

73269-2

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Court of Appeals No. 73269-2-I

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

DONALD BERG and KAREN BERG,

Appellants,

v.

CITY OF KENT,

Respondent.

APPELLANTS' OPENING BRIEF

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I. INTRODUCTION

Donald and Karen Berg own real property in the City of Kent, which is commonly known as “Shady Park”. Since as early as the 1930s, several businesses have continuously conducted business on Shady Park. A large portion of the back of the property is undeveloped land, which has been continuously used to support a business of storing cars, boats, trailers, and other items as a matter of convenience for its neighbors. This outdoor storage yard is the subject of this appeal.

During the time that Shady Park was governed by King County, its commercial businesses enjoyed the status of a legal non-conforming use. In 1996, a large tract of property was annexed to the City of Kent, which included the Shady Park property.

Before the Bergs purchased Shady Park, a neighbor had been submitting complaints to the City of Kent regarding Shady Park’s outdoor storage yard. Brian Swanberg, the City of Kent’s Code Enforcement Officer, was repeatedly instructed by the City of Kent’s Planning Department to close the complaints as resolved, because the outdoor storage yard was grandfathered.

After the Bergs purchased Shady Park, the City of Kent asserted that the outdoor storage yard had been illegally expanded.

A quasi-judicial hearing commenced before the City of Kent's Hearing Examiner. After the first day of the hearing, Mr. Swanberg retired from the City for medical reasons. As the hearing progressed, each of the City's witnesses asserted that they had no understanding of the basis upon which Mr. Swanberg would have noted that the outdoor storage yard as being "grandfathered." They insinuated that Mr. Swanberg was the *only* person who could explain what consistently appeared in the City's records – that the outdoor storage yard was grandfathered.

Given the critical nature of his testimony, Mr. Berg's non-lawyer representative attempted to subpoena Mr. Swanberg to appear and testify before the Hearing Examiner. However, requests for applicable procedural rules were not forthcoming. When Mr. Berg's representative identified the fact that he wanted to offer Mr. Swanberg's testimony to the Hearing Examiner, the City's attorney represented that Mr. Swanberg had retired and misleadingly stated that the City had no way to contact him.

The hearing concluded without the benefit of Mr. Swanberg's testimony. The Hearing Examiner issued a decision that was unfavorable to the Bergs.

Thereafter, the Bergs managed to locate Mr. Swanberg. He was still residing in the same residence as he was while employed by the City of Kent. The City in fact, had all of his current contact information. After

learning what had transpired at the hearing, Mr. Swanberg revealed that the City's witnesses offered false testimony. Mr. Swanberg testified that the City's witnesses affirmatively instructed him to close the complaints regarding the outdoor storage as it was "grandfathered." Yet, these same witnesses identified Mr. Swanberg as person who made the decision to close the complaints and mark the property as "grandfathered." Mr. Swanberg's testimony exposed the City's tactic of distancing itself from its own written records, in order to shift the focus onto the one individual who was no longer employed by the City.

The City Attorney intentionally presented perjurious testimony and obstructed the Berg's ability to obtain a subpoena to compel that testimony. The Bergs moved the King County Superior Court, pursuant to CR 60, to consider this newly discovered evidence.

The Berg's motion accused the City's employees of conspiring to offer false testimony before the Hearing Examiner, shockingly, none of them submitted any response to refute these serious allegations. Notably, the City Attorney did not even refute or challenge the allegation that she deliberately misrepresented the truth or that she presented false testimony.

II. ASSIGNMENTS OF ERROR

1. The Bergs assign error to the decision rendered by the City of Kent Hearing Examiner on December 3, 2013. (CP 12-26)

2. The Bergs assign error to the King County Superior Court Order on LUPA Appeal entered on March 6, 2015. (CP 693-94)
3. The Bergs assign error to the King County Superior Court Order Denying Petitioners' Relief Pursuant to CR 60 entered on August 28, 2015. (CP 904-07)

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the King County Superior Court err in denying the Bergs' motion to consider new evidence that revealed that the City's testimony had been completely false and misleading? (*Error No. 3*).
2. Did the Hearing Examiner err in failing to provide the Bergs with information regarding the applicable procedural rules so that they could issue a subpoena to obtain the testimony of Brian Swanberg during the hearing? (*Error No 1*).
3. Does the Hearing Examiner's Decision contain sufficiently detailed findings of fact to permit meaningful appellate review on the administrative record? (*Error No 1*).
4. Did the Hearing Examiner err in failing to find a legal nonconforming use of outdoor storage given the substantial evidence presented that the undeveloped property had been continually devoted to and utilized for outdoor storage before

the property was annexed by the City of Kent? (*Error No 1*).

5. Did the Hearing Examiner err in finding that the City of Kent satisfied its burden to show an unlawful expansion of outdoor storage given the substantial evidence presented that the undeveloped property had always been entirely devoted for outdoor storage? (*Error No 1*).
6. Did the King County Superior Court err in affirming the Hearing Examiner's decision? (*Error No. 2*).
7. Did the Hearing Examiner and the King County Superior Court err in issuing decisions that violate the Constitutional rights of the Bergs? (*Errors Nos. 1-3*).

IV. APPELLANT'S STATEMENT OF THE CASE

A. General History of Shady Park

The Bergs are property owners of a parcel of property that is commonly known as "Shady Park". It is located in the middle of residential neighborhoods. (CABR 14) The Shady Park Grocery Store was first established in 1932, as a small "Mom and Pop" business, located in unincorporated southeast King County. (CABR 125-126, CABR 189) There is an automobile repair shop and gasoline station operated adjacent to the grocery store, along with other commercial operations. (CABR 56,

CABR 172-88)

King County had no zoning program until 1937, when state legislation authorized local land use planning. For twenty years, King County issued zoning codes, made zoning decisions about parcels of county land, and issued maps showing how those parcels had been zoned. However, in 1958, the King County Superior Court invalidated all county zoning actions because King County failed to previously enact a comprehensive plan. (CABR 195–200)

Consequently, although King County eventually enacted valid zoning codes in conjunction with a comprehensive plan, Shady Park enjoyed the status of a legal nonconforming use as a commercial property, even though it was located in a residential area. (CABR 171)

In 1972, Mrs. Jean Beanblossom purchased the Shady Park property, which included an automobile repair business. At that time, numerous vehicles were consistently stored toward the rear of the property, directly behind the repair shop. (VRP 6/12/13, pg. 35 of 110)

After approximately two years, the business and property were sold to Mr. David Spencer and Mrs. Sue Spencer in 1975. The Spencers leased out the grocery store and began to upgrade the auto repair business. The storage business grew naturally from the auto repair portion. As the population grew in that area, so did the Spencers' business, and they took

advantage of the opportunity to increase their storage business and continued to accept vehicles, boats, trailers, and anything else anyone wanted to store. (CABR 296–97)

In 1994 and 1995, the Spencers began making improvements to the outdoor storage yard, including clearing the property of trees and upgrading the storage yard fence to a more secure chain-link style fence for security purposes. (CABR 297-98) The Spencers devoted the entire portion of undeveloped property behind the grocery store and auto repair business to the outdoor storage business. (CABR 298) After resolving the zoning issues regarding the outdoor storage with the City of Kent in 2004, the Spencers installed a power pole and water line to support the office in the trailer, and upgraded the fence. (CABR 256, 299-300)

B. Annexation of Shady Park by the City of Kent

In 1996, a large tract of property was scheduled to be annexed to the City of Kent, which included the Shady Park property. Prior to the annexation, the City of Kent’s Code Enforcement Officer, Brian Swanberg, became familiar with the new area. Mr. Swanberg had been employed by the City of Kent since 1994. He recalls driving by Shady Park before the annexation and observing “hog wire” fencing around the commercial property. He observed a variety of boats, RVs, trailers, trucks and cars that were parked throughout the property. The entire Shady Park

property was being used, despite the fact that the back of the property was partially obscured with brush and small saplings. (CP 765-66)

In October 1995, even prior to the annexation, the City of Kent determined that residential zoning would not adversely impact the legal non-conforming status of the commercial operations of Shady Park. (CABR 205-206; CP 766)

On July 7, 1998, the City of Kent passed Ordinance 3409, which was the first time that “Neighborhood Convenience Commercial District” (“NCC”) was defined. (CABR 325) As of 1998, Shady Park was located in the City of Kent’s new zone: “Neighborhood Convenience Commercial District.” (CABR 206)

C. City of Kent Repeatedly Acknowledges Outdoor Storage Business is Grandfathered

An anonymous neighbor had complained to the City of Kent about the storage yard in 2002. (CABR 238) The complaint intake notes describe the problem as follows: “illegal storage of RVs, boats, equipment and misc. inoperable/disassembled vehicles. Not legally established prior to annexation. 1/3/96. Zone = NCC; not an allowed use on this property.” (CABR 239) As the code enforcement officer, Mr. Swanberg was responsible for investigating the complaint. Mr. Swanberg visited Shady Park and observed that the property was being used for outdoor storage in

the same way as it had been used prior to the annexation in 1996. (CP 766)

As part of his investigation, Mr. Swanberg also questioned its neighbors and neighboring businesses about their observations of Shady Park. He discovered from some of the more elderly individuals that Shady Park had been used for storage since the 1940s when the area was more rural and remote. Instead of regularly hauling their boats and camping trailers all of the way to and from their homes when they went camping or boating, individuals would pay to store them at Shady Park as a matter of convenience. As a result of his investigation, Mr. Swanberg understood that this was the basis for the creation and continued success for outdoor storage at Shady Park. (CP 767)

As part of his investigation into the complaint, Mr. Swanberg also observed old aerial photographs from the City's records that were consistent with what he had been told, with items having been tucked under the trees throughout the entirety of the property. The aerial photographs that he remembered viewing were much older, long before the annexation in 1996, and clearly showed that the outdoor storage encompassed the entirety of the property long ago. (CP 767) Those photographs were never disclosed to the Bergs by the City of Kent, despite public requests for all documents relating to Shady Park. (CP 825)

In September 2002, Charlene Anderson, the City of Kent's

Planning Manager, instructed Mr. Swanberg to write a violation letter to Shady Park's property owner regarding the outdoor storage. The violation letter asserted that the storage of RVs, boats, equipment, vehicles, and contractor's equipment was not allowed in the NCC zone. (CABR 19-20; CP 767-776).

In January 2003, Mr. Swanberg was instructed by the planning department that this case was resolved; subsequently he entered a note into the computer system, "complied with planning department". As a result, there was no action taken against the owner at that time or any zoning issue with respect to outdoor storage. (CP 767-768)

On May 13, 2005, the City of Kent approved a site plan in conjunction with a permit application to rebuild the grocery store, which had been partially destroyed by fire. (CABR 543) As part of the permitting process, the City conducted a review of the zoning in order to ensure compliance. (CABR 256-57; CP 299) The City specifically required that the site plan to be submitted "indicate a vehicle repair facility, or a self storage facility, or a vehicle impound facility". (CABR 102) The site plan that was submitted and approved identified that the northern half of the property, 82,674 square feet, was devoted to "Existing Self Storage - Vehicles, Trucks, Boats & Trailers". (CABR 543)

In October 2005, the City of Kent received another complaint

regarding outdoor storage at Shady Park. Mr. Swanberg went to Shady Park to investigate this complaint and observed that the property was still being used for storage in the same way it had been. The planning department then advised Mr. Swanberg not to take any further action on the complaint he entered “informed by planning resolved” in the computer system. The City took no action against the property owner as a result of that complaint in 2005. (CP 768)

The Bergs purchased Shady Park in June 2006, and continued to operate the businesses, including the outdoor storage business, ever since. (CABR 568; CP 762) Just prior to their purchase, their real estate agent, Mr. Rick Jusenius, investigated Shady Park. Mr. Jusenius testified that he visited the City of Kent’s Planning Department to inquire about the zoning for Shady Park and what uses would be permitted. Mr. Jusenius testified that he discussed the outdoor storage yard that had access through an electric security gate with the clerk from the Planning Department, who then reviewed the file. As a result of the clerk’s review, Mr. Jusenius learned that the outdoor storage was considered to be grandfathered by the City of Kent. (VRP 7/26/13, pg. 12–16 of 26)

On October 31, 2008, the City of Kent approved a site plan in conjunction with a permit application to add parking stalls. The site plan again specified that the northern half of the property, 82,674 square feet,

was devoted to the same outdoor storage function. (CABR 544)

In February 2008, the City of Kent received a third complaint regarding outdoor storage at Shady Park. Mr. Swanberg was again advised by the planning department to close the complaint because the use was “grandfathered.” As a result of the information received from the planning department, Mr. Swanberg noted in the computer system, “the outdoor storage appears to be o.k. because it was grandfathered in at the time the property was annexed into the City of Kent.” The City took no action against the Bergs as a result of that 2008 complaint. (CABR 564-565; CP 768)

D. Expansion of Outdoor Storage First Alleged in 2009

On or about March 9, 2012, the City of Kent issued a “Correction Notice” to the Bergs, stating:

VIOLATION:

Outdoor storage including truck, heavy equipment, Recreational Vehicles, boats and contractor storage yards. (CABR 6)

Three controlling code sections were listed: KCC 15.04.090, KCC 15.04.020, and KCC 15.08.100.C.2. (CABR 6)

The Correction Notice clarified that although the City of Kent recognized the outdoor storage enjoyed the status of a legal non-conforming use, such use was alleged to have been expanded after the

1996 annexation date. (CABR 13) The City of Kent sought to prohibit the storage yard from being operated on the entirety of the undeveloped portion of Shady Park, to an area that only comprised of 34,720 square feet. (CABR 13) This was completely arbitrary; there was no factual basis for such a limitation. (CP 769; VRP 8/2/13, pg. 56 – 61 of 77)

On or about May 24, 2012, the City of Kent issued a “Notice of Violation” that incorporated the March 9, 2012 “Notice of Correction”. (CABR 1) The Bergs filed a timely appeal to the Notice of Violation. (CABR 791 – 95) A hearing commenced before the City of Kent Hearing Examiner on November 7, 2012. (CABR 802)

E. Obstruction of Bergs’ Attempt to Subpoena Brian Swanberg

Upon commencement of the hearing, the City of Kent submitted a witness list with just two witnesses, one of which was Mr. Swanberg. (CP 792) However, the City of Kent did not call Mr. Swanberg during its case in chief on November 7, 2012. (During the first day of the hearing, the Bergs were represented by legal counsel Jean Jorgensen. Thereafter, the Bergs were represented by their property manager, Tom Glenn, who managed Shady Park, but was not an attorney.) Unbeknownst to the Bergs, Mr. Swanberg retired from the City of Kent for medical reasons, in December 2012. (CP 719)

In preparation for the next hearing date in June 2013, Mr. Glenn sent an e-mail to the City Attorney with his witness list and schedule, specifically requesting that Mr. Swanberg be made available to testify in support of the Bergs' case. The City Attorney replied that Mr. Swanberg no longer worked for the City of Kent, that she did not know where he lived, and suggested that Mr. Glenn subpoena him to testify. (CP 720-731)

Mr. Glenn investigated the applicable rules and procedures that applied, but none of them explained the procedural process for subpoenaing a witness. Mr. Glenn repeatedly asked for information regarding the applicable procedures. The City Attorney and the City of Kent's employee that acted as a liaison for the Hearing Examiner asserted that they were unwilling and unable to provide him with responses to his questions. The City Attorney claimed that the requests for procedural information were "clearly a request for legal advice." As a result of his requests, Mr. Glenn was provided with a document and a reference to the Kent City Code, neither of which referenced the applicable subpoena process. This obstruction of information was consistent with the City's past conduct in withholding public records from Mr. Glenn to inhibit his investigation of Shady Park. (CP 720-755)

As Mr. Glenn was not an attorney, he had no power to subpoena Mr. Swanberg to testify, and he was never provided with rules as to how

he could have a subpoena issued to procure Mr. Swanberg's testimony. Consequently, the Bergs were never able to have a subpoena issued in order to procure the testimony of Mr. Swanberg, who they believed would be a critical witness to their case. (CP 721)

F. City Witnesses Testify they are Ignorant and Defer to Brian Swanberg to Explain Resolution of Prior Violations Pertaining to Outdoor Storage

The Bergs intended to demonstrate that the City's current code enforcement action was completely inconsistent with the way that prior code enforcement actions had been resolved, as the City had previously acknowledged that the entire scope of outdoor storage was a legal non-conforming use. (VRP 8/2/13, pg.7-13 of 77) The Bergs questioned each of the planning department employees to reveal the inconsistency between their issuance of zoning permits that recognized over 82,000 square feet of the outdoor storage yard, and their position before the hearing examiner that only 34,270 square feet was permissible. (CABR 16; VRP 7/26/13, pg 30 of 43; VRP 8/2/13, pg. 60-61 of 77; VRP 9/4/13, pg. 30 of 35)

Although Charlene Anderson, the City of Kent's Planning Manager, personally initiated the violation letter pertaining to outdoor storage that had been issued to the Spencers in 2002, she claimed she had no information on the resolution of that alleged violation. (VRP 8/2/13, pg. 9-10, 21 of 77) Similarly, Matt Gilbert, the City of Kent's Planning

Supervisor, could not point to any documentation regarding the resolution of prior issues with respect to Shady Park's outdoor storage. (VRP 8/2/13, pg. 70-71) Consistently, Sharon Clamp, the City of Kent's Planner, testified that she had no recollection of the outcome of the prior outdoor storage code enforcement events, and although she must have consulted with Mr. Swanberg, she could not recall his response. (VRP 9/4/13, pg. 29 of 35; VRP 9/4/13, pg. 54 of 71) Ms. Clamp refused to agree that the documentation of history was conclusive. (VRP 9/4/13, pg. 65-66)

All three of these individuals had been employed in the City of Kent's Planning Department in 2002, yet they all testified that none of them had any information as to the reason that the identical zoning issues had been resolved years before. Because the City's witnesses had not *personally entered the information regarding the disposition into the City's computer system*, they were testifying that there was no way to ascertain the reason the prior violations, which were identical to the one at issue in this hearing, had been resolved and closed. Their testimony was that the person that made the decision to close the violations was Mr. Swanberg, as he made the computer entries. That testimony was untruthful, deceptive, and misleading. The planning department had determined that the entirety of Shady Park's outdoor storage had not been in violation of the Kent City Code, as it was grandfathered, and one or all

of these planning department employees were responsible for making that decision and instructing Mr. Swanberg to close the violations without adversely affecting the scope of the outdoor storage yard.

The Hearing Examiner became irritated with the City's lack of knowledge about its own records and suggested that the individual who made the decision regarding the prior code enforcement action be presented to testify. Mr. Glenn explained that he attempted to present Mr. Swanberg as a witness, but that the City told him that he was not available. The City Attorney then represented to the Hearing Examiner that he had retired for medical reasons, and that she had no idea how to contact him. (VRP 8/2/13, pg. 10 of 57). That representation was also false and made as part of the City's conspiracy to obstruct the Bergs from discovering the truth by presenting false testimony and deferring to a former employee.

G. Bergs Present Evidence of Continuous Use of Undeveloped Property for Outdoor Storage Yard

In order to prevail, the Bergs needed only to establish a) the scope of the outdoor storage business as it had been used prior to the application of the 1998 NCC zoning law, and b) whether or not the entirety of undeveloped land had been devoted for outdoor storage. The City's counsel's opening statement framed the issues as such. (VRP 11/7/12, pg. 24 of 227)

The only witnesses with any personal knowledge regarding Shady Park were presented by the Bergs. The Bergs' evidence consisted of testimony from seven eyewitnesses with intimate knowledge of the Property dating back to the 1970s forward. None of the City's witnesses had any familiarity with Shady Park prior to its annexation in 1996.

Mrs. Beanblossom, who owned Shady Park between 1972 and 1974, testified that they maintained outdoor storage in the back two acres, among tall trees. She also testified that the next owner, Mr. Spencer, started improving the processes for operating the outdoor storage yard and that he waited until things were resolved with the City of Kent before investing in the installation of a security gate and an office. (VRP 6/12/13, pg 35-41 of 110)

Ms. Spencer, who owned Shady Park between 1974 and 2006, confirmed that testimony and made it clear that she and her husband had devoted the entire portion of the undeveloped property for outdoor storage. Their architect prepared a document to show potential income from the storage yard. Ms. Spencer also testified that they had invested considerable money purchasing a trailer to use as an office, installing a power pole and a water line, upgrading the fence around the storage yard, and installing an automatic security gate. Ms. Spencer testified that these improvements occurred after the 2001 fire and renovations, and they

would not have made the improvements if there were outstanding zoning issued with the City of Kent. (CABR 296-300)

Mr. Loren Macaras, a former employee of the Spencers, testified that the Spencers always stored a variety of items throughout the entirety of the undeveloped property, from one side to the other. (VRP 6/12/13, pg 12-13 of 110)

Mr. Roy Renicker, a friend of the Spencers, testified that Mr. Spencer had consistently stored items all over the property, underneath trees, and all of the way back to the fence line. (VRP 11/7/12, pg. 210-221 of 227)

Mr. John Norris, another employee of the Spencers, testified that Mr. Spencer had intentions of clearing the trees in order to make access easier and in order to maximize his income from the outdoor storage. (VRP 11/7/12, pg. 210 of 227)

Mr. Lawrence Scheurer, the Spencers architect, described the process for calculating income from using the entire vacant area for storage. (CABR 258; VRP 11/7/12, pg. 135-136 of 227)

All of these witnesses testified that the storage business had been operational since prior to 1996; all of the witnesses testified that vehicles were parked under trees, moved throughout the lot regularly, and that storage consistently occurred up to the boundary fences. Both of the

former owners testified about the evolution of the outdoor storage business and the devotion of the entirety of the undeveloped property for that business prior to the annexation by the City of Kent. None of these eyewitnesses had any stake in the outcome of the proceeding.

H. City Presents Evidence Consisting of a Single Photograph to Sustain its Heavy Burden of Proof

In sharp contrast, the City of Kent's eyewitnesses had no personal knowledge of the Property prior to its annexation in 1996, as openly admitted during their testimony. Instead, the City of Kent relies upon an aerial photograph taken from an airplane thousands of feet above the property, which represented a single moment in time. (CABR 7, 14-15; VRP 8/2/13, pg. 66-67 of 77) The trees have been cleared, except around the very perimeter of the lot. There is very little brush remaining. The entire lot behind the buildings is conducive for storage. (CABR 15)

I. Hearing Examiner Issues a Conclusory Decision that Neither Addresses Material Issues of Fact nor Explains the Rationale for his Decision

The hearing in this case took place over seven days, with sixteen witnesses, with nearly one hundred exhibits.¹ When the hearing concluded on September 15, 2013, the Hearing Examiner had ten business days to issue a decision that complied with KCC 1.04.160. Instead, two

¹ Oddly, the decision omits dates in which the hearing occurred, includes dates in which it did not, and lists two witnesses that did not testify.

and a half months later, a decision was issued that consisted of eleven pages listing the witnesses and exhibits that were submitted, with only one page devoted to the Findings of Fact. (CABR 973 – 986) Of the eight Findings of Fact, half of them recount the undisputed procedural history of the matter. (CABR 984)

The Hearing Examiner’s written finding consists entirely of the following statement: “A preponderance of the evidence supports a finding that Mr. and Mrs. Berg violated the King County Code.” (CABR 984)

J. Bergs Locate Brian Swanberg and Learn that City’s Testimony was False and Misleading

After the hearing concluded, Mr. Berg located Mr. Swanberg and asked if he would be willing to speak with him about his property. Mr. Swanberg revealed that he was not the person who made the determination to close the complaints about Shady Park’s outdoor storage, as the City alleged, but that it was the planning department that made the decision and instructed him to make the computer entries. (CP 767-69)

Mr. Swanberg revealed that despite their testimony to the contrary, Ms. Anderson, Mr. Gilbert, and Ms. Clamp were all apprised of the basis for the prior resolutions of the violations and complaints relating to Shady Park’s outdoor storage, and that none of them were ignorant of what had occurred. (CP 767-69) Mr. Swanberg revealed that the City had

previously determined that the outdoor storage yard was grandfathered as a legal non-conforming use, and that the planning department made this decision and directed him not to take any action. (CP 900-01) Mr. Swanberg revealed that the City's contention that the prior storage of automobiles was only related to the automobile repair shop was another falsity. (CP 901) The City refuted none of these allegations of wrongdoing.

V. ARGUMENT

A. The Bergs Satisfied the High Burden of Showing they were Entitled to Relief Pursuant to CR 60

1. CR 60 Provides Broad Relief

Under Washington law, a party can move pursuant to CR 60 for relief from a judgment or order for a number of reasons which materially affect the substantial rights of the moving party. CR 60 provides relief for “excusable neglect or irregularity,” “newly discovered evidence,” “misrepresentation or other misconduct of an adverse party,” and for manifest injustice. CR 60(b)(1), (3), (4), and (11). In deciding whether to grant a motion to vacate under CR 60, a trial court should exercise its authority liberally and equitably “to secure the just, speedy, and inexpensive determination of every action.” CR 1. CR 60 gives courts a broad measure of equitable power to grant parties relief from judgments or

orders. Vaughn v. Chung, 419 Wn.2d 273, 280, 830 P.2d 668 (1992). The court's principle inquiry in balancing competing policies on a motion to vacate a default judgment is whether or not justice is being done. Hwang v. McMahill, 103 Wn. App. 945, 15 P.3d 172 (2000).

The party requesting relief must show misconduct prevented a full and fair presentation of its case. Proof of misconduct must be clear, cogent, and convincing. Dalton v. State, 130 Wn. App. 653, 665, 124 P.3d 305 (2005).

Courts interpreting the federal rule state that one who asserts that an adverse party has obtained a verdict through fraud, misrepresentation or other misconduct has the burden of proving the assertion by clear and convincing evidence. The rule is aimed at judgments which were unfairly obtained, not at those which are factually incorrect. For this reason, the conduct must be such that the losing party was prevented from fully and fairly presenting its case or defense.

Peoples State Bank v. Hickey, 55 Wn. App. 367, 372, 777 P.2d 1056 (1989) (citation omitted).

A trial court's decision on a motion to vacate is reviewed for abuse of discretion. Mitchell v. Washington State Institute of Public Policy, 153 Wn. App. 803, 824, 225 P.3d 280 (2009).

2. Failure to Provide Applicable Procedural Rules

In their motion for relief, the Bergs presented evidence that they were unable to present Mr. Swanberg's testimony because they were never

provided with basic procedural information to ascertain the process for having a subpoena issued on their behalf, information to which they were entitled.

The proper functioning of the administrative tribunal is fundamental. For many citizens, including the Bergs, the only “day in court” they will ever see is the inside of an administrative office where their fundamental rights and property interests are adjudicated, often without the benefit of legal representation. Quasi-judicial administrative proceedings are important to those whose interests are at stake. Even if many of the procedural and evidentiary rules that apply to courts are waived or modified, fundamental notions of fairness and due process must always be followed.

One of those fundamental principles is that the parties be apprised of the applicable rules and procedures of the legal proceeding, including how they may compel a witness to appear to testify on their behalf. RCW 34.05.434 provides that a notice of hearing must contain, among other things, “A reference to the particular sections of the statutes and rules involved.” When Mr. Glenn asked for *procedural* information, which was required to have been previously provided, the City Attorney refused to assist, writing, “While it is clear the Mr. Glenn has a number of questions, it is equally clear that any representative of the City is prohibited from

providing him those answers as they are clearly a request for legal advice.” (CP 738) The administrative secretary stated, “I cannot answer your questions. If you feel like you have to communicate with the hearing examiner, than you will have to contact the Hearing Examiner yourself.” (CP 734) Then, the hearing examiner also refused to provide any assistance, “I am an independent contractor and not an employee of the City of Kent. Therefore, it is inappropriate for me to have ex-parte contact with Mr. Glenn. Moreover, even if his questions were asked during a hearing, I cannot give him any legal advice.” (CP 737) The reference and document that was sent to Mr. Glenn omitted any mention of subpoenaing documents, or RCW 34.05.446, which explains that the presiding officer may issue subpoenas. (CP 746-755)

Washington Courts recognize the importance of subpoena power in being able to fully and fairly present a case.

But the Board attorney's refusal to permit discovery or subpoenas significantly limited Mansour's ability to offer witnesses and evidence on his behalf, ... Even a person disputing a minor civil infraction like a parking ticket has the right to subpoena witnesses. The lack of subpoena power prejudiced Mansour's ability to present his case and argue for a less severe penalty.

Mansour v. King County, 131 Wn. App. 255, 128 P.3d 1241 (2006)

(footnotes omitted).

Irregularities pursuant to CR 60(b)(1) occur when there is a

failure to adhere to some prescribed rule or mode of proceeding, such as when a procedural matter that is necessary for the orderly conduct of trial is omitted or done at an unseasonable time or in an improper manner.

Mosbrucker v. Greenfield Implement, Inc., 54 Wn. App. 647, 652, 774 P.2d 1267 (1989). The failure to provide procedural rules so that a subpoena could be issued entitles the Bergs to relief pursuant to CR 60(1).

3. Misrepresenting Ability to Locate Witness

The Hearing Examiner recognized that Mr. Swanberg was being identified by the City's employees as the only person who could explain the reason that all of the previous complaints and code violations from 2002, 2005, and 2008, which are identical to those at issue in this appeal, were *resolved* instead of enforced. Yet, none of the testifying witnesses from the planning department could explain the meaning or factual basis for the resolution of those prior code violations. They all asserted a lack of knowledge and/or lack of recollection discussions that occurred between the planning department and Mr. Swanberg, which would have prompted him to close out the prior violations. This was all false testimony, designed to enable the City's witnesses to distance themselves from the records so that they could claim ignorance by deferring to the individual who no longer worked for the City, Mr. Swanberg.

When the Hearing Examiner asked if Mr. Swanberg was available

as a witness, the City's attorney misleadingly and deceptively responded, "He's retired on a medical retirement. I have no idea how to reach him." Significantly, even after being accused of being untruthful to a tribunal, the City Attorney did not submit a declaration to refute or challenge this assertion of having deliberately misrepresented the truth during a legal proceeding. Nor was any declaration submitted to challenge the Bergs' allegation that Mr. Swanberg's mailing address and telephone number were, in fact, readily available and could easily have been obtained and provided to the Bergs and/or Hearing Examiner to assist with a subpoena.

The City presented no evidence that the Bergs' assertion that it intentionally concealed Mr. Swanberg's location was inaccurate. The Bergs have proven that the City had Mr. Swanberg's contact information readily accessible, but instead elected to affirmatively misrepresent to the Hearing Examiner that Mr. Swanberg's location was unknown. "Evidence is clear, cogent, and convincing when the ultimate fact in issue is shown by the evidence to be highly probable." In re Dependency of S.M.H., 128 Wn. App. 45, 115 P.3d 990 (2005) (internal citation omitted). In this case, it is highly probable, especially given the lack of response to the allegations, that the City had Mr. Swanberg's contact information readily available in its files but elected to obstruct the Bergs from being able to present Mr. Swanberg's favorable testimony. These material

misrepresentations and misconduct by the adverse party entitle the Bergs to relief pursuant to CR 60(4).

4. Newly Discovered Evidence

The granting of a new trial due to newly discovered evidence is justified where (1) the evidence will likely change the result if a new trial is granted, (2) the evidence was discovered since trial, (3) the evidence could not have been discovered prior to trial by the exercise of diligence, (4) the evidence is material, competent, and otherwise admissible, and (5) the evidence is not merely cumulative or impeaching. Kurtz v. Fels, 63 Wn.2d 871, 874, 389 P.2d 659 (1964).

After the hearing had concluded, the Bergs discovered new evidence in terms of the testimony of Mr. Swanberg, which “cast a very serious reflection on the accuracy and veracity of the [City’s] principal witness[es]”. Rushton v. Borden, 29 Wn.2d 831, 841, 190 P.2d 101 (1948). Mr. Swanberg’s testimony also offered a complete history of the City of Kent’s investigation and acknowledgment of the entire storage yard as having been grandfathered. In Rushton, there was no abuse of discretion in refusing to grant a new trial based upon the newly discovered evidence, because answering affidavits offered a reasonable explanation of the matter. In sharp contrast, in this case, when the veracity of its witnesses were placed directly at issue, the City of Kent submitted no

answering affidavits offering any reasonable explanation; none of the witnesses refuted the allegations that they had all given false testimony.

If granted, Mr. Swanberg's testimony will change the result of the hearing. His testimony, discovered after the hearing, is material and directly relates to the issue being determined: whether or not the entire outdoor storage yard enjoyed the status of a legal nonconforming use. His testimony is admissible, relevant, and is not cumulative. Although impeaching, Mr. Swanberg's testimony is not offered solely for impeachment purposes. Four of the five elements justifying a new trial are satisfied given the facts.

Notably, the Bergs cannot be faulted for lacking due diligence in the attempt to locate Mr. Swanberg given the City Attorney's affirmative representations to the tribunal. A party may rely upon the statements of the adverse party where that party, "in clear and unambiguous terms under oath, asserts the existence or nonexistence of a fact." Kurtz at 875. An attorney always has a duty to provide accurate facts to a tribunal. RPC 3.3. In this case, the City Attorney misrepresented to the hearing examiner that Mr. Swanberg's location could not be ascertained now that he retired for medical reasons, in order to have a subpoena issued. Thus, in exercising the requisite diligence, the Bergs need not "look behind" the statements of its adversary. Kurtz at 875. The Bergs were entitled to rely

upon the veracity of the City Attorney's assertion to the tribunal. Therefore, the third and final element is also satisfied.

The Bergs should be granted relief pursuant to CR 60(3).

B. 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.

The Bergs seek relief under standards (a), (b), (c), (d), and (f).

3. **RCW 36.70C.130(1)(a): Hearing Examiner Failed to Follow a Prescribed Process in Entering Written Findings from the Record to Support His Decision**

The Hearing Examiner's written findings of fact are not sufficiently specific to permit a reviewing court with the opportunity for meaningful review. The Hearing Examiner failed to abide by the

following requirement of the City of Kent Code: “When the hearing examiner renders a decision or recommendation, the hearing examiner shall make and enter written findings from the record and conclusions therefrom which support such decision.” KCC 2.32.130.

“Findings of fact consist of the judge's decision on the controverted issues of fact in the case, and must cover all the material issues of fact which have been controverted on the trial.” Swanson v. May, 40 Wn. App. 148, 158, 697 P.2d 1013 (1985) (internal citations and quotations omitted); *see also* Peterson v. Neal, 48 Wn.2d 192, 195, 292 P.2d 358 (1956). Here, the Hearing Examiner’s written finding consists entirely of the following statement: “A preponderance of the evidence supports a finding that Mr. and Mrs. Berg violated the King County Code.” The Hearing Examiner’s decision does not even utilize the term “legal nonconforming use.” The language used appears standardized and generalized. The findings do not indicate any factual basis for the Hearing Examiner’s ultimate conclusions, including which evidence it considered to be of any significance in reaching his decision. The Findings of Fact do not answer or address any of the specific issues that were raised in this hearing, such as, “Does the storage yard enjoy the status of a legal nonconforming use?”, “Prior to the applicable zoning laws, what was the intent of the former landowner with respect to the scope of The Property

dedicated for outdoor storage?”, “When/How did the scope of The Property dedicated for outdoor storage change?”, or “As to the portion of the outdoor storage that the City of Kent conceded enjoyed the status a legal nonconforming use, what violation, if any, has been proven?”

Findings of Fact must be sufficiently specific to permit meaningful review. The findings of fact in this case are deficient and not specific enough to permit review.

Generally, where findings are required, they must be sufficiently specific to permit meaningful review. While the degree of particularity required in findings of fact depends on the circumstances of the particular case, they should at least be sufficient to indicate the factual bases for the ultimate conclusions. The purpose of the requirement of findings and conclusions is to insure the trial judge has dealt fully and properly with all the issues in the case before he decides it and so that the parties involved and this court on appeal may be fully informed as to the bases of his decision when it is made.

...

Nonetheless, our review of these cases is hampered by the trial court's mostly conclusory and general findings, both oral and written. While not fatal in these cases, such findings hereafter are not adequate.

In re LaBelle, 107 Wn.2d 196, 218-20, 728 P.2d 138, 151-52 (1986) (internal citations omitted).

Recounting a summary of the evidence presented at trial does not assist the reviewing court in determining how disputed issues and evidence were resolved.

Findings of fact by an administrative agency are subject to the same requirement as are findings of fact drawn by a trial court. The purpose of findings of fact is to ensure that the decisionmaker has dealt fully and properly with all the issues in the case before he or she decides it and so that the parties involved and the appellate court may be fully informed as to the bases of his or her decision when it is made. Findings must be made on matters which establish the existence or nonexistence of determinative factual matters. The process used by the decisionmaker should be revealed by findings of fact and conclusions of law. Statements of the positions of the parties, and a summary of the evidence presented, with findings which consist of general conclusions drawn from an indefinite, uncertain, undeterminative narration of general conditions and events, are not adequate.

Weyerhaeuser v. Pierce County, 124 Wn.2d 26, 35-36, 873 P.2d 498 (1994) (internal quotations and citations omitted). Just as in Weyerhaeuser, the Hearing Examiner's decision in this case consisted of, at most, a summary of the evidence presented during the hearing, which fails to elucidate how disputed issues and evidence were resolved.

RCW 36.70C.120 provides that "... 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..." Naturally, judicial review is thwarted by the omission of a sufficient record to review. When there is evidence on the record to support both sides' contentions, the reviewing court does not select whichever one it believes is correct.

It is improper for an appellate court to ferret out a material or ultimate finding of fact from the evidence presented. Such a practice would place the appellate court in the initial decision making process instead of keeping it to the function of review.

In re Welfare of Woods, 20 Wn. App. 515, 517, 581 P.2d 587 (1978)

quoting Wold v. Wold, 7 Wn. App. 872, 876, 503 P.2d 118 (1972).

The case is remanded to the trial court for entry of additional findings of ultimate facts showing the basis for the child deprivation decision and, in the event the trial judge has left the bench and is otherwise unavailable for such purpose, a new trial will be granted.

Woods at 517. The reviewing court requires entry of a specific finding of fact, by remanding it to the hearing examiner:

There is evidence in the record that would support either a finding that the southern parcel had been used for the wrecking yard prior to 1958 or, conversely, a finding that the southern parcel had not been so used prior to 1958. Accordingly, we remand to the hearing examiner for a determination of whether the wrecking yard use existed on the southern parcel prior to 1958.

McMilian v. King County, 161 Wn. App. 581, 603-04, 255 P.3d 739

(2011) (footnote omitted).

Just as in LaBelle, this Court should find that the Hearing Examiner decision suffers from conclusory findings that are not adequate to permit meaningful review, so that a remand to correct that deficiency is necessary.

4. RCW 36.70C.130(1)(c)(d): Hearing Examiner Erred in Applying the Law to the Facts; Substantial Evidence Does Not Support a Finding of a Violation of the King County Code

The Property is physically located in King County, which was annexed by the City of Kent in 1996. The Notice of Violation/Correction dated March 9, 2012 cited the basis for the charges, as due process requires:

Kent City Code References, Description of Violations, and Corrective Actions: **KCC 15.04.090; KCC 15.04.020; KCC 15.08.100.C.2 – Expansion of nonconforming uses.**

(CABR 6)

Upon the conclusion of the contested hearing, the Hearing Examiner was obligated to issue a decision in accordance with the requirements of KCC 1.04.160:

A. Contents of order. Upon the conclusion of a hearing to contest a violation, the hearing examiner may issue a verbal decision pending issuance of the written decision; if necessary, the hearing examiner may delay issuing the written order for up to ten (10) business days following the hearing. In either event, the verbal decision and written order shall contain findings and conclusions based on the record that includes the following information:

1. For each alleged violation of the city code, a statement indicating whether the violation has been found committed or not committed;

The Decision of the Hearing Examiner *never* once cited Kent City Code 15.04.090, 15.04.020, or 15.08.100.C.2, as is required. Instead, his Decision rests upon Finding of Fact No. 5: “A preponderance of the evidence supports a finding that Mr. and Mrs. Berg violated the King

County Code.” (CABR 984) The Hearing Examiner was required to address each violation separately, which serves to avoid the ambiguities and uncertainties that would be inevitable otherwise.

In this case, it is not appropriate to presume that this is a clerical error and that the Hearing Examiner likely meant to refer to the Kent City Code. One of the elements of showing a legal nonconforming use is that the use was lawful before the change in the zoning laws. In other words, in this case, the outdoor storage compliance with the King County Code is both highly relevant and significant when considering the Bergs’ assertion that their outdoor storage yard enjoyed the status of a legal nonconforming use. In reviewing the Hearing Examiner’s Findings of Fact, it would be possible to conclude that all of the violations of the Kent City Code were predicated on a finding that the outdoor storage yard was never in compliance and violated the King County Code, and therefore, did not enjoy the status of a legal non-conforming use.²

This finding of fact, No. 5, is the single most important finding in this case. Given its significance, a determination should not be made by a reviewing court. Woods at 517. Instead, the hearing examiner should be ordered to separately designate each violation, as required by KCC 1.04.160, and whether or not each violation has been committed, including

² The Bergs contend that the City of Kent specifically conceded this in its Correction Notice. (CABR 8)

a sufficient explanation in order to eliminate any ambiguities.

5. RCW 36.70C.130(1)(b): Hearing Examiner Erred in Interpreting Law by Imposing a Burden of Proof Upon the Bergs

The Kent City Code clearly and unequivocally placed the burden of proof upon the City of Kent to show that any alleged violation has been established, by a preponderance of the evidence. KCC 1.04.150. Because the City of Kent conceded the fact that Shady Park, including its outdoor storage business, enjoyed the status of a legal nonconforming use, which is akin to an affirmative defense, the Bergs had no obligation to present any witnesses or evidence to support their position. Yet, the Hearing Examiner clearly placed a heavy burden upon the Bergs, as evidenced by Finding of Fact #8:

Mr. and Mrs. Berg failed to provide credible evidence regarding the nature of the violations, why the violations exist, and why the violations have not been abated or corrected.

Even if all of the evidence presented by the Bergs was completely incredulous, which it certainly was not, the Bergs would prevail if the City of Kent failed to present sufficient credible evidence to satisfy its burden to show that the alleged violations were committed.

Again, given the scarcity of details to explain the rationale of his decision, it is problematic that a separate finding of fact clearly places a

burden upon the Bergs and faults them for failing to produce credible evidence to show the nature of the violations, and that this was a major factor in the decision. Notably, the Hearing Examiner never held that the City of Kent sustained its burden to show that any violations were committed, which further supports the conclusion that the burden of proof was improperly shifted to the Bergs.

The Washington Supreme Court recognized the significant harm of the error and the implications on a reviewing court when the trial court errs in placing the burden of proof on the wrong party and determined that a remand is necessary. Nissen v. Obde, 55 Wn.2d 527, 529–30, 348 P.2d 421 (1960). Just as in Nissen, the reviewing court in this case is unable to review and weigh the evidence in a new light, while correctly applying the burden of proof, and thus, a remand is necessary.

6. RCW 36.70C.130(1)(c): Bergs Presented Substantial Evidence that Legal Nonconforming Use was Not Expanded in Violation of KCC

There is no evidence that Shady Park’s outdoor storage has been expanded beyond that which is permitted under the Kent City Code:

Expansion of nonconforming uses. No existing building, structure, or **land devoted to a nonconforming use** shall be expanded, enlarged, extended, reconstructed, intensified, or structurally altered unless the use thereof is changed to a use permitted in the district in which such building, structure, or land is located...

KCC 15.08.100.C.2 (emphasis added). “Use means an activity for which

land or premises or a building thereon is designed, arranged, or intended, or for which it is occupied or maintained, let or leased.” KCC 15.02.532.

Given the express language of the Kent City Code, and its definition of “use,” the City of Kent’s premise in trying to ascertain the number and location of vehicles that were in place when the zoning laws were implemented, and/or the physical square footage that was occupied at the time, is completely erroneous. (CABR 37) Pursuant to the plain language of its own code, the critical factor in defining the scope of “use” of the undeveloped Shady Park area of “land” is determined and based upon the “intent” of the landowner. Only the *landowner* designates, arranges, and intends the manner and scope in which his land will be dedicated to any particular activity. The landowner is not bound by the physical area that is actively used at any particular point in time as depicted in an aerial photograph; rather, the analysis must focus on the landowner’s subjective intent in which his property is to be used.

In this case the relevant owners of Shady Park (Beanblossoms, Spencers, and Bergs) have devoted the entire portion of land behind the commercial grocery store and automobile repair shop to the storage yard, up to the boundary fences. The devotion of land for storage can be based upon their testimony alone. After resolving the issues with the City of Kent, the Spencers invested in significant improvements to the outdoor

storage business, including the purchase of a structure for an office, the installation of power and water to support that structure, upgraded security fencing around the perimeter, an electrically operated gate, and security lights.

We agree that the spirit of zoning measures is to restrict the extension of nonconforming uses as exemplified in State ex rel. Miller v. Cain, supra. Nevertheless, enactments in derogation of the common law are to be strictly construed. In endeavoring to accommodate both concerns, zoning ordinances are to be liberally construed to accomplish their purpose, but they are not to be extended beyond the clear scope of legislative intent as manifest in their language.

Keller v. City of Bellingham, 92 Wn.2d 726, 730, 600 P.2d 1276 (1979) (internal citation omitted). In this case, the only relevant evidence pertained to the scope of the Shady Park property that was **devoted** to the storage yard. The www.m-w.com dictionary definition of “devote” is:

- 1 : to commit by a solemn act <devoted herself to serving God>
- 2 : to give over or direct (as time, money, or effort) to a cause, enterprise, or activity

As the property owner is the only party that can “devote” part of the property to serve as a storage yard, the City of Kent played no role in the *devotion* of The Property for a specific use. Consequently, no violation of KCC 15.08.100.C.2 was established as the entire parcel behind the commercial enterprise was devoted to the storage yard. The City of Kent presented no evidence to the contrary.

The Hearing Examiner never entered any Findings of Fact as to the landowners' devotion of the undeveloped property for the outdoor storage business. The findings of fact do not set forth the standard that was used to reach the conclusion that a violation occurred. Instead, the Hearing Examiner apparently completely dismissed all of the witnesses and evidence presented by the Bergs, on the basis of credibility. However, nothing in the findings of fact explains the reason the Hearing Examiner found each and every witness lacked any credibility at all. Although it is definitely a function of the trier of fact to assess the credibility of witnesses and evidence, there must be substantial evidence to justify an adverse credibility determination. Osorio v. I.N.S., 99 F.3d 928, 931 (9th Cir., 1996). In this case, the Findings of Fact delineate absolutely no justification for dismissing each and every witness of the Bergs on the basis of credibility. This reviewing court will be unable to determine if substantial evidence exists to justify that adverse credibility determination.

Notably, the City of Kent presented no evidence as to the use of The Property prior to its annexation in 1996, nor did the City of Kent refute the landowners' intent and devotion of the entire undeveloped property for the outdoor storage business.

The Bergs evidence is detailed as follows:

Testimony of Jean Beanblossom

And we had some storage in the back. We had approximately two acres. And there -- it was -- it did have tall trees on it that eventually some of them, by another owner, had taken down. But there was storage there. We store it -- had storage there in the back. (VRP 6/12/13, pg. 34-35)

...

And around -- I don't know, I think it was around nineteen -- it was in the early nineties -- 1990s. Around 1990, maybe '91 that David [Spencer] asked me for advice on how to improve his storage yard. And that's when I gave him a copy of the contract, told him he should have a contract between his tenants and himself. (VRP 6/12/13, pg. 37)

Testimony of Susan Spencer

To be clear, from 1975 to the date that we sold the property to Mr. Berg, we devoted the entire portion of land behind the commercial grocery store and automobile repair shop to the storage yard. We did not intend for any undeveloped property to be maintained for any other purpose than for the storage yard. (CABR 299)

Testimony of Loren Macaras

As far as where the vehicles were parked, again, they were always all over the whole property. And they were again in 2002, like they always had been. But as far as the inventory, the same stuff, I'd say no. (VRP 6/12/13, pg. 19)

Testimony of Roy Renicker

A: Yeah. Yes. Dave always had cars. People's cars were sitting there. Trailers, trucks, buses all parked around the property back in the back. (VRP 11/7/12, pg. 219)

...

A: Yeah, he had -- he had stuff all stuffed underneath trees, back in the corner, up as far as he could get back into the fence. If the trees were in the way, they'd kind of stuff it around by the trees.

Testimony of John Norris

Um, the photographs that I looked at does not show where all the storage was because it went all the way to the back corner because it was all fenced in. Because there was big trees there with branches that are 30 feet up in the air. And they were storing buses, and boats, and trailers, and cars all over the place, so --... (VRP 11/7/12, pg. 207-08)

He just said he wanted to make it full storage back there so he could make more money. (VRP 11/7/12, pg. 210-11)

Testimony of Lawrence Scheurer

Q: Based on your understanding of working for the Spencers, um, did they intend to use the entire lot for storage?

A: The portions without -- yeah, they were planning to use all the vacant area for storage and less the parking and existing buildings. (VRP 11/7/12, pg. 136)

Testimony of Rick Jusenius

Q: So your conclusion from your conversation at the City of Kent was that the storage use was the grandfathered use?

A: That is correct. (VRP 7/26/13, pg. 16)

All of this independent eyewitness testimony supports the contention that the undeveloped property behind the automobile repair shop and grocery store was completely devoted and consistently fully utilized as part of the outdoor storage business. That business was fairly profitable with low overhead. Mr. Spencer installed an office and planned to continue to operate this outdoor storage business through his “retirement”.

This is more than substantial evidence to support the contention that the outdoor storage was not expanded into an area that had not been devoted by the Spencers prior to the annexation by the City of Kent in 1996, and the passage of the zoning law in 1998.

The City's subsequent determination, in 2011, that only a small portion of the outdoor storage yard, 34,270 square feet, had been utilized in 1999 is completely irrelevant. (CABR-16; VRP 6/12/13, pg. 44-45; VRP 7/26/13, pg. 38-42) In attempting to construe such a restriction, the City of Kent blatantly disregards the language of the own code.

7. RCW 36.70C.130(1)(b): Hearing Examiner Erred in Interpreting Law by Basing his Decision on the Berg's Failure to Reach a Settlement Agreement with the City of Kent

The Hearing Examiner's Decision was based, in part, upon the Berg's inability to settle the dispute with the City of Kent, as evidenced in Finding of Fact No. 4:

Mr. and Mrs. Berg were notified of and were given several opportunities to correct the violations and/or to work with the City of Kent to settle the dispute, which did not occur.

The fact there were settlement opportunities is true. The parties engaged in numerous settlement discussions, even during the morning of the first hearing date. However, the failure to reach a settlement is not indicative of an admission of wrongdoing on the part of the Bergs. Rather, this is

more indicative of competent legal representation in recognizing the risks, expenses, and uncertainties of litigation, and in taking advantage of the opportunity to agree on the appropriate monetary and/or equitable relief that might not be available in the court system.

Settlement discussions are highly protected and are not admissible.

ER 408 provides, in pertinent part:

In a civil case, evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. ...

“The rule is intended to encourage settlements and promote free communication in compromise negotiations.” Diaz v. State, 175 Wn.2d 457, 471, 285 P.3d 873 (2012) *citing* 5A Karl B. Tegland, Washington Practice: Evidence, § 408.1, at 59 (5th ed. 2007).

This was a particularly contentious relationship between the parties. For years, the Bergs had been unsuccessfully trying to obtain a complete history of the Shady Park property in order to defend themselves, as they understood that the identical issue regarding outdoor storage had been previously raised by the City of Kent when the Spencers owned the property, and had been resolved. (CABR 239, 242, 294, 299)

The City of Kent was sued for violating the public records act, and even as of the first date of the hearing, the City of Kent continued to wrongfully withhold a substantial number of responsive documents from the Bergs regarding the history of Shady Park. (VRP 11/7/12, pg. 17 of 227)

Yet, the Hearing Examiner apparently determined that the failure to reach a successful settlement agreement gave rise to an adverse inference against the Bergs. Given the scarcity of details to shed any light upon the basis for reaching his findings and conclusions, it is especially troublesome that the Bergs' failure to reach a settlement was of such significance to the decision of the Hearing Examiner that it warranted the dedication of a separate finding of fact.

The Hearing Examiner erroneously considered the Bergs participation in settlement discussions when making his decision; and it was erroneous to affirmatively place an adverse inference on the Bergs as a result of the failure of the parties to reach a settlement agreement.

8. RCW 36.70C.130(1)(f): Due Process Requires Meaningful Judicial Review to Prohibit Intrusions of Constitutionally Guaranteed Rights Based Upon Unarticulated Findings

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).

The Bergs' 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, 167 Wn.2d 242, 251, 218 P.3d 180 (2009). These concepts are "rooted in notions of fundamental fairness ... [and recognize that property] rights can represent a valuable and protectable property interest." Id. at 250. 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 the Bergs 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 Industrial Park v. City of Redmond, 107 Wn.2d 621, 636, 733 P.2d 182 (1987) *citing* West Main Associates v. Bellevue, 106 Wn.2d 47, 51, 720 P.2d 782 (1986).

The City of Kent conceded that the outdoor storage yard is a legal non-conforming use. Had it not, the burden would be on the Bergs to make that showing, as the “land user making the assertion.” McGuire, *supra*, at 647. Once that has initially been proven, the burden of proof shifts to the party challenging the continued status of a legal nonconforming use. Id. “This burden of proof is not an easy one.” Id.

Non-conforming uses are vested property rights which are protected. Protected property rights cannot be lost or voided easily. There is properly a high burden of proof that must be met by the City before Van Sant loses what was a vested property right.

Van Sant v. City of Everett, 69 Wn. App. 641, 649-50, 849 P.2d 1276, (1993) (internal citations omitted). Misallocation of the burden of proof is a significant error. Id. at 650.

The Bergs purchased a commercial property that included an outdoor storage yard. The entire parcel was grandfathered and not subject to any zoning laws when it was annexed by the City of Kent. Nevertheless, the City of Kent fails to recognize the Bergs’ fundamental property right to operate a nonconforming business.

II. REQUEST FOR ATTORNEYS' FEES

Pursuant to RAP 18.1, RCW 4.84.350, RCW 4.84.370, and upon equitable principles, the Bergs request attorneys' fees on appeal. RAP 18.1 provides: "If applicable law grants to a party the right to recover reasonable attorney fees or expenses on review before either the Court of Appeals or Supreme Court, the party must request the fees or expenses as provided in this rule..."

RCW 4.84.350 provides for an award of attorneys fees for prevailing in a judicial review of an agency action. RCW 4.84.370 provides for an award of attorneys fees for prevailing in the appeal of a land use decision. The Bergs should prevail, and will comply with RAP 18.1. This Court should award fees on appeal to the Bergs.

III. CONCLUSION

Before the Hearing Examiner, the City of Kent took the illogical position that its own records could not be relied upon as factually accurate, in terms of recording the history of decisions regarding Shady Park that had been made by its own employees. Instead, the City's witnesses took the position that personal recollections of its employees were the most reliable source of information, but then its witnesses simultaneously claimed to have no recollection of prior events. Notably, the City bore the burden of proof. The City of Kent's burden of proof was not satisfied by

offering assumptions and speculation.

Pursuant to RCW 36.70C.140, the Bergs respectfully request that this Court reverse the land use decision and hold that the entirety of the outdoor storage yard enjoys the status of a legal nonconforming use.

Respectfully submitted this 4th day of March, 2016.

LAW OFFICE OF JEAN JORGENSEN, PS

By 

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Attorneys for Appellants

DECLARATION OF SERVICE

I declare that on this date I have caused to be delivered via email and U.S. regular mail, postage pre-paid, one true copy of APPELLANT'S OPENING BRIEF, to the following counsel:

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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 4th day of March, 2016.



Jamie Brazier, Legal Assistant

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