

**Court of Appeals No. 70515-6-I**

---

**IN THE COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON**

---

LEO MCMILIAN,

Appellant,

v.

KING COUNTY,

Respondent.

---

**APPELLANT'S OPENING BRIEF**

---

RECEIVED  
COURT OF APPEALS  
DIVISION I  
JAN 29 2015  
11:29:57  
K

Jean Jorgensen, WSBA #34964  
Singleton & Jorgensen, Inc., P.S.  
337 Park Avenue  
Renton, WA 98055  
Telephone: (425) 235-4800  
Facsimile: (425) 235-4838  
Attorney for Appellant Leo McMilian

## TABLE OF CONTENTS

I.	INTRODUCTION.....	1
II.	ASSIGNMENTS OF ERROR.....	3
III.	ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.....	3
IV.	APPELLANT’S STATEMENT OF THE CASE.....	5
V.	ARGUMENT.....	11
A.	LUPA STANDARD OF REVIEW.....	11
1.	Court Reviews Administrative Record.....	11
2.	LUPA’s Standards for Relief.....	12
B.	RCW 36.70C.130(1)(a): Hearing Examiner Smith Engaged in Unlawful Procedure in Assessing Credibility of Evidence as he was Not the Fact Finder.....	13
C.	RCW 36.70C.130(1)(c): Hearing Examiner Smith Improperly Offered and Relied upon <i>His Own</i> “Expert” Opinion, Which Contradicted the County’s Evidence and McMilian’s Eyewitnesses.....	18
D.	RCW 36.70C.130(1)(b); The Land Use Decision is Not Supported by Evidence, Which is Substantial When Viewed in Light of the Whole Record Before the Court...24	
E.	RCW 36.70C.130(1)(a), (e) and (f): Office of the Hearing Examiner Engaged in Unlawful Procedure / Failed to Follow a Prescribed Process and as a result, Violated Petitioner’s Constitutional Rights .....	28

1.	Hearing Examiner Donahue Violated Applicable Time Limits Which Have Now Severely Prejudiced Petitioner and Violates Due Process.....	30
2.	Pro Tem Hearing Examiner was Not Properly Appointed.....	33
3.	Hearing Examiner Violated the Scope of Authority.....	34
F.	RCW 36.70C.130(1)(d) -- Land Use Decision is Clearly Erroneous Application of the Law to the Facts. ....	37
G.	RCW 36.70C.130(1)(f): The land use decision violates the constitutional rights of the party seeking relief.....	40
VI.	CONCLUSION.....	42

## TABLE OF AUTHORITIES

### Cases

Armstrong v. Manzo, 380 U.S. 545, 85 S.Ct. 1187, 14 L.Ed.2d 62 (1965) .....	31
Barry v. Barchi, 443 U.S. 55, 99 S. Ct. 2642, 61 L. Ed. 2d 365 (1979) .....	31,32
City of Medina v. T-Mobile USA, Inc., 123 Wash. App. 19, 95 P.3d 377 (2004) .....	13
City of University Place v. McGuire, 144 Wash. 2d 640, 30 P.3d 453 (2001) .....	12, 13
Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 105 S. Ct. 1487, 84 L.Ed.2d 494 (1985) .....	31
Griffin v. Thurston County, 137 Wn. App. 609, 154 P.3d 296 (2007) .....	39
In re Detention of Stout, 159 Wn. 2d 357, 150 P.3d 86 (2007) .....	13
Isla Verde Intern. Holdings, Inc. v. City of Camas, 99 Wn. App. 127, 990 P.2d 429 (1999) .....	18
Isla Verde Intern. Holdings, Inc. v. City of Camas, 146 Wn.2d 740, 49 P.3d 867 (2002) .....	18
Miller v. City of Bainbridge Island, 111 Wn. App. 152, 43 P.3d 1250 (2002) .....	18
Norco Const., Inc. v. King County, 97 Wash.2d 680, 649 P.2d 103 (1982) .....	41
Pavlina v. City of Vancouver, 122 Wn. App. 520, 94 P.3d 366 (2004) .....	11

Peste v. Mason County, 133 Wn. App. 456, 136 P.3d 140 (2006) .....	39
Rhod-A-Zalea & 35th, Inc. v. Snohomish County, 136 Wn.2d 1, 959 P.2d 1024 (1998) .....	40
Sierra Club v. Froehlke, 359 F.Supp. 1289 (S.D.Tex.1973) .....	22
State v. Sherrill, 175 Wn.2d 1006, 285 P.3d 885 (2012) .....	36
Systems Amusement, Inc. v. State, 7 Wn. App. 516, 500 P.2d 1253 (1972) .....	32
Valley View Indus. Park v. City of Redmond, 107 Wn.2d 621, 733 P.2d 182 (1987) .....	41
Vandercook v. Reece, 120 Wn. App. 647, 86 P.3d 206 (2004) .....	22
Van Sant v. City of Everett, 69 Wn. App. 641, 849 P.2d 1276 (1993) .....	39
Wells v. Whatcom County Water Dist. No. 10, 105 Wn. App. 143, 19 P.3d 453 (2001) .....	11
West Main Associates v. City of Bellevue, 106 Wn.2d 47, 720 P.2d 782 (1986) .....	41
Whatcom County Fire Dist. No. 21 v. Whatcom County, 171 Wn.2d 421, 256 P.3d 295 (2011) .....	39
 <b><u>Constitutional Provisions</u></b>	
U.S. Const. Amends. 5, 14 .....	41
Const. Art. 1, § 3 .....	31

**Statutes**

RCW 36.70C.120 .....11  
RCW 36.70C.130 .....11, 12, 17, 23, 28, 36, 39  
RCW 36.70C.140 .....43

**Other Authorities**

1 ROBERT M. ANDERSON, AMERICAN LAW OF ZONING §.01  
(Kenneth H. Young ed., 4th ed. 1996).....13

*I. INTRODUCTION*

McMilian owns an auto-wrecking business, and the real property upon which it is operated located at 37307 Enchanted Parkway South in unincorporated King County. His real property consists of two parcels (King County Parcel Nos. 3321049005 and 3321049038); the latter parcel (“storage yard”) is the subject of this appeal, which is now before this Court for a second time.

Despite the fact that the auto-wrecking business and adjoining storage yard had been consistently in use since prior to 1958, the date King County implemented its zoning laws, King County cited McMilian for a zoning violation in 2007. McMilian asserts a legal nonconforming use that permits him to continue to operate his business despite the change in zoning laws.

A quasi-judicial hearing was held before the King County Hearing Examiner on May 13, 2008; it was continued on August 21, 2008. The presiding hearing examiner was Peter Donahue. Mr. Donahue was to determine whether McMilian committed the zoning violation alleged by King County DDES. On May 26, 2009, Mr. Donahue submitted his decision, finding that the storage yard did not constitute a nonconforming use due to the statute of an unlawful trespasser.

McMilian appealed the hearing examiner decision to the King County Superior Court. On January 13, 2010, the Honorable Judge Deborah Fleck entered an Order Reversing Hearing Examiner's Decision, holding that the alleged trespass did not negate the lawful use of the storage yard. Judge Fleck reversed Hearing Examiner Donahue's decision, holding that the storage yard was a legal nonconforming use, and finding, "numerous independent witnesses with relevant personal knowledge going back over 50 years" was substantial evidence to support a finding that the storage yard operation existed prior to the change in zoning laws in 1958.

On February 9, 2010, King County appealed this decision to this Court of Appeals. In May 2011, this Court issued its opinion, affirming Hearing Examiner Donahue's holding that a trespasser could not establish a lawful use, but holding that it was improper to presume that a trespass occurred in this case. This Court remanded the case back to Hearing Examiner Donahue so that he could supplement his decision by entering a specific finding as to whether the storage yard use existed prior to the change in zoning laws in 1958.

Over a year passed after the Court of Appeals mandate had been issued. Suddenly, on June 28, 2012, Stafford L. Smith, a **new** King County Hearing Examiner who was acting *pro tem*, submitted a

Supplemental Report and Decision on Remand, finding against McMilian. The decision was based upon the administrative record and stated that “McMilian failed to demonstrate by a preponderance of the evidence that an auto wrecking yard use existed” on the subject parcel prior to the change in zoning laws in 1958.

McMilian appealed the new Hearing Examiner’s decision, for the second time, in King County Superior Court. The Honorable Judge LeRoy McCullough entered an Order affirming the decision, stating that it “was supported by substantial evidence.”

The second appeal before Division I of the Court of Appeals now follows.

**II. ASSIGNMENTS OF ERROR**

1. McMilian assigns error to the decision rendered by the *pro tem* King County Hearing Examiner on June 28, 2012. (CP 67-76)
2. McMilian assigns error to the King County Superior Court Order Denying LUPA Appeal and Affirming Examiner’s Order entered on June 7, 2013. (CP 996-999)

**III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

- A. Did Hearing Examiner Smith err in assessing the credibility of evidence, as he was not the fact finder that had presided

over the administrative hearing, and in discrediting evidence that presiding Hearing Examiner Donahue found to be credible? (*Assignment of Errors Nos. 1-2*).

B. Did Hearing Examiner Smith err in making findings and conclusions that lacked any evidentiary basis? (*Assignment of Errors Nos. 1-2*).

C. Did the Hearing Examiner err in failing to find a legal nonconforming use given the substantial evidence presented that the subject parcel had been continually utilized as a storage yard in conjunction with the adjacent automobile wrecking business, since prior to 1958? (*Assignment of Errors Nos. 1-2*).

D. Did the King County Hearing Examiner's Office fail to act within the applicable time limits in rendering its decisions, prejudicing McMilian and violating his due process rights? (*Assignment of Errors Nos. 1-2*).

E. Was Hearing Examiner Smith improperly appointed to McMilian's case? (*Assignment of Errors Nos. 1-2*).

F. Did Hearing Examiner Smith violate the scope of the appellate court's mandate? (*Assignment of Errors Nos. 1-2*).

- G. Did *pro tem* King County Hearing Examiner Smith err in applying the law to the facts and record of this case? (*Assignment of Errors Nos. 1-2*).
- H. Did *pro tem* King County Hearing Examiner Smith err in issuing a decision that violated the Constitutional rights of McMilian? (*Assignment of Errors Nos. 1-2*).

***IV. APPELLANT'S STATEMENT OF THE CASE***

This Court is already familiar with the facts of this case, having issued a prior ruling. However, a brief summary of the facts follows for the Court's convenience.

Leo McMilian owns two adjacent parcels on the west side of Enchanted Parkway South in the unincorporated area east of Federal Way, in King County. CP 330. McMilian operates an automobile wrecking yard on both parcels. CP 263. In March 2002, McMilian purchased the automobile wrecking business, believing that he was purchasing an operation that included the storage yard on the southern parcel, which is the parcel at issue in this case. CP 330. Upon purchasing the business, McMilian discovered that the prior owner, Ritchie Horan, did not hold title to the subject parcel, but used the subject parcel as a storage yard from 1977 through 2002. CP 330. McMilian purchased the subject parcel

in August of 2002, just five months after purchasing the business and continued to use the subject parcel in precisely the same manner and function as every prior owner of the business had, as a storage yard for the ongoing auto wrecking business. CP 334-337.

The northern parcel has been used as a wrecking yard business since prior to 1958. CP 263. In 1958, King County implemented new ordinances that zoned the parcels as residential. CP 263. The wrecking yard on the northern parcel is a valid nonconforming use. CP 263. Prior owners of the northern parcel had also used the southern parcel for the wrecking yard business and, thus, the wrecking yard “bulged” past the northern parcel’s property lines. CP 263.

McMilian and the predecessor owners enjoyed loyal customers who patronized the wrecking yard in search of parts for decades. Those witnesses testified to continuously observing use of the subject parcel in conjunction with the auto wrecking business. CP 800-807. These witnesses’ affidavits were provided to King County’s Department of Development and Environmental Services (“DDES”), upon its request, attesting to their long-term familiarity with the subject parcel, and its continual use as a storage yard for its adjoining auto wrecking business. CP 800-807.

In approximately March of 2005, McMilian wanted to remove some of the overgrown vegetation on the subject parcel in order to facilitate the removal of tens of thousands of tires lying beneath the vegetation, and to help facilitate more efficient use of the parcel for his auto wrecking operation. CP 334-337. McMilian hired Tim Pennington to remove several large tree stumps that had been felled for lumber years before. CP 334-335. Pennington pushed the alders and underbrush to the west of the subject parcel in order to provide for more efficient use and maintenance of the subject parcel. CP 335-336.

McMilian discovered massive amounts of auto parts stored upon the subject parcel, some clearly dating back to the 1930s. CP 331. For example, he found antique auto parts, including bus wheels that were so old they had wooden spokes. CP 331. Among other auto parts, he found and removed over 24 million pounds of tires alone that cost \$37,199.67 to remove. CP 398; 335. The sheer volume of parts attests to the long term use of the subject parcel as an auto wrecking yard; one cannot possibly acquire millions of pounds of tires without accumulating them for many, many years. The car parts he and his predecessor, Mr. Horan, discovered on the subject parcel demonstrate the long-standing use of the site as a wrecking yard: they found parts from an Essex (produced from 1918 to 1922, when it was assumed by Hudson, that produced it until 1932), the

Model A (1927-1931) and the Model T Ford (1908-1927). CP 331.

After the clearing, the storage yard that existed on the subject parcel for over 60 years was far more visible to the adjoining neighborhood. AR \_\_\_\_.<sup>1</sup> In 2005, King County DDES inspectors inspected the Property in response to complaints from the neighbors that McMilian had cleared the Property. AR \_\_\_\_\_. The inspectors concluded that the extent of McMilian's clearing warranted the issuance of a clearing/grading permit from King County DDES. AR \_\_\_\_\_. A case was opened. AR \_\_\_\_\_. On June 29, 2005, King County's Mr. Tijerina noted he required a notarized affidavit from McMilian that describes the use of the subject parcel to verify dates of operation. AR \_\_\_\_\_. On July 14, 2005, Tijerina noted that the clearing/grading permit had been issued and was awaiting documentation regarding the legal nonconforming use of the subject parcel. AR \_\_\_\_\_. In late July, McMilian submitted five affidavits from individuals with knowledge of the subject parcels' continuous use as a wrecking yard storage facility and wrecking yard office site dating back to before changes in zoning dating in 1958. CP 800-807. On January 27, 2006, some five and a half months later, inspector Robert Manns claims

---

<sup>1</sup> Although specifically designated by the Appellant, the Administrative Record was apparently not included as part of the record that was submitted to this Court. Appellant will rectify this error and will file a praecipe with an amended opening brief to include complete references to the Administrative Record once it is part of the clerk's papers.

that the “issued permit” entry by Tijerina was erroneous, but gave no further explanation. AR \_\_\_\_\_. On January 26, 2007, one year later, DDES Supervisor Randy Sandin, issued a letter to Bruce McVeigh stating that the affidavits submitted with the clearing/grading packet are insufficient to establish nonconforming use. AR \_\_\_\_\_. On September 11, 2007, after another nine months, and after nearly two and a half years had lapsed, the DDES issued the Notice and Order to McMilian that was the genesis of this appeal. AR \_\_\_\_\_.

The specific violation that was cited by King County DDES which is relevant in this appeal is as follows:

Operation of an auto wrecking business from a residential site that does not meet the requirements for a home occupation in violation of Section 21A.30.080 (and the allowed use section that the use would be under such as contractor’s storage yard etc) of the King County Code.

CP 42.

The Court of Appeals decision in the first appeal was filed on May 2, 2011. CP 40. This Court’s Opinion stated, “Because the hearing examiner herein improperly presumed that the user of neighboring land was trespassing, we remand for additional findings on the issue of whether a valid nonconforming use existed.” CP 41. The Opinion further stated, “The hearing examiner did not make any finding with regard to whether the wrecking yard use was established on the southern parcel *prior to*

1958, only that it ‘has long been conducted’ *on the northern parcel* and that some spillover had occurred onto the southern parcel.” The issue on remand was very limited, “We remand to the hearing examiner for a decision, based on the existing record, as to whether McMilian established that the wrecking yard use was extant on the southern parcel prior to 1958.” CP 62. A Mandate was issued by this Court on June 21, 2011. CP 288.

The presiding Hearing Examiner, Peter Donahue, did nothing in response to the mandate. His term ended on June 15, 2012. CP 519. Prior to the termination of his position, King County Council’s Chief of Staff asked Stafford L. Smith for help. AR \_\_\_\_\_. Mr. Smith consulted further with King County’s interim Hearing Examiner, who assigned McMilian’s case to him. AR \_\_\_\_\_. At the time of this assignment, Peter Donahue was still employed as the Chief Examiner. AR \_\_\_\_\_.

Over one year after the mandate had been issued, on June 28, 2012, Hearing Examiner Smith submitted a Supplemental Report and Decision on Remand. CP 67. Hearing Examiner Smith reviewed the record of the administrative hearing, discredited all of the witness testimony that had been presented by McMilian, and based his decision solely upon two exhibits. CP 74. Hearing Examiner Smith determined that McMilian failed to sustain his burden to show a legal nonconforming

use of the southern parcel as a storage yard. CP 75.

McMilian appealed Hearing Examiner Smith's decision, for the second time, in King County Superior Court. The Honorable Judge LeRoy McCullough entered an Order affirming Hearing Examiner Smith's decision, finding that it "was supported by substantial evidence." CP 996-999.

***V. ARGUMENT***

***A. LUPA Standard of Review***

***1. Court Reviews Administrative Record***

RCW 36.70C ("LUPA") governs review of land use decisions. On review of a LUPA decision, this court stands in the shoes of the superior court and reviews the hearing examiner's action on the basis of the administrative record. Pavlina v. City of Vancouver, 122 Wn. App. 520, 525, 94 P.3d 366 (2004) *citing* Wells v. Whatcom County Water Dist. No. 10, 105 Wn. App. 143, 150, 19 P.3d 453 (2001).

RCW 36.70C.120 provides:

When the land use decision being reviewed was made by a quasi-judicial body or officer who made factual determinations in support of the decision and the parties to the quasi-judicial proceeding had an opportunity consistent with due process to make a record on the factual issues, judicial review of factual issues and the conclusions drawn from the factual issues shall be confined to the record created by the quasi-judicial body or officer.

When reviewing an administrative land use decision pursuant to the Land Use Petition Act, alleged errors of law are reviewed *de novo* and questions of fact are reviewed for substantial evidence. City of University Place v. McGuire, 144 Wn.2d 640, 647, 30 P.3d 453 (2001).

**2. *LUPA's Standards for Relief***

RCW 36.70C.130(1) sets forth six standards upon which relief may be granted to the petitioning party:

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

McMilian seeks relief under standards (a), (b), (c), (d), (e) and (f).

**B. RCW 36.70C.130(1)(a): Hearing Examiner Smith Engaged in Unlawful Procedure in Assessing Credibility of Evidence as he was Not the Fact Finder**

Only the actual trier of fact is entitled to deference on matters of credibility. A reviewing court “view[s] the evidence and any reasonable inferences in the light most favorable to the party that prevailed in the highest forum exercising fact finding authority.” City of Medina v. T-Mobile USA, Inc., 123 Wash. App. 19, 24, 95 P.3d 377 (2004). This is because when reviewing factual issues under the substantial evidence test, the reviewing court defers to “the fact finder’s views regarding the credibility of witnesses and the weight to be given reasonable but competing inferences.” City of University Place at 652.

Here, Hearing Examiner Smith is not entitled to the deference due the trier of fact, because he was not present during the administrative hearing at issue in this case. Smith is therefore not permitted to substitute himself as a fact finder on credibility based upon his personal review of the record.

Determining credibility is a critical part of the fact finder's role. Fact finders consider many factors when determining whether evidence is credible, including demeanor, bias, opportunity, capacity to observe and narrate the event, character, prior inconsistent statements, contradiction, corroboration, and plausibility. Fact finders are in the best position to resolve issues of credibility and determine how much weight to give evidence because they see and hear

the witnesses. This general rule applies not only in traditional court settings but is equally important in administrative proceedings.

...

A witness's demeanor includes the expressions of his countenance, how he sits or stands, whether he is inordinately nervous, his coloration during critical examination, the modulation or pace of his speech and other non-verbal communication.

In re Detention of Stout, 159 Wn. 2d 357, 382-83, 150 P.3d 86 (2007) (internal citations omitted). Hearing Examiner Smith does not have any advantage or insight in determining the credibility of evidence. His assessment of credibility of evidence is entitled to no deference in this second appeal.

In sharp contrast with the factual findings of Hearing Examiner Donahue, Hearing Examiner Smith completely dismissed all evidence that supported McMilian (oral testimony, written testimony, and supporting documents) in its entirety, solely because of his own assessment of the *credibility* of that evidence. Hearing Examiner Smith based his decision on untenable grounds as he attempted to resolve what he perceived as conflicting testimony, evaluated the veracity of witness testimony and documentary evidence, and weighed the persuasiveness of that evidence, which are all functions of a trier of fact that is in a position to evaluate credibility.

As one example, Hearing Examiner Smith's Finding of Fact #11 properly reflects that King County conceded that the Mecklenberg affidavit, which was presented by McMilian, "should be viewed as reliable," but his Finding of Fact #12 then characterizes that same affidavit as "sufficiently defective as to preclude placing reliance upon" it. CP 70.

In addition to several affidavits submitted on behalf of McMilian along with the 1945 King County archive records, both of which supported the continued use of the subject parcel as a storage yard since prior to 1958, the only live testimony regarding the use of the Property during the time in question was provided by Ritchie Horan. Ritchie Horan frequently visited the wrecking yard business as a child, in approximately 1956, with his father, Harry Horan, who was a mechanic. AR \_\_\_. He was intimately familiar with the wrecking yard from the age of 10 through 16. AR \_\_\_. Some years thereafter, Ritchie Horan established his own body shop and continued to conduct business with the wrecking yard. AR \_\_\_. In 1977, Ritchie Horan purchased the wrecking yard business himself. AR \_\_\_. At that time, he first became aware that the five-acre parcel that contained the wrecking yard business "bulged on all sides" into its adjoining parcels, including the southern parcel at issue. AR \_\_\_. He considered purchasing it, but never did. AR \_\_\_. Ritchie Horan described his efforts to prevent the storage yard from continuing even further south,

past the two-acre's southerly boundary line. AR \_\_\_. Ritchie Horan also testified that at around 1990, he tore down the old office building. AR \_\_\_.

Hearing Examiner Donahue, the trier of fact, found Ritchie Horan's testimony to be credible. His testimony was supportive of the length of time the business had been operating and spilling over to the storage yard, as well as the degree and manner in which the use of the southern parcel had been consistently used for storage. Hearing Examiner Donahue repeatedly quoted Ritchie Horan in his Conclusion of Law No. 2 as evidence of the lack of "hostility" with the neighbors, in his analysis of adverse possession. CP 111-112.

In sharp contrast, Hearing Examiner Smith discounted Ritchie Horan's testimony because of his personal impression that Ritchie Horan was "struggling to reconcile" the 1945 King County archive photograph of an office shed (which is about two inches by three inches, in black and white) with his past recollection of the "little shanty building [with] a stove in it." CP 71. Although Ritchie Horan affirmed that the house to the left of the photograph would have been the neighbor's house, and that the office building on the southern lot was the one that he had torn down, and that but for the density of trees and brush, the "terrain is right," Hearing Examiner Smith dismissed the testimony, stating, "This hardly qualifies as a strong positive identification." CP 71.

Hearing Examiner Smith's Finding of Fact No. 17 improperly states that Richie Horan's familiarity with the property began in 1966, after the zoning laws had been implemented, although Ritchie Horan's testimony was that he began visiting the property in 1956, two years before any zoning laws applied. CP 71; AR \_\_.

Ultimately, Hearing Examiner Smith disregarded Ritchie Horan's testimony altogether, when he held, "The only reliable items of evidence in the record relating to the 1958 timeframe are the 1960 aerial photograph appearing as exhibit no. 21 and the exhibit no. 11 assessor records from the King County archives." CP 74. Hearing Examiner Smith held that the testimony of all of the witnesses, including Ritchie Horan's testimony, was "unreliable individually and collectively ... vague, generalized, speculative, and frequently self-serving." CP 75. After assessing the credibility of the testimony, and discrediting every bit of it, Hearing Examiner Smith reached a conclusion that the testimony did "not constitute substantial and reliable evidence of a nonconforming use." CP 75.

This is undisputable evidence of a significant contradiction between the two hearing examiners in terms of their assessments of the reliability and credibility of the live testimony of Ritchie Horan, in addition to the other witnesses who testified by affidavit. Hearing

Examiner Donahue's finding that "during prior ownerships, some spillover of the auto wrecking operation occurred onto the subject property" could only have been made in reliance upon the testimony of Ritchie Horan and the other corroborating witness testimony. CP 110. Hearing Examiner Donahue gave those witnesses credence. Hearing Examiner Smith did not. As Hearing Examiner Donahue was the only trier of fact who was in a position to assess credibility of evidence, this is not harmless error. Hearing Examiner Donahue's decision clearly indicated that he found McMilian's evidence credible; Hearing Examiner Smith could not subsequently discredit all of that evidence, essentially reversing the original decision.

C. **RCW 36.70C.130(1)(c): Hearing Examiner Smith Improperly Offered and Relied upon *His Own* "Expert" Opinion, Which Contradicted the County's Evidence and McMilian's Eyewitnesses**

Hearing Examiner Smith's findings may be overturned when they are not supported by substantial evidence. Miller v. City of Bainbridge Island, 111 Wn. App. 152, 162, 43 P.3d 1250 (2002). Factual findings under the substantial evidence standard are reviewed *de novo*. Isla Verde Int'l Holdings, Inc. v. City of Camas, 99 Wn. App. 127, 133, 990 P.2d 429, 433 (1999) *aff'd on other grounds*, 146 Wn.2d 740, 49 P.3d 867 (2002). "Substantial evidence exists when the evidence in the record is of

sufficient quantity to persuade a fair-minded rational person of the truth of the finding.” Id.

After improperly making determinations as to the unreliability of all other evidence, Hearing Examiner Smith based his conclusion upon two documents: “The only reliable items of evidence in the record relating to the 1958 timeframe are the 1960 aerial photograph ... and the ... assessor records from the King County archives.” CP 72. Hearing Examiner Smith concluded that the photograph, which shows both parcels together, proves that the eyewitnesses were wrong because the southern portion of the property shows a great deal of tree cover. CP 72.

Critically, however, the County itself admitted that the 1960 aerial photograph does not prove what Hearing Examiner Smith claims: that the storage of automobile debris eyewitnesses saw was not actually occurring on the subject property. Hearing Examiner Smith’s error is based on two “facts” that he himself supplied, “facts” that are flatly contradicted by evidence in the record.

Hearing Examiner Smith’s first erroneous factual statement is that he could determine where in the 1960 photograph the property boundaries were located. The photograph contains no boundary lines or other evidence of the division of the parcels. King County’s witnesses repeatedly affirmed that nothing on the 1960 aerial photograph marked the

boundary lines between the main parcel and the storage yard; no professional survey to designate the property lines was admitted into the record. AR \_\_.

However, Hearing Examiner Smith proceeded with an analysis of the 1960 aerial photograph in Findings of Fact Nos. 19 and 21 as if a line of trees to the south of the wrecking yard was representative of the boundary line between the wrecking yard and storage yard parcels. CP 72. He calculated distances between the boundary line and other structures, when nothing in the record supported such calculations. He made findings regarding the precise location of structures on the storage yard parcel, based upon his impression from the tax records that a segregation of the original parcel had occurred in 1972. Again, nothing was in the record to support those findings. The undisputed testimony of multiple witnesses is that no boundary lines were reflected on the aerial photograph. AR \_\_.

The second incorrect factual statement, Hearing Examiner Smith's supplied was his own "expert" testimony on trees and the density of the cover they provide. Using the same two pieces of evidence -- the 1960 aerial photograph and the 1945 archive tax record -- Hearing Examiner Smith made a factual finding that the tree cover shown in the photograph could not possibly have concealed significant activity or items underneath. CP 72. That expert testimony, improperly supplied by Hearing Examiner

Smith, disregards King County's concession that such debris would not be visible from an aerial photograph. Mr. Tijerina was questioned, "And you wouldn't necessarily be able to see auto wrecking debris under a [vegetative] canopy, would you?" He responded, "No. Not necessarily." AR \_\_. Nevertheless, Hearing Examiner Smith concluded, "The notion that significant auto salvage activity could have occurred on parcel 9038 during any part of the 1950s is thus contradicted by the aerial photograph and implausible under the circumstances. And ... surely the roof would have been visible along with some sort of driveway approach and parking area." CP 72.

The conclusions that the location of the boundary was known and the trees could not have obscured the activity are not based upon evidence and contradict eyewitness testimony and other evidence of the pre-1958 operation of the storage yard. Ritchie Horan testified that he was familiar with the auto wrecking business and in particular the original office and shed that was located on the storage yard parcel. AR \_\_. His father, Harry Horan, testified by affidavit and also verified the existence of the office and shed, its location on the storage parcel, and its use as part of the wrecking yard business since prior to 1957. AR \_\_. Hearing Examiner Donahue did not discredit either of these witnesses who provided their distinct recollections of the office as depicted in King County's 1945

archive records. McMilian testified that he had located and removed parts that were so old they had come from an Essex the Model A, and the Model T Ford. CP 331. Yet, Hearing Examiner Smith concluded that it was “implausible” for automobile parts to be located beneath the canopy of brush and trees that can be observed in the 1960 aerial photograph, simply based upon his personal hypothesis. CP 72.

There is no evidentiary support in the record that a canopy of trees would not create a visible barrier to auto parts underneath the trees, and sometimes parts that were partially buried in the ground. In fact, prior to the clearing of the storage yard, the adjoining neighbors could not even observe auto parts in the storage yard and could barely see the wrecking yard through the trees and brush. AR \_\_. Hearing Examiner Smith concluded that trees and brush would not obscure auto parts from being visible in an aerial photograph based upon no concrete evidence, and even in direct contravention of the evidence that was presented by and conceded by King County. There is no challenge to the fact that trees would obscure auto parts from overhead. The 1960 aerial photograph does not provide an independent evidentiary basis to support the contrary conclusion reached by Hearing Examiner Smith. CP 748.

A judicial officer may not act as a witness, expert or otherwise, in the proceeding in which he is presiding. ER 605, Vandercook v. Reece,

120 Wn. App. 647, 652, 86 P.3d 206, 209 (2004) *see also* Sierra Club v. Froehlke, 359 F.Supp. 1289, 1335 (S.D.Tex.1973) (burden is not to be placed on the judiciary, but on the agency, which must use expertise and support own assessment with evidence in record). In this case, King County's own evidence demonstrated that the 1960 aerial photograph did not contradict the eyewitness testimony, as Hearing Examiner Smith concluded. Hearing Examiner Smith improperly acted as an expert witness and then based his decision upon his own expert testimony.

Hearing Examiner Smith made several other detailed calculations and specific findings with no basis for support in the record. Finding of Fact #22, which asserts that the 2000 aerial photograph, again reflects no actual boundary lines, demonstrates an intrusion of stored vehicles onto the subject parcel "extend[ed] a maximum of about 50 feet and occup[ied] less than 15 percent of the southerly parcel." CP 72-73. Finding of Fact #27 describes an area in which vehicles had been cleared, estimating that area to be "comprising perhaps 2,000 or 3,000 square feet". CP 73-74. Conclusion of Law #3 asserts that the homeowner "would not likely have been indifferent to expansion of the wrecking yard beyond the perimeters of 9005." CP 74-75. The homeowner did not testify; nor is there any evidence that the homeowner knew what legal boundary lines existed, much less precisely where they were located. Hearing Examiner Smith

even opined on the necessity of using the storage yard parcel by stating that the aerial photographs disclose “no necessity for the existing auto salvage yard on parcel 9005 to expand beyond its boundaries.” CP 75. No evidence in the record supports these speculative findings; in fact, the opposite is true.

**D. RCW 36.70C.130(1)(b); The Land Use Decision is Not Supported by Evidence, Which is Substantial When Viewed in Light of the Whole Record Before the Court.**

McMilian presented substantial evidence to support his contention that he has a nonconforming use. To the contrary, King County presented no evidence as to the use of the property prior to 2005, nor did King County refute that continuous *use* commenced as far back as 1956.

Despite these facts, Hearing Examiner Smith failed to reach the correct legal conclusion that a nonconforming use was established given the substantial evidence presented by McMilian, and the lack of evidence presented by King County. McMilian’s substantial evidence is detailed as follows:

**Testimony of Ritchie Horan**

The affidavit of Ritchie Horan stated that he:

“recorded an affidavit from Hank Mecklenberg and his wife stating that Mr. Mecklenberg started the wrecking yard in the 1930’s on a 5 acre parcel currently known as 37307 Enchanted Parkway South, Federal Way, WA 98003 and

that Mr. Mecklenberg also utilized the 2+ acres south of said parcel for office space and storage.” AR \_\_.

Further, Ritchie Horan’s affidavit states:

“The second affidavit from Gerald Bussinus states he purchased and operated said wrecking yard until the sale to myself in 1977. During his tenure, he sold 1 acre on the north side of said 5 acre parcel to the water district and continued to use the 2+ acres on the south side, which is described more specifically below.” AR \_\_.

In his direct testimony, Ritchie Horan testified that he submitted these affidavits in order to obtain licensing of his business, which included the Property. AR \_\_. Ritchie Horan testified that the use of his business was grandfathered. AR \_\_.

Richie Horan’s use was not incidental “spillover.” Instead, Richie Horan, in his direct testimony repeatedly asserted that he continuously used the entire property, excepting some topographically difficult sections, and left a buffer to make sure that he did not infringe too closely on the property immediately to the south of the Property. AR \_\_.

More importantly, Ritchie Horan recalled the use of the Property as a wrecking yard operation prior to 1958. AR \_\_. Ritchie Horan testified that he distinctly remembered the Property as far back as 1956, when he was ten years old, and he recalled the wrecking yard office on the Property and visiting multiple times during that period and many years thereafter. AR \_\_. His account of the office being a little shanty building

is verified by a photograph of the Property in a King County tax record entered as exhibit 11 at the hearing. CP 503. Ritchie Horan testified, after looking at the photograph, that this was the office and this was the Property as he remembered it back in the 1950's. AR \_\_.

**Testimony of Harry Horan**

The testimony of Harry Horan was provided in the form of an affidavit that was admitted. AR \_\_. Harry Horan testified to the fact that his father was a mechanic in the Federal Way area and that he and his father would go to the Property prior to 1957 to look for parts (Horan was born in 1943). He described the office and shed on the Property and auto wreckage located on the Property. He provided his historical knowledge of the Property; he visited it multiple times, and he confirms that it was used for wrecking operations. Additionally, he specifically identified the Property by parcel number. His testimony strongly corroborates that of his son, Ritchie Horan.

**Testimony of Bert M. Willard**

The testimony of Bert Willard was provided in the form of an affidavit that was admitted. AR \_\_. Mr. Willard testified to being a client of the wrecking operation since before 1957 and attested to auto wreckage being located on the Property, which he describes by King County parcel number. His testimony corroborates that of the Horans.

**Testimony of James W. Hutchens**

The testimony of James Hutchens, who lived in the area of the Property, was provided in the form of an affidavit that was admitted. AR \_\_\_. Hutchens testified to being a client of the wrecking operation since 1971 and attested to auto wreckage being located on the Property, which he describes by King County parcel number. His testimony corroborates that of the Horans and Mr. Willard.

**Testimony of A. Richard Hilton**

The testimony of Richard Hilton, a local business owner, was provided in the form of an affidavit that was admitted. AR \_\_\_. Mr. Hilton testified to being a client of the wrecking operation since 1980 and attested to auto wreckage being located on the Property, which he describes by King County parcel number. His testimony corroborates that of the other witnesses.

**McMillian's Acquisition of the Affidavits**

McMillian testified to the fact that the witnesses who submitted these affidavits were aware of precisely the parcel of land to which they were referring in their affidavits. AR \_\_\_. The witnesses provided the affidavits and confirmed with McMillian that they knew the storage yard to the south was at issue. AR \_\_\_.

**Testimony of WSP Trooper Suzanne Pagett**

Trooper Pagett testified to her belief that the Property was part of the wrecking yard operation since she had begun inspecting the yard in 1997. AR \_\_.

McMilian presented substantial evidence to satisfy his burden of showing that the Property enjoyed the status of a nonconforming use. McMilian presented substantial evidence of its continued use. Although the finder of fact found the evidence to be credible, finding that the storage yard had been used for storage during prior ownerships, the finder of fact failed to reach the correct legal conclusion of a nonconforming use. This was because of the error in assuming Ritchie Horan was a trespasser on the storage yard.

**E. RCW 36.70C.130(1)(a), (e) and (f): Office of the Hearing Examiner Engaged in Unlawful Procedure / Failed to Follow a Prescribed Process and as a result, Violated Petitioner's Constitutional Rights**

The King County Code (KCC) created the office of the hearing examiner, delegating to the hearing examiner limited authority to, inter alia, “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...” KCC § 20.24.080(A). The purpose of the office of the hearing examiner is to, among other

things, “expand the principles of fairness and due process in public hearings.” KCC § 20.24.010(C). Another purpose is to ensure that land use decisions are made expeditiously. KCC § 20.24.097. Specific time limits are set by the Code:

Time limits. ... In every appeal heard by the examiner pursuant to K.C.C. 20.24.080, the appeal process, including a written decision, shall be completed within **ninety days** from the date the examiner’s office is notified of the filing of a notice of appeal pursuant to K.C.C. 20.24.090. When reasonably required to enable the attendance of all necessary parties at the hearing, or the production of evidence, or to otherwise assure that due process is afforded and the objectives of this chapter are met, these time periods may be extended by the examiner at the examiner’s discretion for an additional thirty days. With the consent of all parties, the time periods may be extended indefinitely. In all such cases, the reason for such deferral shall be stated in the examiner’s recommendation or decision. Failure to complete the hearing process within the stated time shall not terminate the jurisdiction of the examiner.

KCC § 20.24.098 (emphasis added). There are also specific time limits upon which a decision must be rendered:

Within **ten days** of the conclusion of a hearing or rehearing, the examiner shall render a written recommendation or decision and shall transmit a copy thereof to all persons of record. The examiner's decision shall identify the applicant and/or the owner by name and address.

20.24.210(A) (emphasis added).

**1. *Hearing Examiner Donahue Violated  
Applicable Time Limits Which Have Now  
Severely Prejudiced Petitioner and Violates  
Due Process***

Hearing Examiner Peter Donahue *never* satisfied any of the time requirements of KCC. The appeal was filed on September 18, 2007. CP 109. A decision was not issued within 90 days; the *hearing* was not even completed until nearly one year later, in August 2008. CP 108. Even after the hearing was complete, Hearing Examiner Peter Donahue took another nine months to issue a decision in May 2009. CP 108.

When this Court remanded the case back to Hearing Examiner Peter Donahue on May 2, 2011, he took no further action on the case before his appointment was (presumably) terminated over a year later, on June 15, 2012, other than requested additional briefing on the issue that was remanded. AR \_\_. That briefing was completed by the parties in December 2011. AR \_\_. Another six months passed before Hearing Examiner Donahue ceased to continue as the Hearing Examiner, without ever issuing a decision on the narrow issue that was remanded to him.

This delay far exceeds the ninety day period of time for issuance of a decision that is permitted by the Code. The delays experienced under Hearing Examiner Donahue were not routine delays necessitated by the judicial process. Instead, the delays were unjustified and unreasonable and continued on for so long that the Petitioner became prejudiced by the

delay. Hearing Examiner Donahue was the only trier of fact that was present during the hearing; he is the only individual who can make any findings or conclusions based upon witness credibility. The delay has caused Petitioner's case to be completely reevaluated by a new hearing examiner, whose decision is directly contrary to that of the presiding Hearing Examiner in terms of his assessment of the credibility of evidence presented. This matter has not been managed in a way that demonstrates the orderly administration of a judicial process, nor in accordance with the time limits set forth in the King County Code. The Petitioner should not be penalized for the undue delay in the process that has resulted in the loss of the trier of fact, especially given the fact that this process has been entirely within the control of King County itself, the Respondent in this case.

This unjustified and unreasonable delay is a violation of Petitioner's Due Process rights under the Fourteenth Amendment and the Washington State Constitution. Const. Art. 1, § 3. "The Due Process Clause requires provision of a hearing 'at a meaningful time.' *E.g.*, *Armstrong v. Manzo*, 380 U.S. 545, 552, 85 S.Ct. 1187, 1191, 14 L.Ed.2d 62 (1965). At some point, a delay in the post-termination hearing would become a constitutional violation. See *Barry v. Barchi*, 443 U.S., at 66, 99 S.Ct., at 2650." *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 547,

105 S. Ct. 1487, 84 L.Ed.2d 494 (1985). This case involves several blatant violations of the time limits set for issuance of a decision set by the King County Code, which is 90 days. There have been no prompt dispositions issued in this case; the process has been permitted to drag on for so long that the presiding trier of fact has been terminated and is now unavailable to clarify his own findings of fact and conclusions of law. The procedural history of this matter, which originated with a Notice of Violation in September 2007, coupled with the resulting prejudice, provides a valid basis for stating a claim of constitutional deprivation based upon a lack of procedural due process.

Here, the provision for an administrative hearing, neither on its face nor as applied in this case, assured a prompt proceeding and prompt disposition of the outstanding issues between Barchi and the State. Indeed, insofar as the statutory requirements are concerned, it is as likely as not that Barchi and others subject to relatively brief suspensions would have no opportunity to put the State to its proof until they have suffered the full penalty imposed. Yet, it is possible that Barchi's horse may not have been drugged and Barchi may not have been at fault at all. Once suspension has been imposed, the trainer's interest in a speedy resolution of the controversy becomes paramount, it seems to us. We also discern little or no state interest, and the State has suggested none, in an appreciable delay in going forward with a full hearing. On the contrary, it would seem as much in the State's interest as Barchi's to have an early and reliable determination with respect to the integrity of those participating in state-supervised horse racing.

Barry v. Barchi, 443 U.S. 55, 66, 99 S. Ct. 2642, 2650, 61 L. Ed. 2d 365 (1979). “[H]owever, we conclude that Barchi was not assured a sufficiently timely postsuspension hearing and that § 8022 was unconstitutionally applied in this respect. *Id.*

The violation of the time limits by King County’s Hearing Examiner and the violation of Petitioner’s due process rights justify protection of Petitioner’s property rights by declaring King County’s actions void and entering a finding that the subject property enjoys the status of a legal nonconforming use. Systems Amusement, Inc. v. State, 7 Wn. App. 516, 518, 500 P.2d 1253 (1972).

**2. *Pro Tem Hearing Examiner was Not Properly Appointed***

The King County Code permits the use of *pro tem* Hearing Examiners in limited situations, pursuant to KCC § 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.” It would have been appropriate for the chief examiner to have hired a *pro tem* examiner at the beginning of this case if could not be processed within the time limits proscribed by the King County Code, but that was not done. AR \_\_\_. The Code does not permit the hiring of a *pro tem* hearing examiner to issue decisions after the

conclusion of an administrative hearing; the Code only permits a *pro tem* hearing examiner to **hear** pending applications and appeals.

Furthermore, the King County Code specifies that only the chief examiner can hire a *pro tem* examiner. In this case, the *pro tem* presented a history of the manner in which he became involved, explaining that he was “asked by County Council Chief of Staff Michael Woywod to help out.” AR \_\_. His consultation with David Spohr, “the County’s interim Hearing Examiner,” resulted in the assignment of this case to him. AR \_\_. Neither Mr. Woywod nor Mr. Spohr held the role of chief examiner in May 2012, when the case was apparently re-assigned. Neither had authority to hire a *pro tem* hearing examiner in May 2012.

### ***3. Hearing Examiner Violated the Scope of Authority***

Hearing Examiner Smith issued the 2012 decision that is now being appealed, which decision became necessary as a result of this Court’s remand instruction: “Accordingly, we remand to the hearing examiner for a determination of whether the wrecking yard use existed on the southern parcel prior to 1958.”

In addition to being hired absent appropriate procedures, Hearing Examiner Smith did not limit the scope of his decision to that which was required by the remand. For example the Hearing Examiner’s decision

disputes this Court's Opinion that a presumption of permissive use must apply:

Although not strictly required by this decision on remand, the 1972 segregation has a further important implication. As explained by the Division I opinion, the presumption that an uninvited use is permissive only applies if the property subject to such uninvited use is "vacant, open, unenclosed, and unimproved." But this was not the circumstance with respect to parcel 9038 before its 1972 segregation into two lots. As shown in the 1960 aerial photograph (exhibit no. 21) and substantiated by contemporaneous assessor records (exhibit no. 11), the five-acre parcel that comprised tax lot no. 9038 in 1958 was neither vacant nor unimproved. It contained a house, outbuildings, parking areas and a driveway. Thus in 1958 when a legal nonconforming use would have been required to be established, an incursion of the wrecking yard across the boundary onto parcel 9038 from parcel 9005 to its north would not have been entitled to a presumption of permission.

CP 75. Hearing Examiner Smith also opined on who should have testified at the hearing:

the court attempts to substantially reduce the value of the evidence of the witnesses' unassisted memory. If Harry Horan's recollection indeed was a valuable source of information, he should have been produced as a witness at the hearing and subjected to cross-examination as to the actual extent of his personal observations. The three affidavits under discussion are all

CP 70. Hearing Examiner Smith completely disregarded the findings of fact that had been reached by Hearing Examiner Donahue, instead rewriting the entire decision in order to support his conclusion. For example, Hearing Examiner Donahue's initial decision included the following finding of fact, based upon his personal observation of the witnesses' testimony:

An auto wrecking business has long been conducted on the property directly abutting to the north, under a series of ownerships. During **prior ownerships**, some spillover of the auto wrecking operation occurred onto the **subject property**, which was not owned by the prior ownerships of the auto

wrecking business (it was purchased by Appellants after their purchase of the main Astro Auto Wrecking site abutting to the north). The spillover consisted of *storage* of some wrecked and dismantled cars and *numerous* junk auto parts and tires. The property was not utilized in active auto wrecking operations as was the main operation to the north.

CP 110. The only “prior ownerships” addressed in the record included Mecklenberg between 1957 and 1968, Bussinus between 1968-1977, Horan between 1977-2001, and the Petitioner after 2001.

In sharp contrast, Hearing Examiner Smith completely emasculated that finding of fact, by totally disregarding evidence that was obviously found to have been highly credible by the trier of fact, Hearing Examiner Donahue:

The various testimonial recollections in the record pertaining to the conditions on parcel 9038 in the 1958 timeframe are unreliable individually and collectively. They are vague, generalized, speculative, and frequently self-serving. They do not constitute substantial and reliable evidence of a nonconforming use.

CP 75. Hearing Examiner Smith was bound by the Court of Appeals instructions.

Appellate court actions govern all subsequent proceedings in any trial court. RAP 12.2. Following a remand for resentencing, a trial court's discretion is limited by the scope of the appellate court's mandate. And, trial courts must strictly comply with directives from appellate courts that leave no discretion to the trial court. Appellate courts apply an abuse of discretion standard in reviewing a trial court's resentencing decision on remand.

State v. Sherrill, 167 Wn. App. 1025, *review denied*, 175 Wn.2d 1006, 285 P.3d 885 (2012) (internal citations omitted). Yet, Hearing Examiner Smith did not comply with the instructions on remand, he instead took a much more aggressive role in formulating his own independent opinion on the evidence and case, regardless of whether he directly contradicted the trier of fact's entered findings.

F. **RCW 36.70C.130(1)(d) -- Land Use Decision is Clearly Erroneous Application of the Law to the Facts**

A compelling amount of testimonial and documentary evidence was presented to show that the subject parcel was used as a storage yard in conjunction with the automobile wrecking business since prior to 1958. In support of the use of the subject parcel being used as a storage yard for the adjoining automobile wrecking yard, McMilian produced a) testimony from Mr. Horan, who had personal knowledge of the operation and office that had been located on the subject parcel since the 1930s, when he was a young boy, AR \_\_\_; b) photographs of an office and shed on the subject parcel from King County Tax Records dated in 1945, CP 503; c) affidavits from long-time patrons of the business, including Harry Horan (from 1957), Bert Willard (from 1957), James Hutchens (from 1971), and A. Richard Hilton (from 1980), AR \_\_\_; d) live testimony from Washington State Patrol inspector Suzanne Pagett (from 1997), AR \_\_\_; e) live

testimony from McMilian (from 2001), AR \_\_\_; f) live testimony from contractor Tim Pennington (from 2002), AR \_\_\_; g) live testimony from civil engineer Bruce MacVeigh, AR \_\_\_; and h) photographs and vendor reports relating to the extensive amount of tires removed and disposed of from the subject parcel (from 2005), CP 398.

All of the testimony presented from the long-time patrons supported the continuous use of the subject parcel as a storage yard, which commenced long before 1958, the effective date of King County's restrictive zoning law. McMilian demonstrated evidence of an extensive history of the business operation, and in particular, the storage yard. Consequently, McMilian showed that the use of the subject parcel as a storage yard existed prior to 1958, which satisfies the first element of a legal nonconforming use.

The record is devoid of evidence to the contrary. The only evidence that King County submitted in opposition were aerial photographs that had been taken from an airplane thousands of feet above the property, which represent a single moment in time. Their scale is such (given the vegetative canopy) that identification of anything lying on the property is, at best, extremely difficult. The aerial photos have no valid surveying marks on them to delineate the official boundaries of each parcel. Even King County witnesses conceded that one would be unable to

see auto-wrecking storage under the tree canopy in its aerial photographs.

AR \_\_\_\_.

Because the highest forum that exercised the fact-finding role in this case, Hearing Examiner Donahue, determined that the subject parcel had long been utilized as a storage yard for auto parts over a series of successive ownerships, McMilian satisfied his burden to show that a sufficient quantum of evidence exists to support his premise of the pre-zoning law use of the subject parcel as a storage yard.

Hearing Examiner Smith's decision is contrary to law as he stated that the subject parcel must have been used "in sufficient degree to support a determination that it too is entitled recognition as the location of a legal non-conforming auto wrecking yard use." CP 68. Any level of "degree" of use of the subject parcel as a storage area for the adjoining automobile wrecking yard constitutes a legal nonconforming use.

Consequently, the compelling factual evidence reveals a "mistake has been committed" in the Hearing Examiner's conclusion that McMilian has not satisfied his burden to show that the storage yard has been in use since prior to 1958. Whatcom County Fire Dist. No. 21 v. Whatcom County, 171 Wn.2d 421, 427, 256 P.3d 295, 297 (2011).

G. **RCW 36.70C.130(1)(f): The land use decision violates the constitutional rights of the party seeking relief.**

The constitutionality of land use decisions are legal issues that are reviewed *de novo*. Griffin v. Thurston County, 137 Wn. App. 609, 620, 154 P.3d 296 (2007).

Land use regulations may be challenged as unconstitutional takings, violations of substantive due process, or both. When a party challenges a land use regulation on both grounds, we analyze the takings claim first. Even if a land use regulation does not amount to a taking, it must still comply with the substantive due process requirements of the fifth and fourteenth amendments to the United States Constitution.

Peste v. Mason County, 133 Wn. App. 456, 470, 136 P.3d 140 (2006) (internal citations omitted).

Washington recognizes legal nonconforming uses as "vested rights" that cannot be taken away without the municipality having first satisfied a high burden of proof. Van Sant v. City of Everett, 69 Wn. App. 641, 649, 849 P.2d 1276 (1993). "A nonconforming use is a use which lawfully existed prior to the enactment of a zoning ordinance, and which is maintained after the effective date of the ordinance, although it does not comply with the zoning restrictions applicable to the district in which it is situated." Rhod-A-Zalea & 35th, Inc. v. Snohomish County, 136 Wn.2d 1, 6, 959 P.2d 1024 (1998) (*quoting* 1 ROBERT M. ANDERSON,

AMERICAN LAW OF ZONING §.01 (Kenneth H. Young ed., 4th ed. 1996).

McMilian's federal and state constitutional due process rights are squarely at issue. Washington law offers more protection of real property rights in order to place "greater emphasis on certainty and predictability in land use regulations." Abbey Road Group, LLC v. City of Bonney Lake, S.Ct No. 80878-3 (October 8, 2009). These concepts are "rooted in notions of fundamental fairness ... [and recognize that property] rights can represent a valuable and protectable property interest." *Abbey*. Although the focus of the Washington Supreme Court in *Abbey* was the vesting of development rights, the legal principles involved are identical when considering the property interest of McMilian in continuing to operate an ongoing business despite a change in local zoning ordinances.

Due process requires governments to treat citizens in a fundamentally fair manner. Consequently, citizens must be protected from the fluctuations of legislative policy, so that they can plan their conduct with reasonable certainty as to the legal consequences. Property development rights constitute "a valuable property right."

Valley View Indus. Park v. City of Redmond, 107 Wn.2d 621, 636, 733 P.2d 182 (1987) *citing* West Main Associates v. City of Bellevue, 106 Wn.2d 47, 51, 720 P.2d 782 (1986).

Despite the expanding power over land use exerted by all levels of government, “[t]he basic rule in land use law is still that, absent more, an individual should be able to utilize his own land as he sees fit. U.S. Const. amends. 5, 14.” *Norco Constr., Inc. v. King Cy.*, 97 Wash.2d 680, 684, 649 P.2d 103 (1982).

West Main at 50.

McMilian purchased an ongoing wrecking yard operation which encompassed two parcels of land. The entire business was grandfathered by its prior owner and was not subject to the change in zoning laws in 1958. When King County asked McMilian to provide affidavits from individuals with knowledge of its prior use and dates of that use in order to establish nonconformance, he did so. McMilian provided everything that was ever asked of him. Nevertheless, King County fails to recognize McMilian’s fundamental property right to operate a nonconforming business.

## ***VI. CONCLUSION***

The factual determination that this Court ordered be made by Hearing Examiner Donahue was a very narrow one. Over a year passed without that finding having been made. When it was determined that Hearing Examiner Donahue would leave his position, instead of making that finding, the case was improperly assigned by the King County Hearing Office to a *pro tem* Hearing Examiner, who performed a review

of the administrative record. *Pro tem* Hearing Examiner Smith then issued a supplemental decision that conflicted completely with Hearing Examiner Donahue's original decision.

The *pro tem* Hearing Examiner was not entitled to assess credibility as he did not preside over or observe the administrative hearing. Nevertheless, *pro tem* Hearing Examiner Smith did assess the credibility of all of the witnesses and evidence, dismissing everything as unreliable except for two documents. The evidence dismissed included evidence that the trier of fact, Hearing Examiner Donahue, had found credible and relied upon in making his decision.

*Pro tem* Hearing Examiner Smith relied upon facts that were not in the record, even serving as an expert witness on certain matters. He reached findings and conclusions based upon assumptions he made, absent evidence in the record, frequently in direct conflict with evidence in the record, and even in conflict with King County's concessions. Hearing Examiner Smith also dismissed all of the evidence presented by McMilian of the extensive use of the storage yard in conjunction with the main automobile wrecking yard since prior to 1958, which was a substantial amount of evidence. As a result of these significant errors, *Pro tem* Hearing Examiner Smith reached the wrong conclusion and held that the storage yard did not benefit from the status of a legal nonconforming use.

Pursuant to RCW 36.70C.140, McMilian respectfully requests that this Court reverse the land use decision and hold that the storage yard enjoys the status of a legal nonconforming use. Hearing Examiner Donahue is not willing to revisit the issue. The King County Hearing Examiner Office failed to comply with this Court's prior decision to remand the case for entry of a single finding of fact. The delays throughout this case have been significant and completely unjustified. Given the constitutional issues at stake, McMilian should not bear the burden of further proceedings that have already proven to be fraught with error and futile, and would be likely to continue in that misguided direction.

Respectfully submitted this 18<sup>th</sup> day of October, 2013.

SINGLETON & JORGENSEN, INC. PS

By  \_\_\_\_\_  
Jean Jorgensen  
WSBA No. 34964  
Attorneys for Respondent Leo McMilian

CERTIFICATE OF SERVICE

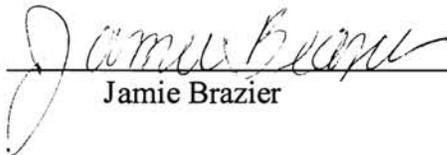
Jamie Brazier declares: I am a citizen of the United States and of the State of Washington; that I am over the age of 18 years and competent to be a witness in this cause. That on October 18, 2013, I caused to be delivered one copy of the APPELLANT'S OPENING BRIEF, to the address(es) listed below by messenger service or by regular U.S. mail to:

Cristy Craig  
Senior Deputy Prosecuting Attorney  
King County Prosecuting Attorney  
King County Administration Building  
516 Third Avenue, Suite W400  
Seattle, WA 98104  
(by email per agreement and messenger service)

Sherry McMilian  
PO Box 508  
Maple Valley, WA 98038  
(by email per agreement)

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

Executed at Renton, Washington, on: October 18, 2013.

  
\_\_\_\_\_  
Jamie Brazier