8, 2006. This plan shall include, at a minimum, temporary and permanent erosion control, removal and disposal of imported organic debris and fill material in excess of code requirements, and resloping and revegetation of the site. Work under this plan shall commence within 10 days of approval by LUSD or within the time frames specified in the approval, whichever is greater. Pay an investigation fee, the amount to be determined by LUSD in conjunction with the review of the abatement plan.

**\*\* ANY PERMITS REQUIRED TO PERFORM THE CORRECTIVE ACTION MUST BE OBTAINED FROM THE PROPER ISSUING AGENCY. Some permit applications require appointments, which may be several weeks out. Please call 206-296-6797 to make an appointment. \*\***

40068

E05G0099-Spencer and Shear  
 October 9, 2006  
 Page 2

**FAILURE TO COMPLY WITH THIS NOTICE AND ORDER MAY SUBJECT YOU TO ADDITIONAL CIVIL PENALTIES, ABATEMENT AND/OR MISDEMEANOR ACTIONS, AND COULD LEAD TO THE DENIAL OF SUBSEQUENT KING COUNTY PERMIT APPLICATIONS ON THE SUBJECT PROPERTY.**

**CIVIL PENALTY/NOTICE OF LIEN (Including KCC Section 23.24.070):**

You shall correct each violation by the above dates or you will incur daily civil penalties against you according to the following schedule:

**Violation 1:** \$95.00 per day for the first 30 days, then \$190.00 per day for each day thereafter.

**Violation 2:** \$95.00 per day for the first 30 days, then \$190.00 per day for each day thereafter.

Any costs of enforcement including legal and incidental expenses, which exceed the amount of the penalties, may also be assessed against you.

This Department shall periodically bill you for the amount incurred up to and through the date of billing. **PERIODIC BILLS ARE DUE AND PAYABLE 30 DAYS FROM RECEIPT.** If any assessed penalty, fee or cost is not paid on or before the due date, King County may charge the unpaid amount as a **LIEN** against the real property of all persons responsible for code compliance and as a **JOINT AND SEVERAL PERSONAL OBLIGATION** of all persons responsible for code compliance.

**CRIMINAL MISDEMEANOR/NON-COMPLIANCE WITH FINAL ORDER (KCC Section 23.02.030):**

Any person who willfully or knowingly causes, aids or abets a civil code violation by any act of commission or omission is guilty of a misdemeanor. Upon conviction, the person shall be punished by a fine of not to exceed one thousand dollars and/or imprisonment in the County jail for a term not to exceed 90 days. Each week (7 days) such violation continues shall be considered a separate misdemeanor offense. **Failure to corrected cited violations may lead to denial of subsequent King County permit applications on the subject property.**

**NOTIFICATION OF RECORDING (KCC Section 23.24.040):**

A copy of this Notice and Order shall be recorded against the property in the King County Office of Records and Elections. King County shall file a Certificate of Compliance when the property is brought into compliance.

**ABATEMENT WORK/NOTICE OF LIEN (Including KCC Section 23.40.030 and RCW 35.80.030.1B):**

King County may proceed to abate the violation(s) and cause the work to be done, and charge the costs thereof as a lien against the real property of all persons responsible for code compliance and as a joint and several personal obligation of all persons responsible for code compliance.

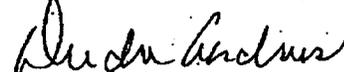
**APPEAL (Including KCC Chapter 23.36):**

Any person named in the Notice and Order or having any record or equitable title in the property against which the Notice and Order is recorded may appeal the order to the Hearing Examiner of King County, provided the appeal is received in writing by DDES within Fourteen days November 2, 2006 and a statement of appeal is received within twenty-one days November 2, 2006 of the date of service of the Notice and Order. **THE DATE OF SERVICE IS three business days after the Notice and Order is mailed. FAILURE TO APPEAL WITH THE SPECIFIC REASONS WHY THE NOTICE AND ORDER SHOULD BE REVERSED OR MODIFIED MAY RESULT IN A MOTION TO HAVE THE APPEAL DISMISSED BY THE HEARING EXAMINER. FAILURE TO APPEAL WITHIN FOURTEEN DAYS OF THE DATE OF SERVICE RENDERS THE NOTICE AND ORDER A FINAL DETERMINATION THAT THE CONDITIONS DESCRIBED IN THE NOTICE AND ORDER EXISTED AND CONSTITUTED A CIVIL CODE VIOLATION, AND THAT THE NAMED PARTY IS LIABLE AS A PERSON RESPONSIBLE FOR CODE COMPLIANCE.**

**DUTY TO NOTIFY (KCC Section 23.24.030N):**

The person(s) responsible for code compliance has the **DUTY TO NOTIFY** the Department of Development and Environmental Services-Building Services Division of **ANY ACTIONS TAKEN TO ACHIEVE COMPLIANCE WITH THE NOTICE AND ORDER.**

**DATED THIS OCTOBER 9, 2006**



Deidre Andrus  
 Code Enforcement Supervisor

DA: AT: al

# APPENDIX B

**2.16.055 Department of development and environmental services — duties — divisions.**

A. The department of development and environmental services is responsible to manage and be fiscally accountable for the building services division, land use services division, fire marshal division and administrative services division. The director of the department shall be the county planning director, zoning adjuster and responsible official for purposes of administering the state Environmental Policy Act, and may delegate those functions to qualified subordinates. The department shall be responsible for regulating the operation, maintenance and conduct of county-licensed businesses, except taxicab and for-hire drivers and vehicles. The department shall be responsible for managing and coordinating the implementation of Growth Management Act requirements, coordinating county and regional land use planning with public and private agencies, developing proposed policies to address regional land use planning and developing and overseeing the countywide program for implementation of the county's Comprehensive Plan including coordinating the implementation of plans that are developed by departments.

B. The building services division shall be responsible for ensuring consistent and efficient administration of environmental, building and land use codes and regulations for commercial and residential projects by means of permit review and approval, construction inspections and public information. The manager of the building services division shall be the county building official. The duties of the division shall include the following:

1. Permit center and public information;
2. Building plan and application review, including building, mechanical, barrier-free, energy, security and other uniform code reviews;
3. Site review, including engineering and critical areas review of permit applications;
4. Inspections, including new-construction inspections for compliance with site and building code requirements.

C. The land use services division shall be responsible for the effective processing and timely review of land development proposals, including zoning variance and reclassification, master drainage plans, variances from the surface water design manual and the King County road standards, critical area, subdivision, right-of-way use, urban planned development, clearing and grading, shoreline, special use and conditional use applications. The duties of the division shall include the following:

1. Permit center and public information;
2. Plan review, including the review of applications for compliance with shorelines, critical areas, subdivision and other zoning regulations, road standards and variances from the surface water design manual, as well as community plans and utility comprehensive plans;
3. Engineering review and inspection, including the review of clearing and grading applications and review of engineering plans for compliance with adopted road and drainage standards and specifications;
4. Development inspection, including inspection of construction activity to ensure compliance with approved plans and codes;

5. Develop and assist in implementing local and subarea specific plans for urban and rural areas, consistent with the Comprehensive Plan;

6. Develop proposed policies to address long-range comprehensive land use planning and analyze and provide proposed updates to the Comprehensive Plan on an annual basis;

7. Develop proposed county plans, programs and policies and implement regulations on environmental issues, including critical areas and mineral resources, and serve as the contact for cities and agencies, providing appropriate research in support of county initiatives on these issues;

8. Administer the state Environmental Policy Act and act as lead agency, including making the threshold determinations, determining the amount of environmental impact and reasonable mitigation measures and coordinating with other departments and divisions in the preparation of county environmental documents or in response to environmental documents from other agencies;

9. Monitor the cumulative effects of the county's Comprehensive Plan and other plans, policies and laws intended to protect natural and community resources while permitting development and growth, and providing periodic status reports to the executive and council; and

10. Pursue and resolve code violations, including preparing for administrative or legal actions, evaluating the department's success in obtaining compliance with King County rules and regulations and designing measures to improve compliance.

D. The fire marshal division shall be responsible for programs designed to reduce the potential risk of fires and for investigating the causes of fires. The manager of the fire marshal division shall be the county fire marshal. The duties of the division shall include the following:

1. Development and implementation of an inspection program to identify fire hazards and require conformance with K.C.C. Title 17;

2. Review of building plans and applications for compliance with K.C.C. Title 17; and

3. Inspections, including inspections of new construction, for compliance with K.C.C. Title 17.

E. The administrative services division shall provide support services throughout the department, including personnel and payroll support, budget support, financial services, information services, facilities management and support, and records management and program analysis services. (Ord. 15921 § 1, 2007; Ord. 15319 § 1, 2005; Ord. 14561 § 3, 2002; Ord. 14199 § 15, 2001; Ord. 12940 § 1, 1997; Ord. 12441 § 5, 1996; Ord. 12051 § 1, 1996; Ord. 11955 § 5, 1995).

**16.82.040 Hazards.** Whenever the director determines that an existing site, as a result of clearing or grading, excavation, embankment, or fill has become a hazard to life and limb, or endangers property, or adversely affects the safety, use or stability of a public way or drainage channel, the owner of the property upon which the clearing, grading, excavation or fill is located, or other person or agent in control of said property, upon receipt of notice in writing from the director, shall within the period specified therein restore the site affected by such clearing or grading or repair or eliminate such excavation or embankment or fill so as to eliminate the hazard and be in conformance with the requirements of this chapter. (Ord. 9614 § 99, 1990: Ord. 3108 § 3, 1977: Ord. 1488 § 4, 1973).

**16.82.050 Clearing and grading permit required - exceptions.**

A. An activity physically altering a site, including clearing or grading activities and forest practices, shall be consistent with and meet the standards in this chapter unless preempted under chapter 76.09 RCW.

B. Unless specifically excepted under K.C.C. 16.82.051, a person shall not do any clearing or grading without first having obtained a clearing and grading permit issued by the department or having all clearing and grading reviewed and approved by the department as part of another development proposal. A separate permit shall be required for each site unless the activity is approved to occur on multiple sites under a programmatic permit issued in accordance with K.C.C. 16.82.053.

C. The permits or approvals issued under this chapter shall be required regardless of permits or approvals issued by the county or any other governmental agency and do not preclude the requirement to obtain all other permits or approvals or to comply with the operating standards in sections K.C.C. 16.82.095, 16.82.100, 16.82.105 and 16.82.130. Exceptions from permits under this chapter do not preclude the requirement to obtain other permits or approvals or to comply with the operating standards in K.C.C. 16.82.095, 16.82.100, 16.82.105 and 16.82.130. (Ord. 15053 § 2, 2004: Ord. 14259 § 3, 2001: Ord. 12878 § 3, 1997: Ord. 12822 § 2, 1997: Ord. 12020 § 51, 1995: Ord. 12016 § 2, 1995: Ord. 12015 § 2, 1995: Ord. 11896 § 2, 1995: Ord. 11886 § 2, 1995: Ord. 11618 § 4, 1994: 11536 § 1, 1994: 11393 § 1, 1994: Ord. 11016 § 14, 1993: Ord. 10152 § 1, 1991: Ord. 9614 § 100, 1990: Ord. 7990 § 20, 1987: Ord. 3108 § 4, 1977: Ord. 1488 § 6, 1973).

**16.82.051 Clearing and grading permit exceptions.**

A. For the purposes of this section, the definitions in K.C.C. chapter 21A.06 apply to the activities described in this section.

B. The following activities are excepted from the requirement of obtaining a clearing or grading permit before undertaking forest practices or clearing or grading activities, as long as those activities conducted in critical areas are in compliance with the standards in this chapter and in K.C.C. chapter 21A.24. In cases where an activity may be included in more than one activity category, the most-specific description of the activity shall govern whether a permit is required. For activities involving more than one critical area, compliance with the conditions applicable to each critical area is required. Clearing and grading permits are required when a cell in this table is empty and for activities not listed on the table.

**KEY**  
 "NP" in a cell means no permit required if conditions are met.  
 A number in a cell means the Numbered condition in subsection C. applies.  
 "Wildlife area and network" column applies to both Wildlife Habitat Conservation Area and Wildlife Habitat Network

OUT OF CRITICAL	AREA AND CRITICAL	COAL MINE HAZARD	EROSION HAZARD	FLOOD HAZARD	CHANNEL MIGRATION	LAND SLIDE HAZARD	AND BUFFER HAZARD	SEISMIC HAZARD	VOLCANIC HAZARD	STEEP SLOPE BUFFER	HAZARDOUS SLOPE BUFFER	RECHARGE AREA BUFFER	WETLANDS AND BUFFER	AQUATIC AREA	AND BUFFER AREA	WILDLIFE AREA	AND NETWORK
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ACTIVITY																	
<b>Grading and Clearing</b>																	
Grading	NP 1, 2	NP 1, 2	NP 1, 2					NP 1, 2	NP 1, 2			NP 1, 2					
Clearing	NP 3 NP 24	NP 3	NP 3	NP 3				NP 3	NP 3			NP 3	NP 4 NP 23	NP 4 NP 23			
Covering of garbage	NP 5																
Emergency tree removal	NP 6																
Removal of noxious weeds	NP																
Removal of invasive vegetation	NP 7	NP 7	NP 7	NP 7	NP 7			NP 7	NP 7			NP 7	NP 8	NP 8	NP 8	NP 8	NP 8
Non conversion Class I, II, III, IV-S forest practice	NP 9																
Emergency action	NP 10																
<b>Roads</b>																	
Grading within the roadway	NP 11						NP 11										
Clearing within the roadway	NP 12																
Maintenance of driveway or private access road	NP 13																
Maintenance of bridge or culvert	NP 13, 14, 15																
Construction of farm field access drive	NP 16																
Maintenance of farm field access drive	NP 17																

(King County 12-2008)

GRADING

16.82.051

<b>Utilities</b>													
Construction or maintenance of utility corridors or facility within the right-of-way	NP 18	NP 19	NP 19	NP 19	NP 19	NP 19	NP 19	NP 19	NP 19	NP 18	NP 19	NP 19	NP 19
Construction or maintenance of utility corridors or facility outside of the right-of-way	NP 1, 2, 3		NP 1, 2, 3				NP 1, 2, 3	NP 1, 2, 3		NP 1, 2, 3			
Maintenance of existing surface water conveyance system	NP 11	NP 11	NP 11	NP 11	NP 11	NP 11	NP 11	NP 11	NP 11	NP 11	NP 11	NP 11	NP 11
Maintenance of existing surface water flow control and surface water quality treatment facility	NP 11	NP 11	NP 11	NP 11	NP 11	NP 11	NP 11	NP 11	NP 11	NP 11	NP 11	NP 11	NP 11
Maintenance or repair of flood protection facility	NP 20	NP 20	NP 20	NP 20	NP 20	NP 20	NP 20	NP 20	NP 20	NP 20	NP 20	NP 20	NP 20
Maintenance or repair of existing instream structure	NP	NP	NP	NP	NP	NP	NP	NP	NP	NP	NP 11	NP 11	NP
<b>Recreation areas</b>													
Maintenance of outdoor public park facility, trail or publicly improved recreation area	NP 13	NP 13	NP 13	NP 13	NP 13	NP 13	NP 13	NP 13	NP 13	NP 13	NP 13	NP 13	NP 13
<b>Habitat and science projects</b>													
Habitat restoration or enhancement project	NP	NP 21	NP 21	NP 21	NP 21	NP 21	NP 21	NP 21	NP 21	NP	NP 21	NP 21	NP 21
Drilling and testing for critical areas report	NP 1, 2	NP 1, 2	NP 1, 2	NP 22	NP 22	NP 22	NP 1, 2	NP 1, 2	NP 22	NP 1, 2	NP 22	NP 22	NP 22
<b>Agriculture</b>													
Horticulture activity including tilling, discing, planting, seeding, harvesting, preparing soil, rotating crops and related activity	NP	NP	NP	NP	NP	NP	NP	NP	NP	NP	NP	NP	NP
Grazing livestock	NP	NP	NP	NP	NP	NP	NP	NP	NP	NP	NP	NP	NP
Construction and maintenance of livestock manure storage facility	NP 16	NP 16	NP 16	NP 16	NP 16		NP 16	NP 16		NP 16	NP 16	NP 16	
Maintenance of agricultural drainage	NP 15	NP 15	NP 15	NP 15	NP 15	NP 15	NP 15	NP 15	NP 15	NP 15	NP 15	NP 15	NP 15
Maintenance of farm pond, fish pond, livestock watering pond	NP 15	NP 15	NP 15	NP 15	NP 15	NP 15	NP 15	NP 15	NP 15	NP 15	NP 15	NP 15	NP 15

(King County 3-2010)

<b>Other</b>													
Excavation of cemetery grave in established and approved cemetery	NP	NP	NP	NP	NP	NP	NP	NP	NP	NP	NP	NP	NP
Maintenance of cemetery grave	NP	NP 13	NP 13	NP	NP 13	NP 13	NP	NP	NP 13	NP	NP 13	NP 13	NP 13
Maintenance of lawn, landscaping and gardening for personal consumption	NP	NP 13	NP 13	NP	NP 13	NP 13	NP	NP	NP 13	NP	NP 13	NP 13	NP 13
Maintenance of golf course	NP 13	NP 13	NP 13	NP 13	NP 13	NP 13	NP	NP	NP 13	NP 13	NP 13	NP 13	NP 13

C. The following conditions apply:

1. Excavation less than five feet in vertical depth, or fill less than three feet in vertical depth that, cumulatively over time, does not involve more than one hundred cubic yards on a single site.

2. Grading that produces less than two thousand square feet of new impervious surface on a single site added after January 1, 2005, or that produces less than two thousand square feet of replaced impervious surface or less than two thousand square feet of new plus replaced impervious surface after October 30, 2008. For purposes of this subsection C.2., "new impervious surface" and "replaced impervious surface" are defined in K.C.C. 9.04.020.

3. Cumulative clearing of less than seven thousand square feet including, but not limited to, collection of firewood and removal of vegetation for fire safety. This exception shall not apply to development proposals:

- a. regulated as a Class IV forest practice under chapter 76.09 RCW;
- b. in a critical drainage areas established by administrative rules;
- c. subject to clearing limits included in property-specific development standards and special district overlays under K.C.C. chapter 21A.38; or
- d. subject to urban growth area significant tree retention standards under K.C.C. 16.82.156 and 21A.38.230.

4. Cutting firewood for personal use in accordance with a forest management plan or rural stewardship plan approved under K.C.C. Title 21A. For the purpose of this condition, personal use shall not include the sale or other commercial use of the firewood.

5. Limited to material at any solid waste facility operated by King County.

6. Allowed to prevent imminent danger to persons or structures.

7. Cumulative clearing of less than seven thousand square feet annually or conducted in accordance with an approved farm management plan, forest management plan or rural stewardship plan.

8. Cumulative clearing of less than seven thousand square feet and either:

- a. conducted in accordance with a farm management plan, forest management plan or a rural stewardship plan; or
- b. limited to removal with hand labor.

9. Class I, II, III or IV forest practices as defined in chapter 76.09 RCW and Title 222 WAC.

10. If done in compliance with K.C.C. 16.82.065.

11. Only when conducted by or at the direction of a government agency in accordance with the regional road maintenance guidelines and K.C.C. 9.04.050, creates less than two thousand square feet of new impervious surface on a single site added after January 1, 2005, and is not within or does not directly discharge to an aquatic area or wetland. For purposes of this subsection C.11., "new impervious surface" is defined in K.C.C. 9.04.020.

12. Limited to clearing conducted by or at the direction of a government agency or by a private utility that does not involve:

- a. slope stabilization or vegetation removal on slopes; or
- b. ditches that are used by salmonids.

13. In conjunction with normal and routine maintenance activities, if:

- a. there is no alteration of a ditch or aquatic area that is used by salmonids;
- b. the structure, condition or site maintained was constructed or created in accordance with law; and
- c. the maintenance does not expand the roadway, lawn, landscaping, ditch, culvert or other improved area being maintained.

14. If a culvert is used by salmonids or conveys water used by salmonids and there is no adopted farm management plan, the maintenance is limited to removal of sediment and debris from the culvert and its inlet, invert and outlet and the stabilization of the area within three feet of the culvert where the maintenance disturbed or damaged the bank or bed and does not involve the excavation of a new sediment trap adjacent to the inlet.

15. If used by salmonids, only in compliance with an adopted farm plan in accordance with K.C.C. Title 21A and only if the maintenance activity is inspected by:

- a. The King Conservation District;
- b. King County department of natural resources and parks;
- c. King County department of development and environmental services; or
- d. Washington state Department of Fish and Wildlife.

16. Only if consistent with an adopted farm plan in accordance with K.C.C. Title 21A.

17. Only if:

a. consistent with a farm plan in accordance with K.C.C. Title 21A; or  
 b. conducted in accordance with best management practices in the Natural Resource Conservation Service Field Office Technical Guide.

18. In accordance with a franchise permit.

19. Only within the roadway in accordance with a franchise permit.

20. When:

- a. conducted by a public agency;
- b. the height of the facility is not increased;
- c. the linear length of the facility is not increased;
- d. the footprint of the facility is not expanded waterward;
- e. done in accordance with the Regional Road Maintenance Guidelines;
- f. done in accordance with the adopted King County Flood Hazard Management Plan and the Integrated Streambank Protection Guidelines (Washington State Aquatic Habitat Guidelines Program, 2002); and

f. monitoring is conducted for three years following maintenance or repair and an annual report is submitted to the department.

21. Only if:

a. the activity is not part of a mitigation plan associated with another development proposal or is not corrective action associated with a violation; and

b. the activity is sponsored or co-sponsored by a public agency that has natural resource management as its primary function or a federally-recognized tribe, and the activity is limited to:

(1) revegetation of the critical area and its buffer with native vegetation or the removal of noxious weeds or invasive vegetation;

(2) placement of weirs, log controls, spawning gravel, woody debris and other specific salmonid habitat improvements;

(3) hand labor except:

(a) the use of riding mower or light mechanical cultivating equipment and herbicides or biological control methods when prescribed by the King County noxious weed control board for the removal of noxious weeds or invasive vegetation; or

(b) the use of helicopters or cranes if they have no contact with or otherwise disturb the critical area or its buffer.

22. If done with hand equipment and does not involve any clearing.

23. Limited to removal of vegetation for forest fire prevention purposes in accordance with best management practices approved by the King County fire marshal.

24. Limited to the removal of downed trees.

(Ord. 16267 § 3, 2008; Ord. 15053 § 3, 2004).

**16.82.055 Applications - Complete applications.**

A. For the purposes of determining the application of time periods and procedures adopted by this chapter, applications for permits authorized by Chapter 16.82 shall be considered complete as of the date of submittal upon determination by the department that the materials submitted contain the following:

1. For clearing and grading permits:
  - a. A legal description of the property,
  - b. A 1:2000 scale vicinity map with a north arrow,
  - c. Grading plans including:
    - (1) Horizontal and vertical scale,
    - (2) Size and location of existing improvements within 50 feet of the project, indicating which will remain and which will be removed.
    - (3) Existing and proposed contours at maximum five foot intervals, and extending for 100 feet beyond the project edge,
    - (4) At least two cross-sections, one in each direction, showing existing and proposed contours and horizontal and vertical scales, and
    - (5) Temporary and permanent erosion-sediment control facilities,
  - d. The following plans must be stamped and signed by a registered civil engineer, licensed to practice in the State of Washington,
    - (1) Permanent drainage facilities,
    - (2) Structures to be built or construction proposed in land slide hazard areas, and
    - (3) Proposed construction or placement of a structure.
2. A completed environmental checklist, if required by K.C.C. chapter 20.44, County Environmental Procedures;
3. Satisfaction of all requirements for grading permits under K.C.C. 16.82.060.

B. Applications found to contain material errors shall not be deemed complete until such material errors are corrected.

C. The director may waive specific submittal requirements determined to be unnecessary for review of an application. (Ord. 11622 § 4, 1994).

**16.82.060 Permit application requirements.**

A. To obtain a permit, the applicant shall first file an application in writing on a form prescribed by the department that, in addition to the requirements of K.C.C. 20.20.040, shall include, at a minimum:

1. Identification and description of the work to be covered by the permit for which application is made;
2. An estimate of the quantities of work involved by volume and the total area cleared or graded as a percentage of the total site area;
3. An identification and description of:
  - a. all critical areas on the site or visible from the boundaries of the site; and
  - b. all clearing restrictions applicable to the site in K.C.C. 16.82.150, critical drainage areas requirements established by administrative rules or property-specific development standards and special district overlays under K.C.C. chapter 21A.38;
4. Location of any open space tracts or conservation easements if required under:
  - a. K.C.C. 16.82.152;
  - b. K.C.C. chapter 21A.14;
  - c. K.C.C. chapter 21A.37;
  - d. critical drainage areas; or
  - e. property-specific development standards or special district overlays under K.C.C. chapter 21A.38;
5. Plans and specifications that, at a minimum, include:
  - a. property boundaries, easements and setbacks;
  - b. a 1:2000 scale vicinity map with a north arrow;
  - c. horizontal and vertical scale;

B. The department shall confirm in a written decision, that the activity was an emergency action, including that:

1. There was imminent danger or risk to the public health, safety and welfare or to persons or property;
2. The emergency was unanticipated and not caused by the inaction or action of the applicant;
3. Immediate emergency action was necessary; and
4. The emergency action was in direct response to and did not exceed the dangers and risks posed by the emergency;

C. At the preapplication meeting, the department shall establish the date by which all required permit applications and other materials or information, including any critical area reports, shall be submitted;

D. Corrective action, as determined by the department, shall be completed in compliance with the corrective action requirements of K.C.C. chapter 21A.24 for any alterations made during the emergency that are not in compliance with this chapter or other law; and

E. Mitigation, as determined by the department, shall be completed in compliance with the mitigation requirements of K.C.C. chapter 21A.24. (Ord. 15053 § 6, 2004).

**16.82.075 Permit review and final decision.**

A. The department shall review permit applications and may impose conditions on permit approval as needed to mitigate identified project impacts and shall deny applications that are inconsistent with this chapter and any other applicable regulations. For permit applications that are within a shoreline of the state or require a shoreline management substantial development permit, the conditions necessary to comply with the King County shoreline management program, including but not limited to, the shoreline management substantial development permit conditions, shall be incorporated into the conditions of any permit issued under this chapter and shall be subject to the inspection and enforcement procedures authorized under this chapter and K.C.C. Title 23.

B. Consistent with permit process and procedures provisions of K.C.C. chapter 20.20, including public notice procedures, the department shall review and provide a final decision to approve, condition or deny permits based on compliance with this title and any other applicable regulations.

C. Any decision to approve, condition or deny a development proposal based on this title and any other applicable regulations may be appealed according to and as part of the appeal procedure for the permit or approval involved as provided in K.C.C. 20.20.020. (Ord. 15053 § 7, 2004).

**16.82.085 Permit duration and renewal.**

A. A clearing and grading permit shall be valid for the number of days stated in the permit but the period shall not be more than two years, except in the case of a programmatic permit which may have a duration of up to five years. A permit shall not remain valid after the permitted activity has been completed, the site has been permanently stabilized and all required mitigation or restoration has been completed, monitored and accepted.

B. If the department determines that operating conditions and performance standards have been met and that the permit conditions are adequate to protect against the impacts resulting from the permitted activity, the permit may be renewed in two-year increments or five-year increments for a programmatic permit, or less if a shorter approval or renewal period is specified by the department. The additional requirements applicable to renewal of programmatic permits in K.C.C. 16.82.053 also apply.

C. If the department determines that activities regulated under a permit issued for mineral extraction in accordance with K.C.C. chapter 21A.22 does not comply with permit conditions or operating standards during a renewal review, it may conduct a periodic review. (Ord. 15053 § 8, 2004).

**16.82.090 Liability insurance required - Exception.** The permittee shall maintain a liability policy in the amount of one hundred thousand dollars per individual, three hundred thousand dollars per occurrence, and fifty thousand dollars property damage, and shall name King County as an additional insured. EXCEPTION: Liability insurance requirements may be waived for projects involving less than ten thousand cubic yards. Liability insurance shall not be required of other King County departments. (Ord. 1488 § 10, 1973).

F. The definitions in K.C.C. 21A.45.020 apply to this section.

G. In the Kirkland Finn Hill/Juanita/Kingsgate Annexation Area, as shown on the map in Ordinance 17029\*, the manner of concealment for any minor communication facility that is a Type II or Type III land use decision shall be reviewed and determined as part of that process. (Ord. 17029 § 5, 2011; Ord. 16263 § 7, 2008; Ord. 15606 § 2, 2006; Ord. 15170 § 2, 2005; Ord. 14449 § 2, 2002; Ord. 14190 § 23, 2001; Ord. 14047 § 11, 2001; Ord. 13694 § 84, 1999; Ord. 13147 § 33, 1998; Ord. 13131 § 1, 1998; Ord. 12878 § 2, 1997; Ord. 12196 § 9, 1996).

\*Available in the clerk of the council's office.

**20.20.020 Classifications of land use decision processes (Effective December 31, 2012, and thereafter).**

A. Land use permit decisions are classified into four types, based on who makes the decision, whether public notice is required, whether a public hearing is required before a decision is made and whether administrative appeals are provided. The types of land use decisions are listed in subsection E. of this section.

1. Type 1 decisions are made by the director, or his or her designee, ("director") of the department of development and environmental services ("department"). Type 1 decisions are nonappealable administrative decisions.

2. Type 2 decisions are made by the director. Type 2 decisions are discretionary decisions that are subject to administrative appeal.

3. Type 3 decisions are quasi-judicial decisions made by the hearing examiner following an open record hearing. Type 3 decisions may be appealed to the county council, based on the record established by the hearing examiner.

4. Type 4 decisions are quasi-judicial decisions made by the council based on the record established by the hearing examiner.

B. Except as provided in K.C.C. 20.44.120A.7. and 25.32.080 or unless otherwise agreed to by the applicant, all Type 2, 3 and 4 decisions included in consolidated permit applications that would require more than one type of land use decision process may be processed and decided together, including any administrative appeals, using the highest-numbered land use decision type applicable to the project application.

C. Certain development proposals are subject to additional procedural requirements beyond the standard procedures established in this chapter.

D. Land use permits that are categorically exempt from review under SEPA do not require a threshold determination (determination of nonsignificance ["DNS"] or determination of significance ["DS"]). For all other projects, the SEPA review procedures in K.C.C. chapter 20.44 are supplemental to the procedures in this chapter.

E. Land use decision types are classified as follow:

TYPE 1	(Decision by director, no administrative appeal)	Temporary use permit for a homeless encampment under K.C.C. 21A.45.010, 21A.45.020, 21A.45.030, 21A.45.040, 24A.45.050, 21A.45.060, 21A.45.070, 21A.45.080 and 21A.45.090; building permit, site development permit, or clearing and grading permit that is not subject to SEPA, that is categorically exempt from SEPA as provided in K.C.C. 20.20.040, or for which the department has issued a determination of nonsignificance or mitigated determination of nonsignificance; boundary line adjustment; right of way; variance from K.C.C. chapter 9.04; shoreline exemption; decisions to require studies or to approve, condition or deny a development proposal based on K.C.C. chapter 21A.24, except for decisions to approve, condition or deny alteration exceptions; approval of a conversion-option harvest plan; a binding site plan for a condominium that is based on a recorded final planned unit development, a building permit, an as-built site plan for developed sites, a site development permit for the entire site.
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TYPE 2 <sup>1,2</sup>	(Decision by director appealable to hearing examiner, no further administrative appeal)	Short plat; short plat revision; short plat alteration; zoning variance; conditional use permit; temporary use permit under K.C.C. chapter 21A.32; temporary use permit for a homeless encampment under K.C.C. 21A.45.100; shoreline substantial development permit <sup>3</sup> ; building permit, site development permit or clearing and grading permit for which the department has issued a determination of significance; reuse of public schools; reasonable use exceptions under K.C.C. 21A.24.070.B; preliminary determinations under K.C.C. 20.20.030.B; decisions to approve, condition or deny alteration exceptions under K.C.C. chapter 21A.24; extractive operations under K.C.C. 21A.22.050; binding site plan; waivers from the moratorium provisions of K.C.C. 16.82.140 based upon a finding of special circumstances.
TYPE 3 <sup>1</sup>	(Recommendation by director, hearing and decision by hearing examiner, appealable to county council on the record)	Preliminary plat; plat alterations; preliminary plat revisions.
TYPE 4 <sup>1,4</sup>	(Recommendation by director, hearing and recommendation by hearing examiner decision by county council on the record)	Zone reclassifications; shoreline environment redesignation; urban planned development; special use; amendment or deletion of P suffix conditions; plat vacations; short plat vacations; deletion of special district overlay.

<sup>1</sup> See K.C.C. 20.44.120.C. for provisions governing procedural and substantive SEPA appeals and appeals of Type 3 and 4 decisions to the council.

<sup>2</sup> When an application for a Type 2 decision is combined with other permits requiring Type 3 or 4 land use decisions under this chapter or under K.C.C. 25.32.080, the examiner, not the director, makes the decision.

<sup>3</sup> A shoreline permit, including a shoreline variance or conditional use, is appealable to the state Shorelines Hearings Board and not to the hearing examiner.

<sup>4</sup> Approvals that are consistent with the Comprehensive Plan may be considered by the council at any time. Zone reclassifications that are not consistent with the Comprehensive Plan require a site-specific land use map amendment and the council's hearing and consideration shall be scheduled with the amendment to the Comprehensive Plan under K.C.C. 20.18.040 and 20.18.060.

F. The definitions in K.C.C. 21A.45.020 apply to this section. (Ord. 17029 § 5, 2011 (Expired 12/31/2012); Ord. 16263 § 7, 2008; Ord. 15606 § 2, 2006; Ord. 15170 § 2, 2005; Ord. 14449 § 2, 2002; Ord. 14190 § 23, 2001; Ord. 14047 § 11, 2001; Ord. 13694 § 84, 1999; Ord. 13147 § 33, 1998; Ord. 13131 § 1, 1998; Ord. 12878 § 2, 1997; Ord. 12196 § 9, 1996).

**20.20.030 Preapplication conferences.**

A.1.a. Except as otherwise provided in subsection A.1.b. of this section, before filing a permit application for a Type 1 decision, the applicant shall contact the department to schedule a preapplication conference, which shall be held before filing the application, if the property will have five thousand square feet of development site or right-of-way improvements, the property is in a critical drainage basin, or the property has a wetland, steep slope, landslide hazard, erosion hazard, or coal mine on site.

b. A preapplication conference is not required for a Type 1 decision for a single family residence and its accessory buildings or for other structures where all work is in an existing building and no parking is required or added.

2. Except as otherwise provided in this section, before filing a permit application requiring a Type 2, 3 or 4 decision, the applicant shall contact the department to schedule a preapplication conference, which shall be held before filing the application.

**20.20.060 Notice of application.**

A. A notice of application shall be provided to the public for land use permit applications as follows:

1. Type 2, 3 or 4 decisions;
2. Type 1 decisions subject to SEPA;
3. As provided in subsection K. and L. of this section; and
4. Type 1 decisions requiring a community meeting under K.C.C. 20.20.035.

B. Notice of the application shall be provided by the department within fourteen days following the department's determination that the application is complete. A public comment period on a notice of application of at least twenty-one days shall be provided, except as otherwise provided in chapter 90.58 RCW and RCW 58.17.215 with regards to subdivision alterations. The public comment period shall commence on the third day following the department's mailing of the notice of application as provided for in subsection H. of this section.

C. If the county has made a determination of significance ("DS") under chapter 43.21C RCW before the issuance of the notice of application, the notice of the DS shall be combined with the notice of application and the scoping notice.

D. Unless the mailed notice of application is by a post card as provided in subsection E. of this section, the notice of application shall contain the following information:

1. The file number;
2. The name of the applicant;
3. The date of application, the date of the notice of completeness and the date of the notice of application;
4. A description of the project, the location, a list of the permits included in the application and the location where the application and any environmental documents or studies can be reviewed;
5. A site plan on eight and one-half by fourteen inch paper, if applicable;
6. The procedures and deadline for filing comments, requesting notice of any required hearings and any appeal procedure;
7. The date, time, place and type of hearing, if applicable and scheduled at the time of notice;
8. The identification of other permits not included in the application to the extent known;
9. The identification of existing environmental documents that evaluate the proposed project; and
10. A statement of the preliminary determination, if one has been made, of those development regulations that will be used for project mitigation and of consistency with applicable county plans and regulations.

E. If mailed notice of application is made by a post card, the notice of application shall contain the following information:

1. A description of the project, the location, a list of the permits included in the application and any environmental documents or studies can be reviewed;
2. The name of the applicant;
3. The date of application, the date of the notice of completeness and the date of the notice of application;
4. If the department has made a decision or recommendation on the application, the decision or recommendation made;
5. The applicable comment and appeal dates and the date, time, place and type of hearing, if applicable;
6. A web site address that provides access to project information, including a site map and application page; and
7. The department contact name, telephone number and email address;

F. Notice shall be provided in the following manner:

1. Posted at the project site as provided in subsections G. and J. of this section;
2. Mailed by first class mail as provided in subsection H. of this section; and
3. Published as provided in subsection I. of this section.

G. Posted notice for a proposal shall consist of one or more notice boards posted by the applicant within fourteen days following the department's determination of completeness as follows:

1. A single notice board shall be posted for a project. This notice board may also be used for the posting of the notice of decision and notice of hearing and shall be placed by the applicant:

- a. at the midpoint of the site street frontage or as otherwise directed by the department for maximum visibility;
  - b. five feet inside the street property line except when the board is structurally attached to an existing building, but a notice board shall not be placed more than five feet from the street property without approval of the department;
  - c. so that the top of the notice board is between seven to nine feet above grade;
  - d. where it is completely visible to pedestrians; and
  - e. comply with site distance requirements of K.C.C. 21A.12.210 and the King County road standards adopted under K.C.C. chapter 14.42.
2. Additional notice boards may be required when:
- a. the site does not abut a public road;
  - b. a large site abuts more than one public road; or
  - c. the department determines that additional notice boards are necessary to provide adequate public notice;
3. Notice boards shall be:
- a. maintained in good condition by the applicant during the notice period through the time of the final county decision on the proposal, including the expiration of any applicable appeal periods, and for decisions which are appealed, through the time of the final resolution of any appeal;
  - b. in place at least twenty-eight days before the date of any required hearing for a Type 3 or 4 decision, or at least fourteen days following the department's determination of completeness for any Type 2 decision; and
  - c. removed within fourteen days after the end of the notice period;
4. Removal of the notice board before the end of the notice period may be cause for discontinuance of county review until the notice board is replaced and remains in place for the specified time period;
5. An affidavit of posting shall be submitted to the department by the applicant within fourteen days following the department's determination of completeness to allow continued processing of the application by the department; and
6. Notice boards shall be constructed and installed in accordance with subsection G. of this section and any additional specifications promulgated by the department under K.C.C. chapter 2.98, rules of county agencies.
- H. Mailed notice for a proposal shall be sent by the department within fourteen days after the department's determination of completeness:
1. By first class mail to owners of record of property in an area within five hundred feet of the site, but the area shall be expanded as necessary to send mailed notices to at least twenty different property owners;
  2. To any city with a utility which is intended to serve the site;
  3. To the state Department of Transportation, if the site adjoins a state highway;
  4. To the affected tribes;
  5. To any agency or community group which the department may identify as having an interest in the proposal;
  6. Be considered supplementary to posted notice and be deemed satisfactory despite the failure of one or more owners to receive mailed notice;
  7. For preliminary plats only, to all cities within one mile of the proposed preliminary plat, and to all airports within two miles of the proposed preliminary plat; and
  8. In those parts of the urban growth area designated by the King County Comprehensive Plan where King County and a city have adopted either a memorandum of understanding or a potential annexation boundary agreement, or both, the director shall ensure that the city receives notice of all applications for development subject to this chapter and shall respond specifically in writing to any comments on proposed developments subject to this title.
- I. The notice of application shall be published by the department within fourteen days after the department's determination of completeness in the official county newspaper and another newspaper of general circulation in the affected area.

J. Posted notice for approved formal subdivision engineering plans, clearing or grading permits subject to SEPA or building permits subject to SEPA shall be a condition of the plan or permit approval and shall consist of a single notice board posted by the applicant at the project site, before construction as follows:

1. Notice boards shall comport with the size and placement provisions identified for construction signs in K.C.C. 21A.20.120B;
2. Notice boards shall include the following information:
  - a. permit number and description of the project;
  - b. projected completion date of the project;
  - c. a contact name and phone number for both the department and the applicant;
  - d. a department contact number for complaints after business hours; and
  - e. hours of construction, if limited as a condition of the permit;
3. Notice boards shall be maintained in the same manner as identified above, in subsection F of this section; and
4. Notice boards shall remain in place until final construction approval is granted. Early removal of the notice board may preclude authorization of final construction approval.

K. Posted and mailed notice consistent with this section shall be provided to property owners of record and to the council district representative in which it is located, for any proposed single-family residence in a higher density urban single family residential zone (R-4 through R-8) exceeding a size of ten thousand square feet of floor area as defined in the Washington State Uniform Building Code.

L. Posted and mailed notice consistent with this section shall be provided to any property owner of record and to the council district representative in which is locating any application for building permits or other necessary land use approvals for the establishment of the social service facilities classified by SIC 8322 and 8361 and listed below, unless the proposed use is protected under the Fair Housing Act:

1. Offender self-help agencies;
2. Parole offices;
3. Settlement houses;
4. Halfway home for delinquents and offenders; and
5. Homes for destitute men and women. (Ord. 16950 § 8, 2010: Ord. 16552 § 3, 2009: Ord. 13694 § 86, 1999: Ord. 13573 § 1, 1999: Ord. 13555 § 2, 1999: Ord. 13131 § 2, 1998: Ord. 13097 § 1, 1998: Ord. 12884 § 1, 1997: Ord. 12196 § 13, 1996).

**20.20.062 Notice of Type I decisions.** Not later than January 1, 2012, the department shall provide public notice of Type-1 decisions for which a notice of application is not otherwise required under K.C.C. 20.20.060. The public notice may be provided electronically. The notice provided under this section shall be considered supplementary to any other notice requirements and shall be deemed satisfactory despite the failure of one or more individuals to receive notice. (Ord. 16950 § 9, 2010).

**20.20.070 Vesting.**

A. Applications for Type 1, 2, and 3 land use decisions, except those which seek variance from or exception to land use regulations and substantive and procedural SEPA decisions shall be considered under the zoning and other land use control ordinances in effect on the date a complete application is filed meeting all of the requirements of this chapter. The department's issuance of a notice of complete application as provided in this chapter, or the failure of the department to provide such a notice as provided in this chapter, shall cause an application to be conclusively deemed to be vested as provided herein.

B. Supplemental information required after vesting of a complete application shall not affect the validity of the vesting for such application.

C. Vesting of an application does not vest any subsequently required permits, nor does it affect the requirements for vesting of subsequent permits or approvals. (Ord. 12196 § 14, 1996).

**20.20.080 Applications - modifications to proposal.**

A. Modifications required by the county to a pending application shall not be deemed a new application.

**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. 20.24.21 0D.

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.

**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.

**20.24.240 Judicial review of final decisions.**

A. Decisions of the council in cases identified in K.C.C. 20.24.070 or in cases appealed to the council as provided in K.C.C. 20.24.210D, shall be final and conclusive action unless within twenty-one calendar days from the date of the council's adoption of an ordinance an appeal is filed in superior court, state of Washington, for the purpose of review of the action taken; provided, no development or related action may occur during the twenty-one day appeal period.

B. Decisions of the examiner in cases identified in K.C.C. 20.24.080 shall be a final and conclusive action unless within twenty-one calendar days from the date of issuance of the examiner's decision an aggrieved person files an appeal in superior court, state of Washington, for the purpose of review of the action taken; provided, no development or related action may occur during the twenty-one day appeal period; provided further, that the twenty-one day appeal period from examiner decisions on appeals of threshold determinations or the adequacy of a final EIS shall not commence until final action on the underlying proposal.

C. Prior to filing an appeal of a final decision for a conditional use permit or special use permit, requested by a party that is licensed or certified by the Washington state department of social and health services or the Washington state department of corrections, an aggrieved party (other than a county, city or town) must comply with the mediation requirements of chapter 35.63 RCW (chapter 119, Laws of 1998). The time limits for appealing a final decision are tolled during the mediation process. (Ord. 13250 § 2, 1998; Ord. 12196 § 44, 1996; Ord. 11502 § 10, 1994; Ord. 4461 § 15, 1979).

**20.24.250 Reconsideration of final action.**

A. Any final action by the county council or hearing examiner may be reconsidered by the council or examiner, respectively if:

1. The action was based in whole or in part on erroneous facts or information;
2. The action when taken failed to comply with existing laws or regulations applicable thereto; or
3. An error of procedure occurred which prevented consideration of the interests of persons directly affected by the action.

B. The council upon reconsideration shall refer the matter to the land use appeal committee to review the matter pursuant to the procedures and authority for appeals pursuant to K.C.C. 20.24.220.

C. The examiner shall reconsider a final decision pursuant to the rules of the hearing examiner.

D. Authority of the council and examiner to reconsider does not affect the finality of a decision when made. (Ord. 12196 § 45, 1996; Ord. 4461 § 14, 1979).

**20.24.300 Digest of decisions.** The examiner shall maintain and publish on a quarterly basis a digest of all decisions and recommendations of the examiner. Decisions reported in the digest shall not be construed to establish any legal precedent. (Ord. 11502 § 17, 1994).

**20.24.310 Citizens guide.** The examiner shall issue a citizen's guide on the office of hearing examiner including making an appeal or participating in a hearing. (Ord. 11502 § 18, 1994).

**20.24.320 Semi-annual report.** The chief examiner shall prepare a semi-annual report to the King County council detailing the length of time required for hearings in the previous six months, categorized both on average and by type of proceeding. The report shall provide commentary on examiner operations and identify any need for clarification of county policy or development regulations. The semi-annual report shall be presented to the council by March 1st and September 1st of each year. (Ord. 11502 § 1994).

**20.44.010 Definitions and abbreviations.**

A. King County adopts by reference the definitions contained in WAC 197-11-700 through 197-11-799.

In addition, the following definitions are adopted for this chapter:

1. "County council" means the county council described in Article 2 of the Home Rule Charter for King County or its duly authorized designee.

2. "County department" means any administrative office or executive department of King County, as described in K.C.C. 2.16.

3. "County executive" means any county executive described in Article 3 of the Home Rule Charter for King County or his or her duly authorized designee.

B. The following abbreviations are used in this chapter:

1. SEPA – State Environmental Policy Act

2. DNS – Determination of Non-Significance

3. DS – Determination of Significance

4. EIS – Environmental Impact Statement

(Ord. 6949 § 3, 1984).

**20.44.020 Lead agency.** The procedures and standards regarding lead agency responsibility contained in WAC 197-11-050 and WAC 197-11-922 through 197-11-948 are adopted, subject to the following:

A. The county department exercising initial jurisdiction over a private proposal or sponsoring a county project shall be responsible for performing the duties of the lead agency. The director of such department shall serve as the responsible official. Department directors may transfer lead agency and responsible official responsibility to any county department which agrees to perform as lead agency or may delegate such responsibility to divisions within their own departments.

B. With respect to actions initiated by the county council, the council shall refer such proposals to the county executive for designation of a county department as lead agency.

C. In the event of uncertainty or disagreement regarding lead agency status, the county executive shall designate the county department responsible for performing the function of lead agency. (Ord. 6949 § 4, 1984).

**20.44.030 Purpose and general requirements.** The procedures and standards regarding the timing and content of environmental review specified in WAC 197-11-055 through 197-11-100 are adopted subject to the following:

A. The optional provision of WAC 197-11-060(3)(c) is adopted.

B. Under WAC 197-11-100, the applicant shall prepare the initial environmental checklist, unless the lead agency specifically elects to prepare the checklist. The lead agency shall make a reasonable effort to verify the information in the environmental checklist and shall have the authority to determine the final content of the environmental checklist.

C. The department of development and environmental services may set reasonable deadlines for the submittal of information, studies, or documents necessary for, or subsequent to, threshold determinations. Failure to meet such deadlines shall cause the application to be deemed withdrawn, and plans or other data previously submitted for review may be returned to the applicant together with any unexpended portion of the application review fees. (Ord. 14449 § 4, 2002; Ord. 8998 § 1, 1989; Ord. 8236 § 1, 1987; Ord. 7990 § 35, 1987; Ord. 6949 § 5, 1984).

**20.44.040 Categorical exemptions and threshold determinations.**

A. King County adopts the standards and procedures specified in WAC 197-11-300 through 197-11-390 and 197-11-800 through 197-11-890 for determining categorical exemptions and making threshold determinations subject to the following:

1. The following exempt threshold levels are hereby established in accordance with WAC 197-11-800(1)(c) for the exemptions in WAC 197-11-800(1)(b):

a. The construction or location of any residential structures of twenty dwelling units within the boundaries of an urban growth area, or of any residential structures of eight dwelling units outside of the boundaries of an urban growth area;

b. The construction of a barn, loafing shed, farm equipment storage building, produce storage or packing structure, or similar agricultural structure, covering thirty thousand square feet on land zoned agricultural, or fifteen thousand square feet in all other zones, and to be used only by the property owner or his or her agent in the conduct of farming the property. This exemption shall not apply to feed lots;

c. The construction of an office, school, commercial, recreational, service or storage building with twelve thousand square feet of gross floor area, and with associated parking facilities designed for forty automobiles;

d. The construction of a parking lot designed for forty automobiles;

e. Any fill or excavation of five hundred cubic yards throughout the total lifetime of the fill or excavation and any fill or excavation classified as a class I, II, or III forest practice under RCW 76.09.050 or regulation thereunder. The categorical exemption threshold shall be one hundred cubic yards for any fill or excavation that is in an aquatic area, wetland, steep slope or landslide hazard area. If the proposed action is to remove from or replace fill in an aquatic area, wetland, steep slope or landslide hazard area to correct a violation, the threshold shall be five hundred cubic yards.

2. The determination of whether a proposal is categorically exempt shall be made by the county department that serves as lead agency for that proposal.

B. The mitigated DNS provision of WAC 197-11-350 shall be enforced as follows:

1. If the department issues a mitigated DNS, conditions requiring compliance with the mitigation measures which were specified in the application and environmental checklist shall be deemed conditions of any decision or recommendation of approval of the action.

2. If at any time the proposed mitigation measures are withdrawn or substantially changed, the responsible official shall review the threshold determination and, if necessary, may withdraw the mitigated DNS and issue a DS. (Ord. 16263 § 10, 2008: Ord. 14449 § 5, 2002: Ord. 12196 § 46, 1996: Ord. 11792 § 16, 1995: Ord. 9103, 1989: Ord. 8236 § 2, 1987: Ord. 6949 § 6, 1984).

**20.44.042 Planned actions.** The procedures and standards of WAC 197-11-164 through WAC 197-11-172 are adopted regarding the designation of planned actions. (Ord. 13131 § 4, 1998: Ord. 12196 § 47, 1996).

**20.44.050 Environmental impact statements and other environmental documents.** The procedures and standards for preparation of environmental impact statements and other environmental documents pursuant to WAC 197-11-400 through 197-11-460 and 197-11-600 through 197-11-640 are adopted, subject to the following:

A. Pursuant to WAC 197-11-408(2)(a), all comments on determinations of significance and scoping notices shall be in writing, except where a public meeting on EIS scoping occurs pursuant to WAC 197-11-410(1)(b).

B. Pursuant to WAC 197-11-420, 197-11-620, and 197-11-625, the county department acting as lead agency shall be responsible for preparation and content of EIS's and other environmental documents. The department shall contract with consultants as necessary for the preparation of environmental documents. The department may consider the opinion of the applicant regarding the qualifications of the consultant but the department shall retain sole authority for selecting persons or firms to author, co-author, provide special services or otherwise participate in the preparation of required environmental documents.

C. Consultants or subconsultants selected by King County to prepare environmental documents for a private development proposal shall not: act as agents for the applicant in preparation or acquisition of associated underlying permits; have a financial interest in the proposal for which the environmental document is being prepared; perform any work or provide any services for the applicant in connection with or related to the proposal.

D. The department shall establish and maintain one or more lists of qualified consultants who are eligible to receive contracts for preparation of environmental documents. Separate lists may be maintained to reflect specialized qualifications or expertise. When the department requires consultant services to prepare environmental documents, the department shall select a consultant from the lists and negotiate a contract for such services. The department director may waive these requirements as provided for in rules adopted to implement this section. Subject to K.C.C. 20.44.145 and pursuant to K.C.C. 2.98, the department of development and environmental services shall promulgate administrative rules prior to the effective date of Ordinance 8998\* that establish processes to: create and maintain a qualified consultant list; select consultants from the list; remove consultants from the list; provide a method by which applicants may request a reconsideration of selected consultants based upon costs, qualifications, or timely production of the environmental document; and waive the consultant selection requirements of this chapter on any basis provided by K.C.C. 4.16.

E. All costs of preparing the environment document shall be borne by the applicant. Subject to K.C.C. 20.44.145 and pursuant to K.C.C. 2.98, the department of development and environmental services shall promulgate administrative rules which establish a trust fund for consultant payment purposes, define consultant payment schedules, prescribe procedures for treating interest from deposited funds, and develop other procedures necessary to implement this chapter.

F. In the event an applicant decides to suspend or abandon the project, the applicant must provide formal written notice to the department and consultant. The applicant shall continue to be responsible for all monies expended by the division or consultants to the point of receipt of notification to suspend or abandon, or other obligations or penalties under the terms of any contract let for preparation of the environmental documents.

G. The department shall only publish an environmental impact statement (EIS) when it believes that the EIS adequately disclose: the significant direct, indirect, and cumulative adverse impacts of the proposal and its alternatives; mitigation measures proposed and committed to by the applicant, and their effectiveness in significantly mitigating impacts; mitigation measures that could be implemented or required; and unavoidable significant adverse impacts. Unless otherwise agreed to by the applicant, a final environmental impact statement shall be issued by the department within 270 days following the issuance of a DS for the proposal, except for public projects and nonproject actions, unless the department determines at the time of issuance of the DS that a longer time period will be required because of the extraordinary size of the proposal or the scope of the environmental impacts resulting therefrom; provided that the additional time shall not exceed ninety days unless agreed to by the applicant.

H. The following periods shall be excluded from the two hundred seventy day time period for issuing a final environmental impact statement:

1. Any time period during which the applicant has failed to pay required environmental review fees to the department;
2. Any period of time during which the applicant has been requested to provide additional information required for preparation of the environmental impact statement, and
3. Any period of time during which the applicant has not authorized the department to proceed with preparation of the environmental impact statement. (Ord. 12196 § 48, 1996; Ord. 8998 § 2, 1989; Ord. 6949 § 7, 1984).

**\*Reviser's note: The language in Ordinance 8998 read "the effective date of this ordinance." Ordinance 8998, Section 6, read in part "section 1, 3, 4, 6 and 7 of this ordinance shall become effective 10 days after enactment [enacted June 14, 1989, effective June 24, 1989]. Sections 2 and 5 shall become effective January 1, 1990."**

**21A.06.060 Amusement arcades.** Amusement arcades: a building or part of a building in which five or more pinball machines, video games, or other such player-operator amusement devices (excluding juke boxes or gambling-related machines) are operated. (Ord. 10870 § 52, 1993).

**21A.06.065 Animal, small.** Animal, small: any animal other than livestock or animals considered to be predatory or wild which are kept outside a dwelling unit all or part of the time. Animals considered predatory or wild, excluding those in zoo animal breeding facilities, shall be considered small animals when they are taken into captivity for the purposes of breeding, domestication, training, hunting or exhibition. (Ord. 12709 § 1, 1997; Ord. 10870 § 53, 1993).

**21A.06.067 Antenna.** Antenna: any system of poles, panels, rods, reflecting discs or similar devices used for the transmission or reception of radio frequency signals. (Ord. 13129 § 20, 1998).

**21A.06.070 Applicant.** Applicant: a property owner, a public agency or a public or private utility that owns a right-of-way or other easement or has been adjudicated the right to such an easement under RCW 8.08.040, or any person or entity designated or named in writing by the property or easement owner to be the applicant, in an application for a development proposal, permit or approval. (Ord. 15051 § 6, 2004; Ord. 12196 § 53, 1996; Ord. 11700 § 42, 1995; Ord. 10870 § 54, 1993).

**21A.06.072 Application rate.** Application rate: the depth of water applied to an area expressed in inches per hour. (Ord. 11210 § 24, 1994).

**21A.06.072B Aquaculture.** Aquaculture: the culture or farming of fin fish, shellfish, algae or other plants or animals in fresh or marine waters. Aquaculture does not include: related commercial or industrial uses such as wholesale or retail sales; or final processing, packing or freezing. (Ord. 16985 § 133, 2010; Ord. 6511 § 1, 1983; Ord. 4222 § 1, 1979; Ord. 3688 § 202, 1978. Formerly K.C.C. 25.08.030).

**21A.06.072C Aquatic area.** Aquatic area: any nonwetland water feature including all shorelines of the state, rivers, streams, marine waters, inland bodies of open water including lakes and ponds, reservoirs and conveyance systems and impoundments of these features if any portion of the feature is formed from a stream or wetland and if any stream or wetland contributing flows is not created solely as a consequence of stormwater pond construction. "Aquatic area" does not include water features that are entirely artificially collected or conveyed storm or wastewater systems or entirely artificial channels, ponds, pools or other similar constructed water features. (Ord. 15051 § 7, 2004).

**21A.06.073 Artist studio.** Artist studio: an establishment providing a place solely for the practice or rehearsal of various performing or creative arts; including, but not limited to, acting, dancing, singing, drawing, painting and sculpting. (Ord. 13022 § 1, 1998).

**21A.06.075 Auction house.** Auction house: an establishment where the property of others is sold by a broker or auctioneer to persons who attend scheduled sales periods or events. (Ord. 10870 § 55, 1993).

**21A.06.078 Bank stabilization.** Bank stabilization: an action taken to minimize or avoid the erosion of materials from the banks of rivers and streams. (Ord. 15051 § 8, 2004).

**21A.06.080 Base flood.** Base flood: a flood having a one percent chance of being equaled or exceeded in any given year, often referred to as the "100-year flood." (Ord. 10870 § 56, 1993).

**21A.06.085 Base flood elevation.** Base flood elevation: the water surface elevation of the base flood in relation to the National Geodetic Vertical Datum of 1929. (Ord. 10870 § 57, 1993).

**21A.06.087 Basement.** Basement: for purposes of development proposals in a flood hazard area, any area of a building where the floor subgrade is below ground level on all sides (Ord. 15051 § 9, 2004).

**21A.06.451 Farm field access drive.** Farm field access drive: an impervious surface constructed to provide a fixed route for moving livestock, produce, equipment or supplies to and from farm fields and structures. (Ord. 15051 § 41, 2004).

**21A.06.451A Farm pad.** Farm pad; an artificially created mound of earth or an elevated platform placed within a flood hazard area and constructed to an elevation that is above the base flood elevation to provide an area of refuge for livestock or small animals, and for storage of farm vehicles, agricultural equipment and shelter for farm products including, but not limited to, feed, seeds, flower bulbs and hay. (Ord. 16172 § 1, 2008).

**21A.06.452 Feasible.** Feasible: capable of being done or accomplished. (Ord. 15051 § 40, 2004).

**21A.06.453 Federal Emergency Management Agency.** Federal Emergency Management Agency: the independent federal agency that, among other responsibilities, oversees the administration of the National Flood Insurance Program. (Ord. 15051 § 42, 2004).

**21A.06.454 FEMA.** FEMA: the Federal Emergency Management Agency. (Ord. 15051 § 43, 2004).

**21A.06.455 FEMA floodway.** FEMA floodway: the channel of the stream and that portion of the adjoining floodplain that is necessary to contain and discharge the base flood flow without increasing the base flood elevation more than one foot. (Ord. 15051 § 44, 2004: Ord. 10870 § 131, 1993).

**21A.06.460 Feed store.** Feed store: an establishment engaged in retail sale of supplies directly related to the day to day activities of agricultural production. (Ord. 10870 § 132, 1993).

**21A.06.464 Fen.** Fen: a wetland that receives some drainage from surrounding mineral soil and includes peat formed mainly from Carex and marsh-like vegetation. (Ord. 15051 § 45, 2004).

**21A.06.465 Fence.** Fence: a barrier for the purpose of enclosing space or separating lots, composed of:  
A. Masonry or concrete walls, excluding retaining walls; or  
B. Wood, metal or concrete posts connected by boards, rails, panels, wire or mesh. (Ord. 10870 § 133, 1993).

**21A.06.467 Financial guarantee.** Financial guarantee means a form of financial security posted to ensure timely and proper completion of improvements, to ensure compliance with the King County Code, and/or to warranty materials, workmanship of improvements, and design. Financial guarantees include assignments of funds, cash deposit, and surety bonds, and or other forms of financial security acceptable to the director. For the purposes of this title, the terms performance guarantee, maintenance guarantee, and defect guarantee are considered sub-categories of financial guarantee. (Ord. 12020 § 32, 1995).

**21A.06.469 Float.** Float: a structure or device that is not a breakwater and that is moored, anchored or otherwise secured in the waters of King County and is not connected to the shoreline. (Ord. 16985 § 74, 2010: Ord. 3688 § 220, 1978. Formerly K.C.C. 25.08.210).

**21A.06.470 Flood fringe, zero-rise.** Flood fringe, zero-rise: that portion of the floodplain outside of the zero-rise floodway. The zero-rise flood fringe is generally associated with standing water rather than rapidly flowing water. (Ord. 15051 § 46, 2004: Ord. 10870 § 134, 1993).

**21A.06.475 Flood hazard area.** Flood hazard area: any area subject to inundation by the base flood or risk from channel migration including, but not limited to, an aquatic area, wetland or closed depression. (Ord. 15051 § 47, 2004: Ord. 11621 § 31, 1994: 10870 § 135, 1993).

**21A.06.476 Flood Hazard Boundary Map.** Flood Hazard Boundary Map: the initial insurance map issued by FEMA that identifies, based on approximate analyses, the areas of the one percent annual chance, one-hundred-year, flood hazard within a community. (Ord. 15051 § 48, 2004).

**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.06.738 Master program, shoreline.** Master program, shoreline: the comprehensive shoreline use plan for King County consisting of:

- A. The King County shoreline management goals and policies, set forth in King County Comprehensive Plan Chapter 5, that guide environmental designations, shoreline protection, shoreline use and shoreline modifications; and
- B. The development regulations identified in K.C.C. 20.12.205. (Ord. 16985 § 80, 2010; Ord. 3688 § 228, 1978. Formerly K.C.C. 25.08.290).

**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)

**21A.06.743 Maximum extent practical.** Maximum extent practical: the highest level of effectiveness that can be achieved through the use of best available science or technology. In determining what is the "maximum extent practical," the department shall consider, at a minimum, the effectiveness, engineering feasibility, commercial availability, safety and cost of the measures. (Ord. 15051 § 76, 2004).

**21A.06.745 Microwave.** Microwave: electromagnetic waves with a frequency range of 300 megahertz (MHz) to 300 gigahertz (GHz). (Ord. 10870 § 189, 1993).

**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.06.796 Navigability or navigable.** Navigability or navigable: the capability of susceptibility of a body of water of having been or being used for the transport of useful commerce. The state of Washington considers all bodies of water meandered by government surveyors as navigable unless otherwise declared by a court. (Ord. 16985 § 81, 2010).

**21A.06.796A Nearshore.** Nearshore: the area beginning at the crest of coastal bluffs and extending seaward through the marine photic zone, and to the head of tide in coastal rivers and streams. Nearshore includes estuaries. (Ord. 16985 § 82, 2010).

**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.06.799 No net loss of shoreline ecological function.** No net loss of shoreline ecological function: the maintenance of the aggregate total of King County shoreline ecological functions over time. The no net loss standard in WAC 173-26-186 requires that the impacts of shoreline use or development, whether permitted or exempt from permit requirements, be identified and mitigated such that there are no resulting adverse impacts on ecological functions or processes. (Ord. 16985 § 127, 2010).

**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.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).

**Chapter 21A.22**  
**DEVELOPMENT STANDARDS - MINERAL EXTRACTION**

**Sections:**

- 21A.22.010 Purpose.
- 21A.22.020 Applicability of chapter.
- 21A.22.030 Grading permits required.
- 21A.22.035 Community meeting.
- 21A.22.040 Nonconforming mineral extraction operations.
- 21A.22.050 Periodic review.
- 21A.22.060 Site design standards.
- 21A.22.070 Operating conditions and performance standards.
- 21A.22.081 Reclamation.
- 21A.22.085 Mitigation and monitoring.
- 21A.22.090 Financial guarantees.

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**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 shall establish a schedule for conformance during the first periodic review of the nonconforming mineral extraction operation and incorporated into the permit conditions. (15032 § 27, 2004: Ord. 10870 § 442, 1993).

**21A.22.050 Periodic review.**

A. In addition to the review conducted as part of the annual renewal of a mineral extraction operating permit or materials processing permit, the department shall conduct a periodic review of mineral extraction and materials processing operation site design and operating standards at five-year intervals.

B. The periodic review is a Type 2 land use decision.

C. The periodic review shall determine:

1. Whether the site is operating consistent with all existing permit conditions; and
2. That the most current site design and operating standards are applied to the site through additional or revised permit conditions as necessary to mitigate identifiable environmental impacts. (Ord 15032 § 28, 2004; Ord. 11157 § 21, 1993; Ord. 10870 § 443, 1993).

**21A.22.060 Site design standards.** Except as otherwise provided for nonconforming mineral extraction operations in K.C.C. 21A.22.040, in addition to requirements in this title, all mineral extraction and materials processing operations shall comply with the following standards:

A. The minimum site area of a mineral extraction or materials processing operation shall be ten acres;

B. Mineral extraction or materials processing operations on sites larger than twenty acres shall occur in phases to minimize environmental impacts. The size of each phase shall be determined during the review process;

C. If the department determines they are necessary to eliminate a safety hazard, fences or alternatives to fences approved by the department, shall be:

1. Provided in a manner that discourages access to areas of the site where:
  - a. active extracting, processing, stockpiling and loading of materials is occurring;
  - b. boundaries are in common with residential or commercial zone property or public lands; or
  - c. any unstable slope or any slope exceeding a grade of forty percent is present;
2. At least six feet in height above the grade measured at a point five feet outside the fence and the fence material shall have no opening larger than two inches;
3. Installed with lockable gates at all openings or entrances;
4. No more than four inches from the ground to fence bottom; and
5. Maintained in good repair;

D. Warning and trespass signs advising of the mineral extraction or materials processing operation shall be placed on the perimeter of the site adjacent to RA, UR or R zones at intervals no greater than two hundred feet along any unfenced portion of the site where the items noted in subsection C.1.a. through c. of this section are present;

E. Structural setbacks from property lines shall be as follows:

1. Buildings, structures and stockpiles used in the processing of materials shall be no closer than:
  - a. one hundred feet from any residential zoned properties except that the setback may be reduced to fifty feet when the grade where such building or structures are proposed is fifty feet or greater below the grade of the residential zoned property;
  - b. fifty feet from any other zoned property, except when adjacent to another mineral extraction or materials processing site;
  - c. the greater of fifty feet from the edge of any public street or the setback from residential zoned property on the far side of the street; and
2. Offices, scale facilities, equipment storage buildings and stockpiles, including those for reclamation, shall not be closer than fifty feet from any property line except when adjacent to another mineral extraction or materials processing site or M or F zoned property. Facilities necessary to control access to the site, when demonstrated to have no practical alternative, may be located closer to the property line;

F. On-site clearing, grading or excavation, excluding that necessary for required access, roadway or storm drainage facility construction or activities in accordance with an approved reclamation plan, shall not be permitted within fifty feet of any property line except along any portion of the perimeter adjacent to another mineral extraction or materials processing operation or M or F zoned property. If native vegetation is restored, temporary disturbance resulting from construction of noise attenuation features located closer than fifty feet shall be permitted;

G. Landscaping consistent with type 1 screening K.C.C. chapter 21A.16, except using only plantings native to the surrounding area, shall be provided along any portion of the site perimeter where disturbances such as site clearing and grading, or mineral extraction or materials processing is performed, except where adjacent to another mineral extraction, materials processing or forestry operation or M or F-zoned property;

H. Relevant clearing and grading operating standards from K.C.C. chapter 16.82 shall be applied; and

I. Lighting shall:

1. Be limited to that required for security, lighting of structures and equipment, and vehicle operations; and

2. Not directly glare onto surrounding properties. (Ord. 15032 § 29, 2004: Ord. 11621 § 67, 1994: 11157 § 22, 1993: Ord. 10870 § 444, 1993).

**21A.22.070 Operating conditions and performance standards.** Operating conditions and performance standards shall be as specified in K.C.C. chapter 16.82 except:

A. Noise levels produced by a mineral extraction or materials processing operation shall not exceed levels specified by K.C.C. chapters 12.86, 12.87, 12.88, 12.90, 12.91, 12.92, 12.94, 12.96, 12.98, 12.99 and 12.100;

B. Blasting shall be conducted under an approved blasting plan:

1. Consistent with the methods specified in the office of surface mining, 1987 Blasting Guidance Manual in a manner that protects from damage all structures, excluding those owned and directly used by the operator, and persons in the vicinity of the blasting area, including, but not limited to, adherence to the following:

a. Airblast levels shall not exceed one hundred thirty-three dBL measured by a two Hz or lower flat response system at the nearest residential property or place of public assembly;

b. Flyrock shall not be cast one-half the distance to the nearest residential property, place of public assembly or the property boundary, whichever is less; and

c. Ground motion shall not exceed ground vibration levels damaging to structures using one of the four accepted methods in the Blasting Guidance Manual;

2. During daylight hours; and

3. According to a time schedule, provided to residents within one-half mile of the site, that features regular or predictable times, except in the case of an emergency. If requested by a resident, the operator shall provide notice of changes in the time schedule at least twenty four hours before the changes take effect;

C.1. Dust and smoke produced by mineral extraction and materials processing operations shall be controlled by best management practices to comply with relevant regulations of the Puget Sound Clean Air Agency.

2. Dust and smoke from process facilities shall be controlled in accordance with a valid operating permit from the Puget Sound Clean Air Agency. Copies of the permit shall be kept onsite and available for department and public inspection. Copies of the Puget Sound Clean Air Agency monitoring results shall be provided to the department on permit monitoring data submittal dates.

3. Dust and smoke from process facilities shall not significantly increase the existing levels of suspended particulates at the perimeter of the site;

D. The applicant shall prevent rocks, dirt, mud and any raw or processed material from spilling from or being tracked by trucks onto public roadways and shall be responsible for cleaning debris or repairing damage to roadways caused by the operation;

E. The applicant shall provide traffic control measures such as flaggers or warning signs as determined by the department during all hours of operation;

F. The operator shall control surface water and site discharges to comply with K.C.C. chapter 9.04 and the surface water design manual and K.C.C. chapter 9.12 and the stormwater pollution prevention manual. For the life of the mineral resource operation and until site reclamation is complete, the operator shall maintain a valid Washington state department of ecology National Pollutant Discharge Elimination System individual permit or maintain coverage under the sand and gravel general permit. The operator shall keep onsite and available for department review copies of the erosion and sediment control plan, the applicable National Pollution Discharge Elimination System individual or general permit and the Stormwater Pollution Prevention Plan. The operator shall make the plans and permit available for public inspection upon request. The operator shall provide to the department copies of the monitoring results on permit monitoring data submittal dates. The department shall make the monitoring results available for public inspection. If the department determines that National Pollution Discharge Elimination System monitoring frequency or type is not adequate to meet the demands of the site and the requirements of this subsection, the department may require more frequent and detailed monitoring and may require a program designed to bring the site into compliance;

G. The operator shall not excavate below the contours determined through hydrologic studies necessary to protect groundwater and the upper surface of the saturated groundwater that could be used for potable water supply;

H. If contamination of surface or ground water by herbicides is possible, to the maximum extent practicable, mechanical means shall be used to control noxious weeds on the site;

I. Upon depletion of mineral resources or abandonment of the site, the operator shall remove all structures, equipment and appurtenances accessory to operations; and

J. If the operator fail to comply with this section, the department shall require modifications to operations, procedures or equipment until compliance is demonstrated to the satisfaction of the department. If the modifications are inconsistent with the approved permit conditions, the department shall revise the permit accordingly. (Ord. 15032 § 30, 2004: Ord. 11621 § 68, 1994: Ord. 10870 § 445, 1993).

#### **21A.22.081 Reclamation**

A. A valid clearing and grading permit shall be maintained on a mineral extraction site until the reclamation of the site required under chapter 78.44 RCW is completed.

B. A reclamation plan approved in accordance with chapter 78.44 RCW shall be submitted before the effective date of a zone reclassification in Mineral-zoned properties or the acceptance of any development proposal for a subsequent use in Forest-zoned properties. The zone reclassification shall grant potential zoning that is only to be actualized, under K.C.C. chapter 20.24, upon demonstration of successful completion of all requirements of the reclamation plan. Development proposals in the Forest zone for uses subsequent to mineral extraction operations shall not be approved until demonstration of successful completion of all requirements of the reclamation plan except that forestry activities may be permitted on portions of the site already fully reclaimed.

C. Mineral extraction operations that are not required to have an approved reclamation plan under chapter 78.44 RCW shall meet the following requirements:

1. Upon the exhaustion of minerals or materials or upon the permanent abandonment of the quarrying or mining operation, all nonconforming buildings, structures, apparatus or appurtenances accessory to the quarrying and mining operation shall be removed or otherwise dismantled to the satisfaction of the director;

2. Final grades shall:

a. be such so as to encourage the uses permitted within the primarily surrounding zone or, if applicable, the underlying or potential zone classification; and

b. result in drainage patterns that reestablish natural conditions of water velocity, volume, and turbidity within six months of reclamation and that precludes water from collecting or becoming stagnant. Suitable drainage systems approved by the department shall be constructed or installed where natural drainage conditions are not possible or where necessary to control erosion. All constructed drainage systems shall be designed consistent with the Surface Water Design Manual;

3. All areas subject to grading or backfilling shall:
    - a. incorporate only nonnoxious, nonflammable, noncombustible and nonputrescible solids; and
    - b. except for roads and areas incorporated into drainage facilities, be surfaced with soil of a quality at least equal to the topsoil of the land areas immediately surrounding, and to a depth of the topsoil of land area immediately surrounding six inches, whichever is greater. The topsoil layer shall have an organic matter content of eight to thirteen percent and a pH of 6.0 to 8.0 or matching the pH of the original undisturbed soil layer. Compacted areas such as pit floors or compacted fill shall be tilled or scarified prior to topsoil placement;
  4. All reclaimed slopes shall comprise an irregular sinuous appearance in both profile and plan view and blend with adjacent topography to a reasonable extent;
  5. Where excavation has penetrated the seasonal or permanent water table creating a water body or wetland:
    - a. All side slopes below the permanent water table and banks shall be graded or shaped as to not constitute a safety hazard;
    - b. Natural features and plantings to provide beneficial wetland functions and promote wildlife habitat shall be provided; and
    - c. Appropriate drainage controls shall be provided to stabilize the water level and not create potential flooding hazards;
  6. All cleared, graded or backfilled areas, including areas surfaced with topsoil, shall be planted with a variety of trees, shrubs, legumes and grasses indigenous to the surrounding area and appropriate for the soil, moisture and exposure conditions;
  7. Waste or soil piles shall be used for grading, backfilling or surfacing if permissible under this section, then covered with topsoil and planted in accordance with subsection C.3. and 6. of this section. Waste or soil piles not acceptable to be used for fill in accordance with this chapter or as top soil in accordance with subsection C.3. of this section shall be removed from the site; and
  8. Where excavation has exposed natural materials that may create polluting conditions, including but not limited to acid-forming coals and metalliferous rock or soil, such conditions shall be addressed to the satisfaction of the department. The final ground surface shall be graded so that surface water drains away from any such materials remaining on the site.
- D. The department may modify any requirement of this section when not applicable or if it conflicts with an approved subsequent use for the site. (Ord. 15032 § 32, 2004; Ord. 14199 § 223, 2001; Ord. 3108 § 9, 1977; Ord. 1488 § 12, 1973. Formerly 16.82.110).

**21A.22.085 Mitigation and monitoring.** The applicant shall mitigate adverse impacts resulting from the extraction or processing operations and monitor to demonstrate compliance with this chapter. (Ord. 15032 § 34, 2004).

**21A.22.090 Financial guarantees.** Financial guarantees shall be required consistent with K.C.C. Title 27A. (Ord. 15032 § 35, 2004; Ord. 12020 § 53, 1995; Ord. 11157 § 24, 1993; Ord. 10870 § 447, 1993).

**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.

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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 of 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

5. The face of the recorded subdivision, short subdivision, urban planned development or binding site plan shall include the following for all lots:

- a. building setback areas restricting structures to designated buildable areas;
- b. base flood data and sources and flood hazard notes including, but not limited to, base flood elevation, required flood protection elevations, the boundaries of the floodplain and the zero-rise floodway, if determined, and channel migration zone boundaries, if determined; and

c. include the following notice:

"Lots and structures located within flood hazard areas may be inaccessible by emergency vehicles during flood events. Residents and property owners should take appropriate advance precautions.";

E. New residential structures and substantial improvements of existing residential structures shall meet the following standards:

- 1. Elevate the lowest floor, including basement, to the flood protection elevation;
- 2. Do not fully enclose portions of the structure that are below the lowest floor area;
- 3. Design and construct the areas and rooms below the lowest floor to automatically equalize hydrostatic and hydrodynamic flood forces on exterior walls by allowing for the entry and exit of floodwaters as follows:

- a. provide a minimum of two openings on each of two opposite side walls in the direction of flow, with each of those walls having a total open area of not less than one square inch for every square foot of enclosed area subject to flooding;

- b. design and construct the bottom of all openings so they are no higher than one foot above grade; and

- c. screens, louvers or other coverings or devices are allowed over the opening if they allow the unrestricted entry and exit of floodwaters;

- 4. Use materials and methods that are resistant to and minimize flood damage; and

- 5. Elevate above or dry-proof all electrical, heating, ventilation, plumbing, air conditioning equipment and other utilities that service the structure, such as duct-work to the flood protection elevation;

F. New nonresidential structures and substantial improvements of existing nonresidential structures shall meet the following standards:

- 1. Elevate the lowest floor to the flood protection elevation;

- 2. Dry flood-proof the structure to the flood protection elevation to meet the following standards:

- a. the applicant shall provide certification by a civil or structural engineer that the dry flood-proofing methods are adequate to withstand the flood-depths, pressures, velocities, impacts, uplift forces and other factors associated with the base flood. After construction, the engineer shall certify that the permitted work conforms to the approved plans and specifications; and

- b. approved building permits for dry flood-proofed nonresidential structures shall contain a statement notifying applicants that flood insurance premiums are based upon rates for structures that are one foot below the elevation to which the building is dry-floodproofed;

- 3. Nonresidential agricultural accessory buildings that do not equal or exceed a maximum assessed value of sixty-five thousand dollars may be designed and oriented to allow the free passage of floodwaters through the building in a manner affording minimum flood damage provided they meet the standards in subsection F.4. through F.6. of this section. Nonresidential agricultural accessory buildings that equal or exceed sixty-five thousand dollars may apply for an alteration exception pursuant to K.C.C. 21A.24.070. Nonresidential agricultural accessory buildings that do not meet the elevation standard in subsection F. 1. of this section or the dry flood-proofing standard in subsection F.2. of this section will be assessed at the flood insurance rate based on the risk to which the building is exposed;

- 4. Use materials and methods that are resistant to and minimize flood damage;

- 5. Design and construct the areas and rooms below the lowest floor to automatically equalize hydrostatic and hydrodynamic flood forces on exterior walls by allowing for the entry and exit of floodwaters as follows:

- a. provide a minimum of two openings on each of two opposite side walls in the direction of flow, with each of those walls having a total open area of not less than one square inch for every square foot of enclosed area subject to flooding;

- b. design the bottom of all openings is no higher than one foot above grade; and

- c. screens, louvers or other coverings or devices are allowed if they do not restrict entry and exit of floodwaters; and

- 6. Dry flood proof all electrical, heating, ventilation, plumbing, air conditioning equipment and other utility and service facilities to, or elevated above, the flood protection elevation;

G. Anchor all new construction and substantially improved structures to prevent flotation, collapse or lateral movement of the structure. The department shall approve the method used to anchor the new construction;

H. Newly sited manufactured homes and substantial improvements of existing manufactured homes shall meet the following standards:

1. Manufactured homes shall meet all the standards in this section for residential structures and the following standards:

- a. anchor all manufactured homes; and
  - b. install manufactured homes using methods and practices that minimize flood damage;
2. All manufactured homes within a new mobile home park or expansion of an existing mobile home park must meet the requirements for flood hazard protection for residential structures; and
3. Only manufactured homes are allowed in a new or existing mobile home park located in a flood hazard area;

I. Public and private utilities shall meet the following standards:

1. Dry flood-proof new and replacement utilities including, but not limited to, sewage treatment and storage facilities, to, or elevate above, the flood protection elevation;

2. Locate new on-site sewage disposal systems outside the floodplain. When there is insufficient area outside the floodplain, new on-site sewage disposal systems are allowed only in the zero-rise flood fringe. Locate on-site sewage disposal systems in the zero-rise flood fringe to avoid:

- a. impairment to the system during flooding;
  - b. contamination from the system during flooding;
3. Design all new and replacement water supply systems to minimize or eliminate infiltration of floodwaters into the system;

4. Above-ground utility transmission lines, except for electric transmission lines, are allowed only for the transport of nonhazardous substances; and

5. Bury underground utility transmission lines transporting hazardous substances at a minimum depth of four feet below the maximum depth of scour for the base flood, as predicted by a civil engineer, and achieve sufficient negative buoyancy so that any potential for flotation or upward migration is eliminated;

J. Critical facilities are allowed within the zero-rise flood fringe only when a feasible alternative site is not available and the following standards are met:

1. Elevate the lowest floor to the five-hundred year floodplain elevation or three or more feet above the base flood elevation, whichever is higher;

2. Dry flood-proof and seal structures to ensure that hazardous substances are not displaced by or released into floodwaters; and

3. Elevate access routes to or above the base flood elevation from the critical facility to the nearest maintained public street or roadway;

K. New construction or expansion of existing farm pads is allowed only as follows:

1. A farm pad is allowed only if there is no other suitable holding area on the site outside the floodplain;

2. Construct the farm pad to the standards in an approved farm management plan prepared in accordance with K.C.C. 21A.24.051 and K.C.C. chapter 21A.30. The farm management plan shall demonstrate compliance with the following:

- a. flood storage compensation consistent with subsection A. of this section;
- b. siting and sizing that do not increase base flood elevations consistent with K.C.C. 21A.24.250.B.; and
- c. siting that is located in the area least subject to risk from floodwaters;

L. New construction or expansion of existing livestock manure storage facilities is only allowed as follows:

1. The livestock manure storage facility is only allowed if there is not a feasible alternative area on the site outside the floodplain;

2. Construct the livestock manure storage facility to the standards in an approved farm management plan prepared in accordance with K.C.C. 21A.24.051 and K.C.C. chapter 21A.30. The farm management plan shall demonstrate compliance with the following:

- a. flood storage compensation consistent with subsection A. of this section;

- b. siting and sizing that do not increase base flood elevations consistent with K.C.C. 21A.24.250.B. and 21A.24.260.D;
  - c. dry flood-proofing to the flood protection elevation; and
  - d. siting that is located in the area least subject to risk from floodwaters; and
- M. Recreational vehicles must be on site for fewer than one hundred eighty days or be fully licensed and ready for highway use. (Ord. 16686 § 3, 2009: Ord. 16267 § 44, 2008: Ord. 16172 § 4, 2008: Ord. 15051 § 162, 2004: Ord. 11621 § 76, 1994: Ord. 10870 § 471, 1993).

**21A.24.250 Zero-rise floodway — development standards and alterations.** The following development standards apply to development proposals and alterations on sites within the zero-rise floodway:

- A. The development standards that apply to the zero-rise flood fringe also apply to the zero-rise floodway. The more restrictive requirements shall apply where there is a conflict;
- B. A development proposal shall not increase the base flood elevation except as follows:
  - 1. Revisions to the Flood Insurance Rate Map are approved by FEMA, in accordance with 44 CFR 70, to incorporate the increase in the base flood elevation; and
  - 2. Appropriate legal documents are prepared and recorded in which all property owners affected by the increased flood elevations consent to the impacts on their property;
- C. If post and piling construction techniques are used, the following are presumed to produce no increase in the base flood elevation and a critical areas report is not required to establish this fact:
  - 1. New residential structures outside the FEMA floodway on lots in existence before November 27, 1990, that contain less than five thousand square feet of buildable land outside the zero-rise floodway if the total building footprint of all existing and proposed structures on the lot does not exceed two-thousand square feet;
  - 2. Substantial improvements of existing residential structures in the zero-rise floodway, but outside the FEMA floodway, if the footprint is not increased; or
  - 3. Substantial improvements of existing residential structures that meet the standards for new residential structures in K.C.C. 21A.24.240.E;
- D. When post or piling construction techniques are not used, a critical areas report is required in accordance with K.C.C. 21A.24.110 demonstrating that the proposal will not increase the base flood elevation;
- E. During the flood season from September 30 to May 1 the following are not allowed to be located in the zero-rise floodway;
  - 1. All temporary seasonal shelters, such as tents, awnings and greenhouses, except for those used for agricultural activities and domestic household use; and
  - 2. Staging or stockpiling of equipment, materials or substances that the director determines may be hazardous to the public health, safety or welfare except for those used for agricultural activities and domestic household use;
- F. New residential structures and substantial improvements to existing residential structures or any structure accessory to a residential use shall meet the following standards:
  - 1. Locate the structures outside the FEMA floodway;
  - 2. Locate the structures only on lots in existence before November 27, 1990, that contain less than five thousand square feet of buildable land outside the zero-rise floodway; and
  - 3. To the maximum extent practical, locate the structures the farthest distance from the channel, unless the applicant can demonstrate that an alternative location is less subject to risk;
- G. Public and private utilities are only allowed if:
  - 1. The department determines that a feasible alternative site is not available;
  - 2. A waiver is granted by the Seattle-King County department of public health for new on-site sewage disposal facilities;
  - 3. The utilities are dry flood-proofed to or elevated above the flood protection elevation;
  - 4. Above-ground utility transmission lines, except for electrical transmission lines, are only allowed for the transport of nonhazardous substances; and

5. Underground utility transmission lines transporting hazardous substances are buried at a minimum depth of four feet below the maximum depth of scour for the base flood, as predicted by a civil engineer, and achieve sufficient negative buoyancy so that any potential for flotation or upward migration is eliminated;

H. Critical facilities, except for those listed in subsection I. of this section are not allowed within the zero-rise floodway; and

I. Structures and installations that are dependent upon the zero-rise floodway are allowed in the zero-rise floodway if the development proposal is approved by all agencies with jurisdiction and meets the development standards for the zero-rise floodway. These structures and installations may include, but are not limited to:

1. Dams or diversions for water supply, flood control, hydroelectric production, irrigation or fisheries enhancement;
2. Flood damage reduction facilities, such as levees, revetments and pumping stations;
3. Stream bank stabilization structures only if a feasible alternative does not exist for protecting structures, public roadways, flood protection facilities or sole access routes. Bank stabilization projects must be consistent with the Integrated Streambank Protection Guidelines (Washington State Aquatic Habitat Guidelines Program, 2002) and use bioengineering techniques to the maximum extent practical. An applicant may use alternative methods to the guidelines if the applicant demonstrates that the alternative methods provide equivalent or better structural stabilization, ecological and hydrological functions and salmonid habitat;
4. Surface water conveyance facilities;
5. Boat launches and related recreation structures;
6. Bridge piers and abutments; and
7. Approved aquatic area or wetland restoration projects including, but not limited to, fisheries enhancement projects. (Ord. 16686 § 4, 2009; Ord. 16267 § 45, 2008; Ord. 15051 § 163, 2004; Ord. 10870 § 472, 1993).

**21A.24.260 FEMA floodway — development standards and alterations.**

A. The development standards that apply to the zero-rise floodway also apply to the FEMA floodway. The more restrictive standards apply where there is a conflict.

B. A development proposal shall not increase the base flood elevation. A civil engineer shall certify, through hydrologic and hydraulic analyses performed in accordance with standard engineering practice, that any proposed encroachment would not result in any increase in flood levels during the occurrence of the base flood discharge.

C. New residential or nonresidential structures are prohibited within the mapped FEMA floodway, except for farm pads and nonresidential agricultural accessory buildings within an agricultural production district that meet applicable compensatory storage and conveyance standards. Until March 31, 2010, the size of a new nonresidential agriculture accessory building is limited to a footprint of five thousand square feet. A residential structure cannot be constructed on fill placed within the mapped FEMA floodway.

D. Manure storage facilities are prohibited in the FEMA floodway;

E. If the footprint of the existing residential structure is not increased, substantial improvements of existing residential structures in the FEMA floodway, meeting the requirements of WAC 173-158-070, as amended, are presumed to not increase the base flood elevation and do not require a critical areas report to establish this fact.

F. Maintenance, repair, replacement or improvement of an existing residential structure located within the agricultural production district on property that is zoned agriculture (A) is allowed in the FEMA floodway if the structure meets the standards for residential structures and utilities in K.C.C. 21A.24.240 and also meets the following requirements:

1. The existing residential structure was legally established;
2. The viability of the farm is dependent upon a residential structure within close proximity to other agricultural structures; and
3. Replacing an existing residential structure within the FEMA floodway is only allowed if:
  - a. there is not sufficient buildable area on the site outside the FEMA floodway for the replacement;
  - b. the replacement residential structure is not located in an area that increases the flood hazard in water depth, velocity or erosion;

c. the building footprint of the existing residential structure is not increased; and  
 d. the existing structure, including the foundation, is completely removed within ninety days of receiving a certificate of occupancy, or temporary certificate of occupancy, whichever occurs first, for the replacement structure.

G. Maintenance, repair or replacement of a substantially damaged existing residential structure, other than a residential structure located within the agricultural production district on property that is zoned agricultural (A), is allowed in the FEMA floodway if the structure meets the standards for existing residential structures and utilities in K.C.C. 21A.24.240 and also meets the following requirements:

1. The Washington state Department of Ecology has assessed the flood characteristics of the site and determined:

a. base flood depths will not exceed three feet;  
 b. base flood velocities will not exceed three feet per second;  
 c. there is no evidence of flood-related erosion, as determined by location of the project site in relationship to mapped channel migration zones or, if the site is not mapped, evidence of overflow channels and bank erosion; and  
 d. a flood warning system or emergency plan is in operation;

2. The Washington state Department of Ecology has prepared a report of findings and recommendations to the department that determines the repair or replacement will not result in an increased risk of harm to life based on the characteristics of the site;

3. The department has reviewed the Washington state Department of Ecology report and concurs that the development proposal is consistent with the findings and recommendations in the report;

4. The development proposal is consistent with the findings and recommendations of the Washington state Department of Ecology report;

5. The existing residential structure was legally established; and

6. Replacing an existing residential structure within the FEMA floodway is only allowed if:

a. there is not sufficient buildable area on the site outside the FEMA floodway;  
 b. the replacement structure is a residential structure built as a substitute for a previously existing residential structure of equivalent use and size; and  
 c. the existing residential structure, including the foundation, is removed within ninety days of receiving a certificate of occupancy, or temporary certificate of occupancy, whichever occurs first, for the replacement structure.

H. Maintenance or repair of a structure, as defined in WAC 173-158-030, that is identified as a historic resource, as defined in K.C.C. 21A.06.597, is allowed in the FEMA floodway if the structure and utilities meet the standards of K.C.C. 21A.24.240 for residential structures or nonresidential structures, as appropriate. (Ord. 16267 § 46, 2008: Ord. 16172 § 5, 2008: Ord. 15051 § 164, 2004: Ord. 10870 § 473, 1993).

**21A.24.270 Flood hazard areas — certification by engineer or surveyor.**

A. For all new structures or substantial improvements in a flood hazard area, the applicant shall provide a FEMA elevation certificate completed by a land surveyor licensed by the state of Washington documenting:

1. The actual as-built elevation of the lowest floor, including basement;  
 2. The actual as-built elevation to which the structure is dry flood-proofed, if applicable; and  
 3. If the structure has a basement.

B. The applicant shall submit a FEMA elevation certificate before the issuance of a certificate of occupancy or temporary certificate of occupancy, whichever occurs first. For unoccupied structures, the applicant shall submit the FEMA elevation certificate before the issuance of the final letter of completion or temporary letter of completion, whichever occurs first.

C. The department shall maintain the certifications required by this section for public inspection and for certification under the National Flood Insurance Program. (Ord. 16686 § 5, 2009: Ord. 15051 § 165, 2004: Ord. 10870 § 474, 1993).

**21A.42.030 Code compliance review — decisions and appeals.**

A. The department shall approve, approve with conditions, or deny development proposals based on compliance with this title and any other development condition affecting the proposal.

B. K.C.C. chapter 20.20 applies to appeals of decisions on development proposals. (Ord. 15051 § 219, 2004; Ord. 10870 § 611, 1993).

**21A.42.040 Director review — actions subject to review.** The following actions shall be subject to the director review procedures in this chapter:

A. Applications for variances, exceptions under K.C.C. 21A.24.070, and conditional uses; and

B. Periodic review of mineral extraction operations. (Ord. 15051 § 220, 2004; Ord. 12196 § 55, 1996; Ord. 11621 § 105, 1994; Ord. 10870 § 612, 1993).

**21A.42.080 Director review — decision regarding development proposal — rules.**

A. Decisions regarding the approval or denial of development proposals, excluding periodic review of mineral extraction operations, subject to director review shall be based upon compliance with the required showings of K.C.C. chapter 21A.44. Periodic reviews of mineral extraction operations shall be based upon the criteria outlined in K.C.C. 21A.22.050.B.

B. The written decision contained in the record shall show:

1. Facts, findings and conclusions supporting the decision and demonstrating compliance with the applicable decision criteria; and

2. Any conditions and limitations imposed, if the request is granted.

C. The director shall mail a copy of the written decision to the applicant and to all parties of record.

D. The director shall adopt rules for the transaction of business and shall keep a public record of his actions, findings, waivers and determinations. (Ord. 15051 § 221, 2004; Ord. 12196 § 56, 1996; Ord. 10870 § 616, 1993).

**21A.42.090 Director review - Decision final unless appealed.**

A. The decision of the director shall be final unless the applicant or an aggrieved party files an appeal to the hearing examiner pursuant to K.C.C. 20.24.

B. The examiner shall review and make decisions based upon information contained in the written appeal and the record.

C. The examiner's decision may affirm, modify, or reverse the decision of the director.

D. As provided by K.C.C. 20.24.210A and C:

1. The examiner shall render a decision within ten days of the closing of hearing; and

2. The decision shall be final unless appealed under the provisions of K.C.C. 20.24.240B.

E. Establishment of any use or activity authorized pursuant to a conditional use permit or variance shall occur within four years of the effective date of the decision for such permit or variance, provided that for schools this period shall be five years. This period may be extended for one additional year by the director if the applicant has submitted the applications necessary to establish the use or activity and has provided written justification for the extension.

F. For the purpose of this section, "establishment" shall occur upon the issuance of all local permit(s) for on-site improvements needed to begin the authorized use or activity, provided that the conditions or improvements required by such permits are completed within the timeframes of said permits.

G. Once a use, activity or improvement allowed by a conditional use permit or variance has been established, it may continue as long as all conditions of permit issuance are met. (Ord. 12196 § 57, 1996; Ord. 11940 § 1, 1995; Ord. 10870 § 617, 1993).

**21A.50.010 Purpose.** The purpose of this chapter is to promote compliance with this title by establishing enforcement authority, defining violations, and setting standards for initiating the procedures set forth in K.C.C. Title 23, Enforcement, when violations of this title occur. (Ord. 10870 § 629, 1993).

**21A.50.020 Authority and application.** The director is authorized to enforce this title, any implementing administrative rules adopted under K.C.C. chapter 2.98 administration, and approval conditions attached to any land use approval, through revocation or modification of permits or through the enforcement, penalty and abatement provisions of K.C.C. Title 23, Code Compliance. (Ord. 15051 § 225, 2004; Ord. 10870 § 630, 1993).

**21A.50.022 Inspections.** The director is authorized to make such inspections and take such actions as may be required to enforce this title. (Ord. 15051 § 226, 2004).

**21A.50.025 Hazards.** If the director determines that an existing site, as a result of alterations regulated under this title has become a hazard to life and limb, endangers property or the environment, or adversely affects the safety, use or stability of a public way or public drainage channel, the owner of the property upon which the alterations are located, or other person or agent in control of the property, upon receipt of notice in writing from the director, shall within the period specified in the notice restore the site affected by the alterations or remove or repair the alterations so as to eliminate the hazard and conform with this title. (Ord. 15051 § 227, 2004).

**21A.50.030 Violations defined.** No building permit or land use approval in conflict with this title shall be issued. Structures or uses that do not conform to this title, except legal nonconformances specified in K.C.C. chapter 21A.32 and approved variances, are violations subject to the enforcement, penalty and abatement provisions of K.C.C. Title 23, including, but not limited to:

- A. Establishing a use not permitted in the zone in which it is located;
- B. Constructing, expanding or placing a structure in violation of setback, height and other dimensional standards in this title;
- C. Establishing a permitted use without complying with applicable development standards set forth in other titles, ordinances, rules or other laws, including but not limited to, road construction, surface water management, the Fire Code and rules of the department of public health;
- D. Failing to carry out or observe conditions of land use or permit approval, including contract development standards;
- E. Failing to secure required land use or permit approval before establishing a permitted use;
- F. Failing to maintain site improvements, such as landscaping, parking or drainage control facilities as required by this code or other King County ordinances;
- G. Undertaking any development within the shoreline jurisdiction without first obtaining a required substantial development permit or required statement of exemption; and
- H. Undertaking any development within the shoreline jurisdiction that is exempt from the requirement to obtain a substantial development permit that is not in compliance with the policy of RCW 90.58.020 and the requirements of chapter 173-26 WAC and the King County shoreline master program. (Ord. 16985 § 116, 2010; Ord. 10870 § 631, 1993).

**23.02.010 Definitions.** The words and phrases designated in this section shall be defined for the purposes of this title as follows:

A. "Abate" means to take whatever steps are deemed necessary by the director to return a property to the condition in which it existed before a civil code violation occurred or to assure that the property complies with applicable code requirements. Abatement may include, but is not limited to, rehabilitation, demolition, removal, replacement or repair.

B. "Civil code violation" means and includes one or more of the following:

1. Any act or omission contrary to any ordinance, resolution, regulation or public rule of the county that regulates or protects public health, the environment or the use and development of land or water, whether or not the ordinance, resolution or regulation is codified; and

2. Any act or omission contrary to the conditions of any permit, notice and order or stop work order issued pursuant to any such an ordinance, resolution, regulation or public rule.

C. "Contested hearing" means a hearing requested 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.

D. "Director" means, depending on the code violated:

1. The director of the department of development and environmental services;

2. The director of the Seattle-King County department of public health, or "local health officer" as that term is used in chapter 70.05 RCW);

3. The director of the department of natural resources and parks;

4. The director of any other county department authorized to enforce civil code compliance;

5. Authorized representatives of a director, including compliance officers and inspectors whose responsibility includes the detection and reporting of civil code violations; or

6. Such other person as the council by ordinance authorizes to use this title.

E. "Found in violation" means that:

1. A citation, notice and order or stop work order has been issued and not timely appealed;

2. A voluntary compliance agreement has been entered into; or

3. The hearing examiner has determined that the violation has occurred and the hearing examiner's determination has not been stayed or reversed on appeal.

F. "Hearing examiner" means the King County hearing examiner, as provided in K.C.C. chapter 20.24.

G. "Mitigate" means to take measures, subject to county approval, to minimize the harmful effects of the violation where remediation is either impossible or unreasonably burdensome.

H. "Mitigation hearing" means a hearing requested in response to a citation to explain mitigating circumstances surrounding the commission of a violation.

I. "Permit" means any form of certificate, approval, registration, license or any other written permission issued by King County. All conditions of approval, and all easements and use limitations shown on the face of an approved final plat map which are intended to serve or protect the general public are deemed conditions applicable to all subsequent plat property owners and their tenants and agents as permit requirements enforceable under this title.

J. "Person" means any individual, association, partnership, corporation or legal entity, public or private, and the agents and assigns of the individual, association, partnership, corporation or legal entity.

K. "Person responsible for code compliance" means either the person who caused the violation, if that can be determined, or the owner, lessor, tenant or other person entitled to control, use or occupy, or any combination of control, use or occupy, property where a civil code violation occurs, or both

L. "Public rule" means any rule adopted under K.C.C. chapter 2.98 to implement code provisions.

M. "Remediate" means to restore a site to a condition that complies with critical area or other regulatory requirements as they existed when the violation occurred; or, for sites that have been degraded under prior ownerships, restore to a condition that does not pose a probable threat to the environment or to the public health, safety or welfare.

N. "Resolution" means any law enacted by resolution of the board of county commissioners prior to the establishment of the charter, or any health rule adopted by resolution of the board of health. (Ord. 16278 § 1, 2008: Ord. 14309 § 1, 2002: Ord. 14199 § 246, 2001: Ord. 13263 § 3, 1998).

**23.02.010 Definitions.** The words and phrases designated in this section shall be defined for the purposes of this title as follows:

A. "Abate" means to take whatever steps are deemed necessary by the director to return a property to the condition in which it existed before a civil code violation occurred or to assure that the property complies with applicable code requirements. Abatement may include, but is not limited to, rehabilitation, demolition, removal, replacement or repair.

B. "Civil code violation" means and includes one or more of the following:

1. Any act or omission contrary to any ordinance, resolution, regulation or public rule of the county that regulates or protects public health, the environment or the use and development of land or water, whether or not the ordinance, resolution or regulation is codified; and

2. Any act or omission contrary to the conditions of any permit, notice and order or stop work order issued pursuant to any such an ordinance, resolution, regulation or public rule.

C. "Contested hearing" means a hearing requested 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.

D. "Director" means, depending on the code violated:

1. The director of the department of development and environmental services;

2. The director of the Seattle-King County department of public health, or "local health officer" as that term is used in chapter 70.05 RCW);

3. The director of the department of natural resources and parks;

4. The director of any other county department authorized to enforce civil code compliance;

5. Authorized representatives of a director, including compliance officers and inspectors whose responsibility includes the detection and reporting of civil code violations; or

6. Such other person as the council by ordinance authorizes to use this title.

E. "Found in violation" means that:

1. A citation, notice and order or stop work order has been issued and not timely appealed;

2. A voluntary compliance agreement has been entered into; or

3. The hearing examiner has determined that the violation has occurred and the hearing examiner's determination has not been stayed or reversed on appeal.

F. "Hearing examiner" means the King County hearing examiner, as provided in K.C.C. chapter 20.24.

G. "Mitigate" means to take measures, subject to county approval, to minimize the harmful effects of the violation where remediation is either impossible or unreasonably burdensome.

H. "Mitigation hearing" means a hearing requested in response to a citation to explain mitigating circumstances surrounding the commission of a violation.

I. "Permit" means any form of certificate, approval, registration, license or any other written permission issued by King County. All conditions of approval, and all easements and use limitations shown on the face of an approved final plat map which are intended to serve or protect the general public are deemed conditions applicable to all subsequent plat property owners and their tenants and agents as permit requirements enforceable under this title.

J. "Person" means any individual, association, partnership, corporation or legal entity, public or private, and the agents and assigns of the individual, association, partnership, corporation or legal entity.

K. "Person responsible for code compliance" means either the person who caused the violation, if that can be determined, or the owner, lessor, tenant or other person entitled to control, use or occupy, or any combination of control, use or occupy, property where a civil code violation occurs, or both

L. "Public rule" means any rule adopted under K.C.C. chapter 2.98 to implement code provisions.

M. "Remediate" means to restore a site to a condition that complies with critical area or other regulatory requirements as they existed when the violation occurred; or, for sites that have been degraded under prior ownerships, restore to a condition that does not pose a probable threat to the environment or to the public health, safety or welfare.

N. "Resolution" means any law enacted by resolution of the board of county commissioners prior to the establishment of the charter, or any health rule adopted by resolution of the board of health. (Ord. 16278 § 1, 2008: Ord. 14309 § 1, 2002: Ord. 14199 § 246, 2001: Ord. 13263 § 3, 1998).

**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).

**23.24.010 Authority.** Whenever a director has reason to believe, based on investigation of documents and/or physical evidence, that a civil code violation exists or has occurred, or that the civil code violations cited in a citation have not been corrected, or that the terms of a voluntary compliance agreement have not been met, the director is authorized to issue a notice and order to any person responsible for code compliance. The director shall make a determination whether or not to issue a notice and order within one hundred twenty days of receiving a complaint alleging a violation or otherwise discovering that a violation may potentially exist, or within thirty days of the end of a voluntary compliance agreement time period which has not been met. Subsequent complaints shall be treated as new complaints for purposes of this section. Issuance of a citation is not a condition precedent to the issuance of a notice and order. (Ord. 13263 § 20, 1998).

**23.24.020 Effect.**

A. Subject to the appeal provisions of K.C.C. chapter 23.36, a notice and order represents a determination that a civil code violation has been committed, that the person cited is a person responsible for code compliance, and that the violations set out in the notice and order require the assessment of penalties and costs and other remedies including cleanup restitution payment, if applicable, specified in the notice and order.

B. Failure to correct the civil code violation in the manner prescribed by the notice and order subjects the person to whom the notice and order is directed to the use of any of the compliance remedies provided by this title, including:

1. Additional civil penalties and costs;
2. A requirement that abatement, remediation or mitigation be performed;
3. An agreement to perform community service as prescribed by this chapter;
4. Permit suspension, revocation, modification or denial as prescribed by this chapter; or
5. Abatement by a director and recovery of the costs of abatement according to the procedures described in this chapter.

C. Any person identified in the notice and order as responsible for code compliance may appeal the notice and order within fourteen days according to the procedures in K.C.C. chapter 23.36.

D. Failure to appeal the notice and order within the applicable time limits shall render the notice and order a final determination that the conditions described in the notice and order existed and constituted a civil code violation, and that the named party is liable as a person responsible for code compliance.

E. Issuance of a notice and order in no way limits a director's authority to issue a citation or stop work order to a person previously cited through the notice and order process pursuant to this title. Payment of the civil penalties assessed under the notice and order does not relieve a person found to be responsible for code compliance of his or her duty to correct the violation and/or to pay any and all civil fines or penalties accruing under citations or stop work orders issued pursuant to this title. (Ord. 16278 § 19, 2008; Ord. 13263 § 21, 1998).

# APPENDIX C

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**KING COUNTY**

1200 King County Courthouse  
516 Third Avenue  
Seattle, WA 98104

**Signature Report**

**September 28, 2004**

**Ordinance 15032**

**Proposed No.** 2004-0118.3

**Sponsors** Constantine, Edmonds and Phillips

1 AN ORDINANCE relating to zoning; amending Ordinance  
2 10870, Section 48, and K.C.C. 21A.06.040, Ordinance  
3 10870, Section 168, and K.C.C. 21A.06.640, Ordinance  
4 10870, Section 280, and K.C.C. 21A.06.1200, Ordinance  
5 10870, Section 330, as amended, and K.C.C. 21A.08.030,  
6 Ordinance 10870, Section 331, as amended, and K.C.C.  
7 21A.08.040, Ordinance 10870, Section 332, as amended,  
8 and K.C.C. 21A.08.050, Ordinance 10870, Section 333, as  
9 amended, and K.C.C. 21A.08.060, Ordinance 10870,  
10 Section 334, as amended, and K.C.C. 21A.08.070,  
11 Ordinance 10870, Section 335, as amended, and K.C.C.  
12 21A.08.080, Ordinance 10870, Section 336, as amended,  
13 and K.C.C. 21A.08.090, Ordinance 10870, Section 340, as  
14 amended, and K.C.C. 21A.12.030, Ordinance 10870,  
15 Section 364, as amended, and K.C.C. 21A.14.040,  
16 Ordinance 10870, Section 365, and K.C.C. 21A.14.050;  
17 Ordinance 10870, Section 388, as amended, and K.C.C.

86            NEW SECTION. SECTION 6. There is hereby added to K.C.C. 21A.06 a new  
87 section to read as follows:

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

93            NEW SECTION. SECTION 7. There is hereby added to K.C.C. 21A.06 a new  
94 section to read as follows:

95            **Processing operation, waste materials.** Processing operation waste materials: a  
96 site or establishment, accessory to mineral extraction or sawmill use, that is primarily  
97 engaged in crushing, grinding, pulverizing or otherwise preparing earth materials,  
98 vegetation, organic waste, construction and demolition materials or recycled and source  
99 separated nonhazardous waste materials and that is not the final disposal site.

100           NEW SECTION. SECTION 8. There is hereby added to K.C.C. 21A.06 a new  
101 section to read as follows:

102           **Puget Sound counties.** Puget Sound counties: the twelve counties that border  
103 the waters of Puget Sound.

104           SECTION 9. Ordinance 10870, Section 280, and K.C.C. 21A.06.1200 are each  
105 hereby amended to read as follows:

106           **Specialized instruction school.** Specialized instruction school: establishments  
107 engaged in providing specialized instruction in a designated field of study, rather than a full  
108 range of courses in unrelated areas; including, but not limited to:

785            SECTION 15. Ordinance 10870, Section 335, as amended, and K.C.C.

786            21A.08.080 are each hereby amended to read as follows:

787            **Manufacturing land uses.**

A. Manufacturing land USES.KEY		RESOURCE			RESIDENTIAL				COMMERCIAL/INDUSTRIAL				
P - Permitted Use		A	F	M	R	UR	U	R	NB	CB	RB	O	I
C - Conditional Use		G	O	I	U	RE	R	E	EU	OU	EU	F	N
S - Special Use		R	R	N	R	BS	B	S	IS	MS	GS	F	D
	Z	I	E	E	A	AE	A	I	HI	MI	II	I	U
	O	C	S	R	L	NR	N	D	GN	EN	ON	C	S
	N	U	T	A		V		E	BE	RE	NE	E	T
	E	L		L		E		N	OS	CS	AS		R
		T						T	RS	IS	LS		I
		U						I	H	A			A
		R						A	O	L			L
		E						L	O				
									D				
SIC #	SPECIFIC LAND USE	A	F	M	RA	UR	R1-8	R12-48	NB	CB	RB	O	I (II)
20	Food and Kindred Products	P1, C14	P1		P1, C14						C		P2 C
2082/2084	Winery/Brewery	P3 C12			P3 C13	P3					C		P
*	Materials Processing Facility	P15	P16 C	P17 C18									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										C		P

**Ordinance 15032**

	Fixtures												
26	Paper and Allied Products												C
27	Printing and Publishing						P7	P7	P7	P7	C	C	P
28	Chemicals and Allied Products												C
2911	Petroleum Refining and Related Industries												C
30	Rubber and Misc. Plastics Products												C
31	Primary Metal Industries									C			P
32	Fabricated Metal Products							P8	P9				P
33	Industrial and Commercial Machinery												C
34	Heavy Machinery and Equipment												P
35	Industrial and Commercial Machinery												P
351-55	Heavy Machinery and Equipment												C
357	Computer and Office Equipment									C			P
36	Electronic and other Electric Equipment									C			P
374	Railroad Equipment												C
376	Guided Missile and												C

Ordinance 15032

	Space Vehicle Parts												
379	Miscellaneous Transportation Vehicles												C
38	Measuring and Controlling Instruments									C			P
8.5	Miscellaneous Light Manufacturing									C			P
*	Motor Vehicle and Bicycle Manufacturing												C
*	Aircraft, Ship and Boat Building												P10 C
7534	Tire Retreading									C			P
781-82	Movie Production/Distribut ion									P			P
<b>GENERAL CROSS</b>		Land Use Table Instructions, see K.C.C. 21A.08.020 and 21A.02.070;											
<b>REFERENCES:</b>		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 chapters K.C.C. 21A.40 through 21A.44; (* ) Definition of this specific land use, see K.C.C. chapter 21A.06.											

- 789                   B. Development conditions.
- 790                   1. ~~((Limited to agricultural products grown on-site, provided))~~ a. The floor area
- 791                   devoted to processing shall not exceed two thousand square feet.
- 792                   b. ~~((s))~~ Structures and areas used for processing shall maintain a minimum
- 793                   distance of seventy-five feet from property lines adjoining residential zones.
- 794                   c. Processing is limited to agricultural products and sixty percent or more of
- 795                   the products processed must be grown in the Puget Sound counties. At the time of initial

796 application, the applicant shall submit a projection of the source of products to be  
797 produced.

798 2. Except slaughterhouses.

799 3. Only as a home industry, subject to K.C.C. chapter 21A.30.

800 4. Limited to rough milling and planing of products grown on-site with portable  
801 equipment.

802 5. Limited to SIC Industry Group No. 242-Sawmills. For RA zoned sites,  
803 limited to RA-10 on lots at least ten acres in size and only as accessory to forestry uses.

804 6. Limited to uses found in SIC Industry No. 2434-Wood Kitchen Cabinets and  
805 No. 2431-Millwork (excluding planing mills).

806 7. Limited to photocopying and printing services offered to the general public.

807 8. Only within enclosed buildings, and as an accessory use to retail sales.

808 9. Only within enclosed buildings.

809 10. Limited to boat building of craft not exceeding forty-eight feet in length.

810 11. For I-zoned sites located outside the urban growth area designated by the  
811 King County Comprehensive Plan, uses shown as a conditional use in the table of K.C.C.  
812 21A.08.080\_A, shall be prohibited, and all other uses shall be subject to the provisions for  
813 rural industrial uses as set forth in K.C.C chapter 21A.12.

814 12. Limited to wineries subject to the following:

815 a. the total floor area of structures for wineries and any accessory uses not to  
816 exceed three thousand five hundred square feet, including underground storage, unless  
817 located in existing agricultural structures, including, but not limited to, barns.

818           b. ~~((e))~~Expansions of existing agricultural structures used for wineries are not  
819 to exceed three thousand five hundred square feet.

820           c. ~~((a))~~At least sixty percent of the grapes or other agricultural products used to  
821 produce the wine must be grown in King County.

822           d. ~~((s))~~Structures and areas used for processing are set back a minimum  
823 distance of seventy-five feet from property lines adjacent to residential zones.

824           e. ~~((w))~~Wineries must comply with Washington state Department of Ecology  
825 and King County board of health regulations for water usage and wastewater disposal.  
826 Wineries using water from exempt wells must install a water meter.

827           13. Limited to wineries subject to the following:

828           a. The floor area of structures for wineries and any accessory uses are limited  
829 to a total of eight thousand square feet, except that underground storage that is  
830 constructed completely below natural grade, not including required exits and access  
831 points, may add an additional eight thousand square feet provided that the underground  
832 storage is at least one foot below the surface and is not visible above ground and must  
833 meet the following:

834           (1) ~~((w))~~Wineries must comply with Washington state Department of  
835 Ecology and King County board of health regulations for water usage and wastewater  
836 disposal. Wineries using water from exempt wells are to install a water meter.

837           (2) ~~((e))~~Clearing on the site is limited to a maximum of thirty-five percent of  
838 the lot area or the amount previously legally cleared, whichever is greater. Removal of  
839 noxious weeds and invasive vegetation is exempt from this clearing limitation. The

840 remainder of the site is to be managed under a forest management plan approved by the  
841 King County department of natural resources and parks.

842 (3) ~~((e))~~Off-street parking is limited to one hundred and fifty percent of the  
843 minimum requirement for wineries specified in K.C.C. 21A.18.030.

844 (4) ~~((s))~~Structures and areas used for processing are set back a minimum  
845 distance of seventy-five feet from property lines adjacent to residential zones.

846 b. Structures for wineries and any accessory uses that exceed six thousand  
847 square feet of total floor area including underground storage must:

848 (1) have a minimum lot size of ten acres; and

849 (2) use a minimum of two and one-half acres of the site for the growing of  
850 agricultural products.

851 c. Structures for wineries and any accessory uses that do not exceed a six  
852 thousand square feet of total floor area including underground storage must have a  
853 minimum lot size of five acres.

854 d. On Vashon-Maury Island, the total floor area of structures for wineries and  
855 any accessory uses located may not exceed six thousand square feet including  
856 underground storage and must have a minimum lot size of five acres.

857 14. Accessory to agriculture uses provided:

858 a. In the RA zones and on lots less than thirty-five acres in the A zones, the  
859 floor area devoted to processing shall not exceed three thousand five hundred square feet  
860 unless located in a farm structure, including but not limited to barns, existing as of  
861 December 31, 2003.

862           b. On lots at least thirty-five acres in the A zones, the floor area devoted to  
863 processing shall not exceed seven thousand square feet unless located in a farm structure,  
864 including but not limited to barns, existing as of December 31, 2003.

865           c. In the A zones, structures used for processing shall be located on portions of  
866 agricultural lands that are unsuitable for other agricultural purposes, such as areas within  
867 the already developed portion of such agricultural lands that are not available for direct  
868 agricultural production, or areas without prime agricultural soils.

869           d. Structures and areas used for processing shall maintain a minimum distance  
870 of seventy-five feet from property lines adjoining residential zones.

871           e. Processing is limited to agricultural products and sixty percent or more of  
872 the products processed must be grown in the Puget Sound counties. At the time of initial  
873 application, the applicant shall submit a projection of the source of products to be  
874 processed.

875           15. Limited to source separated organic waste processing facilities at a scale  
876 appropriate to process the organic waste generated in the agricultural zone.

877           16. Only on the same lot or same group of lots under common ownership or  
878 documented legal control, which includes but is not limited to, fee simple ownership, a  
879 long-term lease or an easement:

880           a. as accessory to a primary forestry use and at a scale appropriate to process  
881 the organic waste generated on the site; or

882           b. as a continuation of a sawmill or lumber manufacturing use only for that  
883 period to complete delivery of products or projects under contract at the end of the  
884 sawmill or lumber manufacturing activity.

885           17. Only on the same lot or same group of lots under common ownership or  
886           documented legal control, which includes but is not limited to, fee simple ownership, a  
887           long-term lease or an easement:  
888                 a. as accessory to a primary mineral use; or  
889                 b. as a continuation of a mineral processing use only for that period to  
890           complete delivery of products or projects under contract at the end of mineral extraction.

891           18. Continuation of a materials processing facility after reclamation in  
892           accordance with an approved reclamation plan.

893           SECTION 16. Ordinance 10870, Section 336, as amended, and K.C.C.  
894           21A.08.090 are each hereby amended to read as follows:

895           **Resource land uses.**

896           **A. Resource land uses.**

1301 shall base allowable waivers or modifications on the policies and guidelines in such a  
1302 plan.

1303 SECTION 23. Ordinance 10870, Section 439, as amended, and K.C.C.

1304 21A.22.010 are each hereby amended to read as follows:

1305 **Purpose.** The purpose of this chapter is to establish standards ~~((which))~~ that  
1306 minimize the impacts of ~~((extractive))~~ mineral extraction and materials processing  
1307 operations upon surrounding parties by:

1308 A. Ensuring adequate review of operating aspects of ~~((extractive))~~ mineral  
1309 extraction and materials processing sites;

1310 B. Requiring project phasing on large sites to minimize environmental impacts;

1311 C. Requiring minimum site areas large enough to provide setbacks and  
1312 mitigations necessary to protect environmental quality; and

1313 D. Requiring period review of ~~((extractive and processing))~~ mineral extraction  
1314 and materials processing operations to ensure compliance with the ~~((most current))~~  
1315 approved operating standards.

1316 SECTION 24. Ordinance 10870, Section 440 and K.C.C. 21A.22.020 are each  
1317 hereby amended to read as follows:

1318 ~~((Exemptions))~~ **Applicability of chapter.** ~~((The provisions of t))~~ This chapter  
1319 shall ~~((not))~~ only apply to uses or activities ~~((specifically exempted in K.C.C. 16.82.050))~~  
1320 that are mineral extraction or materials processing operations.

1321 SECTION 25. Ordinance 10870, Section 441 and K.C.C. 21A.22.030 are each  
1322 hereby amended to read as follows:

1323           **Grading permits required.** Extractive operations and materials processing  
1324 operations shall commence only after issuance of a grading permit.

1325           NEW SECTION. SECTION 26. There is hereby added to K.C.C. 21A.22 a new  
1326 section to read as follows:

1327           **Community meeting.**

1328           A. Not later than thirty days after the department provides the notice of  
1329 application to the public required by K.C.C. 20.20.060 on a mineral extraction or  
1330 materials processing site or for an expansion of an existing mineral extraction or  
1331 materials processing site or operation beyond the scope of the prior environmental  
1332 review, the applicant shall hold a community meeting. The notice of application shall  
1333 include notification of the date, time and location of the community meeting. At the  
1334 meeting, the applicant shall provide information relative the proposal, including  
1335 information on existing residences and lot patterns within one-quarter mile of potential  
1336 sites and on alternative haul routes. The applicant shall also provide a preliminary  
1337 evaluation at the meeting of any alternative routes that have been provided to the  
1338 applicant in writing at least five days in advance of the meeting. The applicant shall  
1339 provide to the department within fourteen days after the community meeting a written list  
1340 of meeting attendees and documentation of the meeting.

1341           B. Public notice of the community meeting required by this section shall be  
1342 prepared, posted and distributed in accordance with KCC 20.20.060 at least two weeks  
1343 before the community meeting. In addition, the department shall:

- 1344           1. Publish a notice of the meeting in a local newspaper of general circulation in  
1345 the affected area;

# APPENDIX D

C

Supreme Court of Michigan.

CITY OF HILLSDALE, a municipal corporation,  
 and Thurman C. Diethrich, Elmer A. Pearson, A. C.  
 Lowe, Harold Ridley, R. M. Lake and Ora Carlisle,  
 Plaintiffs and Appellees,

v.

HILLSDALE IRON & METAL COMPANY, Inc., a  
 Michigan corporation, Defendant and Appellant.

No. 1.  
 Jan. 4, 1960.

Action by city and others to restrain defendant from operating scrap yard in a residential zone. From adverse decree of the Circuit Court, Hillsdale County, in Chancery, James R. Breakey, Jr., J., the property owner appealed. The Supreme Court, Dethmers, C. J., held that where at time defendant's property was zoned for single residence use only, the property was being used for the gathering and 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.

Decree affirmed.

West Headnotes

**[1] Zoning and Planning 414 ↪1068****414 Zoning and Planning****414II Validity of Zoning Regulations****414II(B) Particular Matters**

**414k1066** Architectural or Structural Designs

**414k1068** k. Area and frontage requirements. **Most Cited Cases**  
 (Formerly 414k72, 268k625)

Where defendant's property did not abut on a street on any side but a street ended at about the center of its north boundary and there was nothing to prevent defendant from laying out street or "places"

on its property connecting with the street to the north and dimensions of property would permit that to be done in a manner making it usable for several dwelling lots, ordinance zoning such area for single residence use only and providing that no lot shall be used for a dwelling unless it abuts for its full frontage upon a street or place was not reasonable and unconstitutional as applied to defendant's property.

**[2] 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, 268k625)

Where lands immediately to north and south of defendant's property were zoned residential and contained a number of residences ranging in value from \$2,000 to \$22,000 and a high hill and undeveloped area was on the west side and a railroad right of way bounded the property on the east, beyond which was a street along which were some substandard dwellings, zoning of defendant's property for single residence use only was not unreasonable and unconstitutional.

**[3] Municipal Corporations 268 ↪122.1(2)****268 Municipal Corporations**

**268IV** Proceedings of Council or Other Governing Body

**268IV(B)** Ordinances and By-Laws in General

**268k122.1** Evidence

**268k122.1(2)** k. Presumptions and burden of proof. **Most Cited Cases**  
 (Formerly 268k122(2))

A municipal zoning ordinance is presumed to be reasonable and constitutional, and burden is on 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 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 individual 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 conformity 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 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, 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,

VOELKER and KAVANAGH, JJ., concur.

Mich. 1960  
City of Hillsdale v. Hillsdale Iron & Metal Co.  
358 Mich. 377, 100 N.W.2d 467

END OF DOCUMENT

**C**  
 McDonald v. Zoning Bd. of Appeals of Town of Islip  
 31 A.D.3d 642, 819 N.Y.S.2d 533  
 NY,2006.

31 A.D.3d 642819 N.Y.S.2d 533, 2006 WL 2005099,  
 2006 N.Y. Slip Op. 05791

In the Matter of Gary McDonald, Appellant  
 v  
 Zoning Board of Appeals of Town of Islip, Respon-  
 dent.  
 Supreme Court, Appellate Division, Second Depart-  
 ment, 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 processing facility operating on portion of subject property was impermissible expansion and alteration that exceeded scope of legal nonconforming use of property as landscaping and excavation business was not illegal, arbitrary or capricious, or abuse of discretion.

In a proceeding pursuant to CPLR article 78 to review 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 December 22, 2004, which denied the petition and dismissed 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 designated for industrial 1 use in the Town of Islip. The petitioner seeks review of so much of a determination 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 administrative 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]; *Matter of Urban Forest Prods. v Zoning Bd. of Appeals for Town of Haverstraw*, 300 AD2d 498 [2002]). A use of property that existed before the enactment of a zoning restriction that prohibits the use is a legal nonconforming use, but the right to maintain a nonconforming use does not include the right to extend or enlarge that 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 Haverstraw*, supra). "Further, in keeping with the sound public policy of eventually extinguishing all nonconforming uses, the courts will enforce a municipality's reasonable circumscription of the right to expand the volume or intensity of a prior nonconforming 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 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

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(Cite as: 31 A.D.3d 642, 819 N.Y.S.2d 533)

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 Suratwala 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

31 A.D.3d 642

END OF DOCUMENT

300 A.D.2d 498

(Cite as: 300 A.D.2d 498, 751 N.Y.S.2d 581)

**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., Interve-  
nors-Respondents.

Supreme Court, Appellate Division, Second Depart-  
ment, 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 re-  
view a determination of the Zoning Board of Appeals  
of the Town of Haverstraw, dated September 12,  
2001, made after a hearing, which denied the peti-  
tioners' application for review of an administrative  
decision of the Chief Code Enforcement Officer of  
the Town of Haverstraw that determined that the peti-  
tioners 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 proceed-  
ing.

Ordered that the judgment is affirmed, with costs.

The subject of this CPLR article 78 proceeding is a  
commercial landscaping and mulching business oper-  
ated by the petitioners at 229 Quaker Road (hereinaf-  
ter 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 non-  
conforming 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 es-  
tablished 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 En-  
forcement Officer of the Town of Haverstraw (here-  
inafter the CCEO) originally determined that the peti-  
tioners' operation was a protected legal nonconform-  
ing use, in May 2001 he issued a notice of violation  
to the petitioners for operating a commercial mulch-  
ing business in a residential-zoned area. After exten-  
sive hearings, the Zoning Board of Appeals of the  
Town of Haverstraw (hereinafter the Board) rejected  
the petitioners' application to review the CCEO's de-  
termination, based, among other things, on its finding  
that the previous nonconforming use (vehicle stor-  
age) 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 ac-  
tion 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

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 Ru-  
dolf Steiner Fellowship Found. v De Luccia*, 90  
NY2d 453, 458; *Matter of Lindstrom v Zoning Bd. of  
Appeals of Town of Warwick*, 225 AD2d 626,

493 F.Supp. 1059  
(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, Harold 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

92XXVI(B) Particular Classes

92XXVI(B)8 Race, National Origin, or Ethnicity

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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  
92XXXVII 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.

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

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(Cite as: 493 F.Supp. 1059)

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 officers 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 purposes is not unreasonable or arbitrary, but fairly debatable, it will be upheld by a court.

**[12] Constitutional Law 92 ↪4096**

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

Even if owners of asphalt plant did have protected interests in their 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, 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 regulation. 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 general 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 contractual 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 regulation. 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)

Application of zoning ordinance which affected proposed erection of asphalt plant was valid exercise of county's police power and did not unreasonably or

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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.<sup>[FN1]</sup> Jurisdiction is founded on 28 U.S.C. ss 1343 <sup>[FN2]</sup> and also 1331.<sup>[FN3]</sup> 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.<sup>[FN4]</sup>

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.

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

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(Cite as: 493 F.Supp. 1059)

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.

\*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 re-

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sponse, 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 letters 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

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the premises and to establish an asphalt plant for a term of three years "or until the gravel is depleted from said parcel, whichever occurs 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 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

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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 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 "black-top 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.<sup>[FN7]</sup>

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

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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.

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 violation 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:

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"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.

"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 plain-

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tiffs lacked operating capital. Furthermore, Mr. Beasley testified that the asphalt 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 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

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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 unprovable 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

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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 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

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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 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 Sterling 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

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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. 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 contracts.

#### 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

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

IT IS SO ORDERED.

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# APPENDIX E



# WASHINGTON STATE LEGISLATURE


  
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## WAC 197-11-800

[Agency filings affecting this section](#)

### Categorical exemptions.

The proposed actions contained in Part Nine are categorically exempt from threshold determination and EIS requirements, subject to the rules and limitations on categorical exemptions contained in WAC [197-11-305](#).

Note: The statutory exemptions contained in chapter [43.21C](#) RCW are not included in Part Nine. Chapter [43.21C](#) RCW should be reviewed in determining whether a proposed action not listed as categorically exempt in Part Nine is exempt by statute from threshold determination and EIS requirements.

#### (1) Minor new construction -- Flexible thresholds.

(a) The exemptions in this subsection apply to all licenses required to undertake the construction in question, except when a rezone or any license governing emissions to the air or discharges to water is required. To be exempt under this subsection, the project must be equal to or smaller than the exempt level. For a specific proposal, the exempt level in (b) of this subsection shall control, unless the city/county in which the project is located establishes an exempt level under (c) of this subsection. If the proposal is located in more than one city/county, the lower of the agencies' adopted levels shall control, regardless of which agency is the lead agency.

(b) The following types of construction shall be exempt, except when undertaken wholly or partly on lands covered by water:

(i) The construction or location of any residential structures of four dwelling units.

(ii) The construction of a barn, loafing shed, farm equipment storage building, produce storage or packing structure, or similar agricultural structure, covering 10,000 square feet, and to be used only by the property owner or his or her agent in the conduct of farming the property. This exemption shall not apply to feed lots.

(iii) The construction of an office, school, commercial, recreational, service or storage building with 4,000 square feet of gross floor area, and with associated parking facilities designed for twenty automobiles.

(iv) The construction of a parking lot designed for twenty automobiles.

(v) Any landfill or excavation of 100 cubic yards throughout the total lifetime of the fill or excavation; and any fill or excavation classified as a Class I, II, or III forest practice under RCW [76.09.050](#) or regulations thereunder.

(c) Cities, towns or counties may raise the exempt levels to the maximum specified below by implementing ordinance or resolution. Such levels shall be specified in the agency's SEPA procedures (WAC [197-11-904](#)) and sent to the department of ecology. A newly established exempt level shall be supported by local conditions, including zoning or other land use plans or regulations. An agency may adopt a system of several exempt levels (such as different levels for different geographic areas). The maximum exempt level for the exemptions in (1)(b) of this section shall be, respectively:

(i) 20 dwelling units.

(ii) 30,000 square feet.

(iii) 12,000 square feet; 40 automobiles.

(iv) 40 automobiles.

(v) 500 cubic yards.

(2) **Other minor new construction.** The following types of construction shall be exempt except where undertaken wholly or in part on lands covered by water (unless specifically exempted in this subsection); the exemptions provided by this section shall apply to all licenses required to undertake the construction in question, except where a rezone or any license governing emissions to the air or discharges to water is required:

(a) The construction or designation of bus stops, loading zones, shelters, access facilities and pull-out lanes for taxicabs, transit and school vehicles.

(b) The construction and/or installation of commercial on-premise signs, and public signs and signals.

(c) The construction or installation of minor road and street improvements such as pavement marking, freeway surveillance and control systems, railroad protective devices (not including grade-separated crossings), grooving, glare screen, safety barriers, energy attenuators, transportation corridor landscaping (including the application of Washington state department of agriculture approved herbicides by licensed personnel for right of way weed control as long as this is not within watersheds controlled for the purpose of drinking water quality in accordance with WAC ~~248-54-660~~), temporary traffic controls and detours, correction of substandard curves and intersections within existing rights of way, widening of a highway by less than a single lane width where capacity is not significantly increased and no new right of way is required, adding auxiliary lanes for localized purposes, (weaving, climbing, speed change, etc.), where capacity is not significantly increased and no new right of way is required, channelization and elimination of sight restrictions at intersections, street lighting, guard rails and barricade installation, installation of catch basins and culverts, and reconstruction of existing roadbed (existing curb-to-curb in urban locations), including adding or widening of shoulders, addition of bicycle lanes, paths and facilities, and pedestrian walks and paths, but not including additional automobile lanes.

(d) Grading, excavating, filling, septic tank installations, and landscaping necessary for any building or facility exempted by subsections (1) and (2) of this section, as well as fencing and the construction of small structures and minor facilities accessory thereto.

(e) Additions or modifications to or replacement of any building or facility exempted by subsections (1) and (2) of this section when such addition, modification or replacement will not change the character of the building or facility in a way that would remove it from an exempt class.

(f) The demolition of any structure or facility, the construction of which would be exempted by subsections (1) and (2) of this section, except for structures or facilities with recognized historical significance.

(g) The installation of impervious underground tanks, having a capacity of 10,000 gallons or less.

(h) The vacation of streets or roads.

(i) The installation of hydrological measuring devices, regardless of whether or not on lands covered by water.

(j) The installation of any property, boundary or survey marker, other than fences, regardless of whether or not on lands covered by water.

**(3) Repair, remodeling and maintenance activities.** The following activities shall be categorically exempt: The repair, remodeling, maintenance, or minor alteration of existing private or public structures, facilities or equipment, including utilities, involving no material expansions or changes in use beyond that previously existing; except that, where undertaken wholly or in part on lands covered by water, only minor repair or replacement of structures may be exempt (examples include repair or replacement of piling, ramps, floats, or mooring buoys, or minor repair, alteration, or maintenance of docks). The following maintenance activities shall not be considered exempt under this subsection:

(a) Dredging;

(b) Reconstruction/maintenance of groins and similar shoreline protection structures; or

(c) Replacement of utility cables that must be buried under the surface of the bedlands. Repair/rebuilding of major dams, dikes, and reservoirs shall also not be considered exempt under this subsection.

**(4) Water rights.** Appropriations of one cubic foot per second or less of surface water, or of 2,250 gallons per minute or less of groundwater, for any purpose. The exemption covering not only the permit to appropriate water, but also any hydraulics permit, shoreline permit or building permit required for a normal diversion or intake structure, well and pumphouse reasonably necessary to accomplish the exempted appropriation, and including any activities relating to construction of a distribution system solely for any exempted appropriation.

**(5) Purchase or sale of real property.** The following real property transactions by an agency shall be exempt:

(a) The purchase or acquisition of any right to real property.

(b) The sale, transfer or exchange of any publicly owned real property, but only if the property is not subject to an authorized public use.

(c) The lease of real property when the use of the property for the term of the lease will remain essentially the same as the existing use, or when the use under the lease is otherwise exempted by this chapter.

(6) **Minor land use decisions.** The following land use decisions shall be exempt:

(a) Except upon lands covered by water, the approval of short plats or short subdivisions pursuant to the procedures required by RCW 58.17.060, but not including further short subdivisions or short platting within a plat or subdivision previously exempted under this subsection.

(b) Granting of variances based on special circumstances, not including economic hardship, applicable to the subject property, such as size, shape, topography, location or surroundings and not resulting in any change in land use or density.

(c) Classifications of land for current use taxation under chapter 84.34 RCW, and classification and grading of forest land under chapter 84.33 RCW.

(7) **Open burning.** Opening burning and the issuance of any license for open burning shall be exempt. The adoption of plans, programs, objectives or regulations by any agency incorporating general standards respecting open burning shall not be exempt.

(8) **Clean Air Act.** The granting of variances under RCW 70.94.181 extending applicable air pollution control requirements for one year or less shall be exempt.

(9) **Water quality certifications.** The granting or denial of water quality certifications under the Federal Clean Water Act (Federal Water Pollution Control Act amendments of 1972, 33 U.S.C. 1341) shall be exempt.

(10) **Activities of the state legislature.** All actions of the state legislature are exempted. This subsection does not exempt the proposing of legislation by an agency (WAC 197-11-704).

(11) **Judicial activity.** The following shall be exempt:

(a) All adjudicatory actions of the judicial branch.

(b) Any quasi-judicial action of any agency if such action consists of the review of a prior administrative or legislative decision. Decisions resulting from contested cases or other hearing processes conducted prior to the first decision on a proposal or upon any application for a rezone, conditional use permit or other similar permit not otherwise exempted by this chapter, are not exempted by this subsection.

(12) **Enforcement and inspections.** The following enforcement and inspection activities shall be exempt:

(a) All actions, including administrative orders and penalties, undertaken to enforce a statute, regulation, ordinance, resolution or prior decision. No license shall be considered exempt by virtue of this subsection; nor shall the adoption of any ordinance, regulation or resolution be considered exempt by virtue of this subsection.

(b) All inspections conducted by an agency of either private or public property for any purpose.

(c) All activities of fire departments and law enforcement agencies except physical construction activity.

(d) Any action undertaken by an agency to abate a nuisance or to abate, remove or otherwise cure any hazard to public health or safety. The application of pesticides and chemicals is not exempted by this subsection but may be exempted elsewhere in these guidelines. No license or adoption of any ordinance, regulation or resolution shall be considered exempt by virtue of this subsection.

(e) Any suspension or revocation of a license for any purpose.

(13) **Business and other regulatory licenses.** The following business and other regulatory licenses are exempt:

(a) All licenses to undertake an occupation, trade or profession.

(b) All licenses required under electrical, fire, plumbing, heating, mechanical, and safety codes and regulations, but not including building permits.

(c) All licenses to operate or engage in amusement devices and rides and entertainment activities, including but not limited to cabarets, carnivals, circuses and other traveling shows, dances, music machines, golf courses, and theaters, including approval of the use of public facilities for temporary civic celebrations, but not including licenses or permits required for permanent construction of any of the above.

(d) All licenses to operate or engage in charitable or retail sales and service activities, including but not limited to peddlers, solicitors, second hand shops, pawnbrokers, vehicle and housing rental agencies, tobacco sellers, close out and special sales, fireworks, massage parlors, public garages and parking lots, and used automobile dealers.

(e) All licenses for private security services, including but not limited to detective agencies, merchant and/or

residential patrol agencies, burglar and/or fire alarm dealers, guard dogs, locksmiths, and bail bond services.

(f) All licenses for vehicles for-hire and other vehicle related activities, including but not limited to taxicabs, ambulances, and tow trucks: Provided, That regulation of common carriers by the utilities and transportation commission shall not be considered exempt under this subsection.

(g) All licenses for food or drink services, sales, and distribution, including but not limited to restaurants, liquor, and meat.

(h) All animal control licenses, including but not limited to pets, kennels, and pet shops. Establishment or construction of such a facility shall not be considered exempt by this subsection.

(i) The renewal or reissuance of a license regulating any present activity or structure so long as no material changes are involved.

**(14) Activities of agencies.** The following administrative, fiscal and personnel activities of agencies shall be exempt:

(a) The procurement and distribution of general supplies, equipment and services authorized or necessitated by previously approved functions or programs.

(b) The assessment and collection of taxes.

(c) The adoption of all budgets and agency requests for appropriation: Provided, That if such adoption includes a final agency decision to undertake a major action, that portion of the budget is not exempted by this subsection.

(d) The borrowing of funds, issuance of bonds, or applying for a grant and related financing agreements and approvals.

(e) The review and payment of vouchers and claims.

(f) The establishment and collection of liens and service billings.

(g) All personnel actions, including hiring, terminations, appointments, promotions, allocations of positions, and expansions or reductions in force.

(h) All agency organization, reorganization, internal operational planning or coordination of plans or functions.

(i) Adoptions or approvals of utility, transportation and solid waste disposal rates.

(j) The activities of school districts pursuant to desegregation plans or programs; however, construction of real property transactions or the adoption of any policy, plan or program for such construction of real property transaction shall not be considered exempt under this subsection.

**(15) Financial assistance grants.** The approval of grants or loans by one agency to another shall be exempt, although an agency may at its option require compliance with SEPA prior to making a grant or loan for design or construction of a project. This exemption includes agencies taking nonproject actions that are necessary to apply for federal or other financial assistance.

**(16) Local improvement districts.** The formation of local improvement districts, unless such formation constitutes a final agency decision to undertake construction of a structure or facility not exempted under WAC 197-11-800 and 197-11-880.

**(17) Information collection and research.** Basic data collection, research, resource evaluation, requests for proposals (RFPs), and the conceptual planning of proposals shall be exempt. These may be strictly for information-gathering, or as part of a study leading to a proposal that has not yet been approved, adopted or funded; this exemption does not include any agency action that commits the agency to proceed with such a proposal. (Also see WAC 197-11-070.)

**(18) Acceptance of filings.** The acceptance by an agency of any document or thing required or authorized by law to be filed with the agency and for which the agency has no discretionary power to refuse acceptance shall be exempt. No license shall be considered exempt by virtue of this subsection.

**(19) Procedural actions.** The proposal or adoption of legislation, rules, regulations, resolutions or ordinances, or of any plan or program relating solely to governmental procedures, and containing no substantive standards respecting use or modification of the environment shall be exempt. Agency SEPA procedures shall be exempt.

**(20) Building codes.** The adoption by ordinance of all codes as required by the state Building Code Act (chapter 19.27 RCW).

(21) **Adoption of noise ordinances.** The adoption by counties/cities of resolutions, ordinances, rules or regulations concerned with the control of noise which do not differ from regulations adopted by the department of ecology under chapter 70.107 RCW. When a county/city proposes a noise resolution, ordinance, rule or regulation, a portion of which differs from the applicable state regulations (and thus requires approval of the department of ecology under RCW 70.107.060(4)), SEPA compliance may be limited to those items which differ from state regulations.

(22) **Review and comment actions.** Any activity where one agency reviews or comments upon the actions of another agency or another department within an agency shall be exempt.

(23) **Utilities.** The utility-related actions listed below shall be exempt, except for installation, construction, or alteration on lands covered by water. The exemption includes installation and construction, relocation when required by other governmental bodies, repair, replacement, maintenance, operation or alteration that does not change the action from an exempt class.

(a) All communications lines, including cable TV, but not including communication towers or relay stations.

(b) All storm water, water and sewer facilities, lines, equipment, hookups or appurtenances including, utilizing or related to lines eight inches or less in diameter.

(c) All electric facilities, lines, equipment or appurtenances, not including substations, with an associated voltage of 55,000 volts or less; and the overbuilding of existing distribution lines (55,000 volts or less) with transmission lines (more than 55,000 volts); and the undergrounding of all electric facilities, lines, equipment or appurtenances.

(d) All natural gas distribution (as opposed to transmission) lines and necessary appurtenant facilities and hookups.

(e) All developments within the confines of any existing electric substation, reservoir, pump station or well: Provided, That additional appropriations of water are not exempted by this subsection.

(f) Periodic use of chemical or mechanical means to maintain a utility or transportation right of way in its design condition: Provided, That chemicals used are approved by the Washington state department of agriculture and applied by licensed personnel. This exemption shall not apply to the use of chemicals within watersheds that are controlled for the purpose of drinking water quality in accordance with WAC 248-54-660.

(g) All grants of rights of way by agencies to utilities for use for distribution (as opposed to transmission) purposes.

(h) All grants of franchises by agencies to utilities.

(i) All disposals of rights of way by utilities.

(24) **Natural resources management.** In addition to the other exemptions contained in this section, the following natural resources management activities shall be exempt:

(a) Issuance of new grazing leases covering a section of land or less; and issuance of all grazing leases for land that has been subject to a grazing lease within the previous ten years.

(b) Licenses or approvals to remove firewood.

(c) Issuance of agricultural leases covering one hundred sixty contiguous acres or less.

(d) Issuance of leases for Christmas tree harvesting or brush picking.

(e) Issuance of leases for school sites.

(f) Issuance of leases for, and placement of, mooring buoys designed to serve pleasure craft.

(g) Development of recreational sites not specifically designed for all-terrain vehicles and not including more than twelve campsites.

(h) Periodic use of chemical or mechanical means to maintain public park and recreational land: Provided, That chemicals used are approved by the Washington state department of agriculture and applied by licensed personnel. This exemption shall not apply to the use of chemicals within watersheds that are controlled for the purpose of drinking water quality in accordance with WAC 248-54-660.

(i) Issuance of rights of way, easements and use permits to use existing roads in nonresidential areas.

(j) Establishment of natural area preserves to be used for scientific research and education and for the protection of rare flora and fauna, under the procedures of chapter 79.70 RCW.

**(25) Personal wireless service facilities.**

(a) The siting of personal wireless service facilities are exempt if the facility:

(i) Is a microcell and is to be attached to an existing structure that is not a residence or school and does not contain a residence or a school;

(ii) Includes personal wireless service antennas, other than a microcell, and is to be attached to an existing structure (that may be an existing tower) that is not a residence or school and does not contain a residence or school, and the existing structure to which it is to be attached is located in a commercial, industrial, manufacturing, forest, or agriculture zone; or

(iii) Involves constructing a personal wireless service tower less than sixty feet in height that is located in a commercial, industrial, manufacturing, forest, or agricultural zone.

(b) For the purposes of this subsection:

(i) "Personal wireless services" means commercial mobile services, unlicensed wireless services, and common carrier wireless exchange access services, as defined by federal laws and regulations.

(ii) "Personal wireless service facilities" means facilities for the provision of personal wireless services.

(iii) "Microcell" means a wireless communication facility consisting of an antenna that is either:

(A) Four feet in height and with an area of not more than five hundred eighty square inches; or

(B) If a tubular antenna, no more than four inches in diameter and no more than six feet in length.

(c) This exemption does not apply to projects within a critical area designated under GMA (RCW 36.70A.060).

[Statutory Authority: RCW 43.21A.090, chapter 43.21C RCW, RCW 43.21C.035, 43.21C.037, 43.21C.038, 43.21C.0381, 43.21C.0382, 43.21C.0383, 43.21C.110, 43.21C.222, 03-16-067 (Order 02-12), § 197-11-800, filed 8/1/03, effective 9/1/03. Statutory Authority: 1995 c 347 (ESHB 1724) and RCW 43.21C.110, 97-21-030 (Order 95-16), § 197-11-800, filed 10/10/97, effective 11/10/97. Statutory Authority: RCW 43.21C.110, 84-05-020 (Order DE 83-39), § 197-11-800, filed 2/10/84, effective 4/4/84.]