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No. 73269-2-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

DONALD BERG and KAREN BERG,

Appellants,

vs.

CITY OF KENT,

Respondent.

RESPONSE BRIEF BY THE CITY OF KENT

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TABLE OF CONTENTS

I. INTRODUCTION ..... p. 1

II. RESTATEMENT OF THE CASE ..... p. 5

A. Zoning history of the Property ..... p. 5

1. Pre-1996 – The Property is zoned residential in King County ..... p. 5

2. January 1, 1996 – The Property is annexed by the City ..... p. 6

3. 2001–The grocery store is destroyed by fire .. p. 10

4. 2002 – The City issues a Notice of Violation based upon unpermitted outdoor storage on the Property ..... p. 10

5. 2004 – City issues a permit to rebuild the grocery store ..... p. 12

6. 2006 - Property is purchased by the Bergs ... p. 12

7. 2006-2009 – The Bergs' use of the Property for outdoor storage unlawfully expands ..... p. 12

8. 2012 – The City is forced to issue a Notice of Violation ..... p. 16

B. The Bergs file an administrative appeal of the 2012 NOV ..... p. 17

C. The Hearing Examiner finds that the Bergs have violated the Kent zoning code as set forth in the City's Notice of Violation ..... p. 17

D. The superior court affirms the Hearing Examiner's decision ..... p. 19

E. The Bergs' CR 60(b) motion was properly denied . p. 20

III. ARGUMENT . . . . . p. 21

A. Standards of review under the Land Use Petition Act . . . . . p. 21

B. The Hearing Examiner's written findings and conclusions are sufficient to support his Decision . . . . p. 23

C. The Examiner's Decision is supported by substantial evidence . . . . . p. 24

D. The Examiner's interpretation of the law was not erroneous . . . . . p. 27

E. This Court should affirm the Hearing Examiner's Decision that the Bergs unlawfully expanded a nonconforming use on their Property . . . . . p. 29

1. Legal nonconforming uses under Washington law . . . . . p. 30

2. Legal nonconforming uses under the City's zoning code . . . . . p. 32

3. An outdoor storage yard is not a permitted use in the NCC zone pursuant to KCC, Ch. 15.04 . . . . p. 34

4. The Bergs did not meet their burden of showing that use of the entire Property for outdoor storage existed before contrary (residential) zoning was enacted by King County . . . . . p. 35

5. The Bergs' limited right to use a portion of the Property for outdoor storage related to the auto repair business has unlawfully expanded . . . . . p. 41

F. The Bergs have not stated a constitutional claim . . . . . p. 44

G. The Bergs' CR 60(b) motion was properly denied .... p. 45

H. The City is entitled to an award of reasonable attorney's fees and costs pursuant to RCW 4.84.370 and RAP 14.2 ..... p. 49

IV. CONCLUSION ..... p. 49

TABLE OF AUTHORITIES

CASE LAW

Abbey Road v. Bonney Lake, 141 Wn. App. 184,
167 P.3d 1213 (2007), *aff'd,* 167 Wn.2d 242, 218 P.3d 180 (2009) 22

Anderson v. Island Cy., 81 Wn.2d 312, 501 P.2d 594 (1972) 40,
41

Cingular Wireless v. Thurston County, 131 Wn. App. 756,
129 P.3d 300 (2006) 22

First Pioneer Trading v. Pierce County, 146 Wn. App. 606,
191 P.3d 928 (2008) 28, 35
45

Goldblatt v. Town of Hempstead, 369 U.S. 590, 592,
82 S. Ct. 987, 8 L.Ed.2d 130 (1962) 32

Harman v. Dep't of Labor Industries, 111 Wn. App. 920,
47 P.3d 169 (2002) 48

Hilltop Terrace HOA v. Island County, 126 Wn.2d 22,
891 P.2d 29 (1995) 22

Keller v. Bellingham, 92 Wn.2d 726, 600 P.2d 1276 (1979) 32, 41

King Cy Dep't of Dev. and Envtl. Servs v. King Cy,
177 Wn.2d 636, 305 P.3d 490 (2013) 27, 31, 35, 45

Kingery v. Dep't of Labor & Indus., 132 Wn.2d 162,
937 P.2d 565 (1997) 48

In re LaBelle, 107 Wn.2d 196, 728 P.2d 138 (1986) 24, 25, 26

In re Marriage of Rich, 80 Wn. App. 252,
907 P.2d 1234 (1996) 4

McMilian v. King Cy, 161 Wn. App. 581, 255 P.3d 739 (2011) 45

Meridian Minerals v. King Cy., 61 Wn. App. 195, 810 P.2d 31 (1991) 39, 41

Miller v. Bainbridge Island, 111 Wn. App. 152, 43 P.3d 1250 (2002) . . 22

Pinecrest HOA v. Cloninger, 151 Wn.2d 279, 87 P.3d 1176 (2004) 22

Quality Rock v. Thurston County, 139 Wn. App. 125, 159 P.3d 1 (2007) 23

Rhod-A-Zalea v. Snohomish County, 136 Wn.2d 1, 959 P.2d 1024 (1988) 30, 31, 32, 37, 39

Schofield v. Spokane County, 96 Wn. App. 581, 980 P.2d 277 (1999) 22, 36

University Place v. McGuire, 144 Wn.2d 640, 30 P.3d 453 (2001) 31

Westside v. Pierce Cty, 100 Wn. App. 599, 5 P.3d 713 (2000) 23

Weyerhaeuser v. Pierce County, 124 Wn.2d 26, 873 P.2d 498 (1994) 26, 27

Wright by Wright v. Group Health, 103 Wn.2d 192, 691 P.2d 564 (1984) 39

COURT RULES

CR 60(b) 20, 45, 46, 48

RAP 2.5(a) 11

RAP 14.2 . . . . . 49, 50

STATUTES

RCW 4.84.30 . . . . . 49, 50

Land Use Petition Act ("LUPA"), RCW Ch. 36.70C 1, 4, 21

RCW 36.70C.130 . . . . . 18, 28

RCW 36.70C.130(1) 21

CITY CODES

KCC 1.04.150.A 18, 27

KCC 1.04.150.B 28

KCC Title 15 . . . . . 33, 42

KCC 15.02.285 . . . . . 33, 37

KCC 15.02.533 . . . . . 42, 43

KCC 15.02.533(2) 43, 44

KCC 15.02.533(3) 43, 44

KCC 15.02.533(4) 43, 44

KCC 15.02.533(6) 43, 44

KCC 15.02.533(7) 43, 44

KCC 15.03.010 9

KCC, Ch. 15.04 34

KCC 15.04.090 10

KCC Ch. 15.08 33

KCC 15.08.100.A & B 33

KCC 15.08.100.A.3 33

KCC 15.08.100.A.4 33

KCC 15.08.100.B 33

KCC 15.08.100.C.2 . . . . . 34, 42

NCC zone 9, 10, 13, 34, 35

PCC 2.36.100 27

CONSTITUTIONAL PROVISIONS

Washington State Constitution 44

Federal Constitution 44

TREATISES

1 R. Anderson, Zoning § 6.32, at 550 (3d ed. 1986) 39

Tegland, 14A Wash. Prac., Civ. Pro. § 33:17 (2d ed.) (2014) . . 5, 24

I. INTRODUCTION

This case comes to the Court as an appeal of a final land use decision under the Land Use Petition Act ("LUPA"), RCW Ch. 36.70C. The only issue is whether the City of Kent (the "City") submitted substantial evidence at the administrative hearing to support the Hearing Examiner's final decision (the "Examiner's Decision") that the owner of the Shady Park Property (the "Property"), Donald and Karen Berg (the Bergs), unlawfully expanded a nonconforming use of their Property. The City's position is that a discrete portion of the Property can be used for outdoor storage of vehicles related to an auto repair shop as a lawful nonconforming use. The Bergs argue, however, that all of their Property can be used for commercial outdoor storage of any kind. A review of the Record[1] supports the Examiner's Decision that the Bergs violated the City's zoning code regarding unlawful expansion of a nonconforming use. The superior court affirmed the Examiner's Decision.[2] The City respectfully requests that this Court affirm the decisions of the Examiner and the superior court and hold that the Bergs' present use of their entire Property for commercial outdoor storage is an illegal expansion of a nonconforming use under the Kent zoning code and Washington law.

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[1] Citations to the *Certified Administrative Board Record* will be referenced as CABR.
[2] CP 693-694.

The Shady Park Property, which is approximately three acres, was annexed into the City on January 1, 1996. In King County, the Property had always been zoned for strictly residential uses. In 1995, the City conducted an investigation to determine how the Property should be zoned by the City after annexation. The property owner at that time, David Spencer, testified before the City Planning Commission that despite the residential zoning, two businesses were being run on the Property as legal grandfathered uses: a grocery store and an auto repair shop. Spencer testified that the grocery store had been in existence since the 1920s and the auto repair shop had been operating since the 1940s, both before King County enacted contrary zoning. The City has aerial photos from 1996 and 1999 that confirm the existence of a grocery store and an auto repair shop on the Property. These photos also confirm the auto repair business used a portion of the Property for the outdoor storage of vehicles as a business accommodation. Finally, these photos show that the remainder of the Property was undeveloped, mainly covered with trees and shrubs.[3]

At the Planning Commission Hearing, Mr. Spencer asked the City to zone all of the Property commercial. The City did not, however, want to zone the entire Property commercial as it was located in a low-density residential neighborhood and such zoning would allow expanded

[3] CABR 14-15.

commercial enterprises that were incompatible with residential uses. Thus, the City compromised and zoned the Property "neighborhood convenience commercial" ("NCC"), which allowed the grocery store use outright. The City also determined that the existing auto repair business was a lawful nonconforming use that would be allowed to continue on the Property after annexation. This necessarily included the small amount of outdoor storage of vehicles attendant to the auto repair business.

Over the next several years the various Property owners attempted to illegally expand use of the Property for commercial "outdoor storage." The City responded to several complaints from neighbors regarding the unlawful expansion of outdoor storage. The present appeal arises out of the City's Notice of Violation filed against the Bergs in 2012 (the "2012 NOV"), alleging unlawful expansion of a nonconforming use. The Bergs requested an administrative hearing before the City's Hearing Examiner. The Examiner held eight (8) hearings over the next 10 months. The Bergs were represented by an attorney at the first hearing, then chose to have their friend, Tom Glenn, represent them for the remaining hearings.

The City's position is that the auto shop, and a limited amount of outdoor storage of vehicles related to the auto shop, are lawful nonconforming uses. The Bergs argued that they should be allowed to use all of their Property for outdoor storage of any kind. The Examiner agreed

with the City and issued his Decision sustaining the 2012 NOV. The Bergs filed a LUPA appeal to the superior court. The superior court affirmed the Examiner's Decision and the Bergs filed this appeal.

The Bergs' main argument in this appeal is that the Examiner did not prepare sufficient written Findings and Conclusions to support his Decision. This argument has no merit. First, the Examiner relied on written findings contained in documents that were specifically referenced in his Decision and, thus, incorporated by reference. The Bergs simply want the Court to ignore these incorporated findings and conclusions.

Furthermore, the Examiner's Decision is fully supported by substantial evidence in the record as a whole as required by the LUPA, RCW 36.70C.130(1)(c). The Examiner explicitly noted that the Bergs had not presented any "credible evidence" in support of their position. The Examiner doubted the credibility of the witness testimony presented by the Bergs, especially in light of the overwhelming contradictory witness and documentary evidence in the Record presented by the City. It is not the function of this Court to second guess the Hearing Examiner and weigh the credibility of the Bergs' witnesses' testimony.[4] The Bergs' appeal,

[4] It is not the function of a court of appeals to substitute its judgment for that of the fact finder or to weigh the evidence or credibility of witnesses. *In re Marriage of Rich*, 80 Wn. App. 252, 259, 907 P.2d 1234, 1237 (1996).

which is almost entirely premised upon their argument that the Examiner should have believed their biased witnesses, versus the substantial and unbiased evidence submitted by the City, does not have merit. "Civil appeals raising only factual issues rarely result in reversals[.]" Tegland, 14A Wash. Prac., Civ. Pro. § 33:17 (2d ed.) (2014).

In light of the Record as a whole, the Bergs' appeal was properly denied by both the Hearing Examiner and the superior court, and the City respectfully requests that these denials be affirmed on appeal by the Court.

II. RESTATEMENT OF THE CASE

A. Zoning history of the Property

1. Pre-1996 – The Property is zoned residential in King County

The Shady Park Property is located at 27918 and 27824 152nd Ave. S.E. in Kent. The Property was annexed by the City on January 1, 1996.[5] Prior to annexation, the Property was in King County. King County zoning codes first came into existence in the late 1930's.[6] The City has no quarrel with the Bergs' claim that King County may not have enacted valid zoning codes until 1958.[7] This fact is irrelevant because between the enactment of King County's first zoning code and annexation by Kent in

[5] *Sharon Clamp*, CP 59.
[6] CABR 649-661.
[7] *Opening Brief*, p. 6.

1996, the Property was always zoned residential.[8] None of the zoning codes applicable to this Property has ever allowed it to be used as a commercial outdoor storage lot.[9]

2. January 1, 1996 – The Property is annexed by the City

Prior to annexation, the Kent Planning Commission met on September 25 and 26, 1995, to hear testimony regarding future City zoning for the Property.[10] David Spencer, the owner of Shady Park at the time, testified at the hearings.[11] Mr. Spencer's testimony, which the Bergs have studiously ignored throughout all stages of this proceeding, is key to the Hearing Examiner's Decision. It is undisputed that Mr. Spencer told the Planning Commission that the residentially-zoned Property was being used by him commercially for only two (2) purposes: first, for a grocery store (Shady Park Grocery) since about 1920; and second, for an auto repair shop that had been in continuous operation since about 1940. At no time in his testimony did Mr. Spencer identify commercial "outdoor storage" as a third business on his Property as of September 1995, as follows:

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[8] Before 1979, the Property was zoned "suburban residential"; from 1979 to 1994 it was again zoned "suburban residential"; and from 1994 until it was annexed in 1996, it was zoned "urban reserve." *Sharon Clamp*, CP 1158.
[9] *Sharon Clamp*, CP 1158-1159; CABR 5-6, 649-661.
[10] CABR 133-140.
[11] CABR 136.

> David Spenser [sic], 27848 152nd Ave SE (Shady Park Grocery). This property has been the Shady Park Grocery since about 1920. He also has an existing auto repair shop. . . . Mr. Spenser [sic] would like consideration for some type of commercial zoning. He has suggested perhaps dividing the property and zoning the portion of property that is on 152nd commercial.[12] (Emphasis added.)

First, it appears Mr. Spencer asked the City to zone the entire Property commercial. Second, as an alternative, he actually suggested that the Property be "divided" and that only a portion of the Property – the portion along 152nd – be zoned commercial. This evidence (Mr. Spencer's 1995 testimony to the Planning Commission) clearly indicates that, before annexation, the former property owner was only using a *portion* of the Property for commercial uses. This testimony, along with a 1996 aerial photo which shows that only the west side of the Property was being used commercially at that time,[13] is the best evidence of the preexisting use of the Property. The Bergs have never disputed Mr. Spencer's testimony. They have never even addressed this testimony; they have simply ignored it in the proceedings below and continue to hope this Court also ignores it.

The Record also contains clear evidence of how the City zoned the Property in 1996, including its approval of the auto repair shop as a legal nonconforming use. That zoning specifically did not include approving a

[12] CABR 136. (The Court should note that two pages of the CABR were mistakenly stamped "136." Here, the City refers to the second page stamped "136"; which is originally "Page 6" of the Planning Commission Minutes dated September 26, 1995.)
[13] CABR 15.

commercial use of even a portion of the site, much less the entire site, as the Bergs now contend. After the hearings, the Planning Director prepared a memorandum making a formal determination that the grocery store and auto repair shop were likely legal non-conforming uses on the Property under King County's zoning.[14] But he declined to recommend that any portion of the Property be zoned "commercial" upon annexation by the City, explaining that the surrounding area was developed as low density single family, and therefore it would not be in the City's best interest to designate the site as a straight commercial zone. The Planning Director's memo/zoning recommendation reads as follows:

> **Shady Park Grocery and Auto Repair at 27848 152nd Avenue SE (Spenser [sic])**
>
> **Issue: Should this area be changed from single family residential to commercial?**
>
> **Staff Recommendation: Remain single-family residential**
>
> **Discussion:**
>
> The Shady Park grocery is located at 27848 152nd Avenue SE, at the northeast corner of 152nd Avenue SE and SE 280th Street. The site contains a grocery store and an auto repair use. The owner testified at the September 26 [1995] hearing that the grocery store has been in existence since 1920, and that the auto repair use has been operating since 1940. This being the case, both uses are likely legal and nonconforming, since the site is currently zoned as Urban Reserve in King

[14] CABR 124-125. (Again, two pages of the CABR were mistakenly stamped "124." Here, the City refers to the second page stamped "124"; which is originally "Page 5" of the Planning Director's memo.)

> County (one dwelling unit per 5 acres). The general area surrounding the site is zoned and developed as very low density single-family.
>
> The legal, non-conforming status of the uses on the site will continue if the site is zoned for single-family use upon annexation into the City, meaning that the uses may continue to operate on the site.[15] Designating the site as commercial would allow an expanded number of commercial uses of the site if the ownership were to change, and would create a commercial zoning designation in the middle of a low density single-family area.[16] Furthermore, auto repair is not a permitted use in the NCC (Neighborhood Convenience Commercial) zone, meaning that making this use conforming would require a CC (Community Commercial) or GC (General Commercial) zoning designation.[17]

Clearly, the Planning Director was opposed to any expanded commercial use of the site after annexation. Again, this evidence is contrary to the Bergs' current claim and has never been disputed.

In the end the City compromised with the former property owner and zoned the site Neighborhood Convenience Commercial (NCC)[18], which allows a grocery store use outright.[19] Additionally, the City agreed that the auto repair business could continue as a legal nonconforming

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[15] The Planning Director recommended the site be zoned "single family residential," but that the grocery store and auto repair shop be allowed as legal nonconforming uses. Ultimately, the site was zoned NCC, which allowed the grocery store outright; and in addition, the City allowed the auto repair shop as a legal nonconforming use.
[16] The Planning Director was opposed to allowing any expanded commercial uses on the site after annexation.
[17] CABR 124-125. (Bold in original, underline added.)
[18] KCC 15.03.010/CABR 618.
[19] *Sharon Clamp*, CP 61.

use.[20] But commercial outdoor storage is not a permitted use in the NCC zone, *see* KCC 15.04.090,[21] and there is no evidence in the Record that the City ever authorized an outdoor storage lot – or any other commercial use – on the entirety of the Shady Park Property.

3. 2001 – The grocery store is destroyed by fire

In 2001, the grocery store burned down. On December 6, 2001, Mr. Spencer wrote a letter to the City expressing his desire to rebuild the grocery store.[22]

4. 2002 – The City issues a Notice of Violation based upon unpermitted outdoor storage on the Property

Based upon Mr. Spencer's request for construction permits to rebuild the grocery store, the City inspected the Property and noted it was being used unlawfully for outdoor storage (which was not a permitted use in the NCC zone). In January 2002, the City sent Mr. Spencer a letter putting him on notice that there were potential code violations occurring on the Property due to its unlawful use as an outdoor storage lot.[23]

In July 2002, Mr. Spencer initiated a pre-application conference with the City to rebuild the grocery store.[24] As the permitting process continued, so too did the City's inspections of the Property.

On September 6, 2002, the City issued a Notice of Violation (the "2002 NOV") to Mr. Spencer for unlawfully using the Property for

[20] CABR 125.
[21] CABR 635-636.
[22] CABR 17.
[23] CABR 17-18.
[24] CABR 216-218.

outdoor storage.[25] The City identified the violation as the "illegal storage of recreational vehicles, boats, equipment and miscellaneous inoperable and/or disassembled vehicles on the Property."[26]

Mr. Spencer and City representatives met on September 10, 2002 for a pre-application conference to rebuild the grocery store.[27] The Bergs claim in this appeal that the City's approval of the former property owner's grocery store permit also authorized use of the entire Property for outdoor storage.[28] Not so. In fact, in a letter following this meeting the City explicitly told Mr. Spencer that its review of his application to rebuild the grocery store did "not constitute approval of the outdoor RV and boat storage, self-service mini-warehouse storage, impounded vehicle storage, or vehicle dismantling and salvage that were occurring on the Property (as identified in the 2002 NOV)."[29] This letter directly disputes the Bergs' argument. The 2002 NOV was closed on January 14, 2003.[30]

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[25] CABR 19-24.
[26] CABR 19.
[27] CABR 27.
[28] This argument was abandoned by Berg after the administrative hearing level and was never raised at the superior court level. An abandoned argument should not be resurrected on appeal; especially where it does not meet the parameters of RAP 2.5(a) regarding the limited number of errors that may be raised for the first time on appeal.
[29] CABR 27.
[30] *Tom Glenn,* CP 941. A note in the City's computer Code Enforcement File on that date says "Complied with Planning." *Id.* The Bergs argue this note means the City made a determination at that time that the entire site could be used as an outdoor storage lot. *Opening Brief,* p. 9-10; 15-17. But had the City actually made such a determination, it would have entered an unequivocal record of that determination in its file, not simply this three-word note. The City's Planner testified this note likely means the property owner came into compliance with the Planning Department's requirements at that time, *i.e.,* he "[c]omplied with Planning." Then, however, the property owner came out of compliance again. This happened multiple times over the years. *Sharon Clamp*, CP 1172-1178.

5. 2004 – The City issues a permit to rebuild the grocery store

On May 27, 2004, the City issued Mr. Spencer a permit to rebuild the grocery store.[31] Contrary to the Bergs' new argument that the City's approval of the grocery store permit also authorized use of the entire Property for outdoor storage, the City's Economic Development Manager testified that this permit did not address, much less authorize, any outdoor storage on the Property.[32] Additional proof that the City did not authorize outdoor storage on the entire Property via issuance of this permit is found on the City's copy of the site plans for the grocery store, where the City hand-wrote that the owner's use of the Property as "existing self-storage, vehicles, trucks, boats & trailers" was "not allowed in NCC."[33]

6. 2006 – The Property is purchased by the Bergs

The Bergs purchased the Property on June 27, 2006.[34]

7. 2006-2009 – The Bergs' use of the Property for outdoor storage unlawfully expands

In 2009 the City began to receive a number of complaints regarding the Bergs' use of the Property. Most of these complaints were with regard to the increased amount of vehicles, heavy equipment, recreational vehicles and boats stored outside on the site.[35]

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[31] CABR 30-32.
[32] *Kurt Hanson*, CP 155-156.
[33] CABR 217.
[34] CABR 56.
[35] CABR 590-591; 610-615.

In February 2009, the City sent a letter to the Bergs identifying concerns with the Property, including the issue of outdoor storage.[36] The City informed the Bergs that outdoor storage was not an allowed use in the NCC zone. The City went on to state, however, that after researching the Property's history it was the City's determination that a discrete amount of outdoor storage associated with the auto repair business was a legal non-conforming use of the Property because (1) it had been an established use prior to annexation; and (2) it appeared to have been a legal non-conforming use when the Property was in King County (because it had been in existence prior to adoption of the County's first zoning code).[37]

The City concluded that the amount of property the Bergs could continue to use for outdoor storage was equal to the amount depicted in aerial photos taken in 1996 and 1999, around the time of annexation:

> After reviewing the site history obtained through Washington State Regional Archives, the City determined that outdoor storage was legally established on the site prior to annexation and the degree of outdoor storage allowed on the site is that which is depicted on aerial photos taken in **1996,** the same year the property was annexed to the City of Kent. A clearer aerial image of the site taken in **1999** shows a similar level of outdoor storage.[38] (Emphasis added.)

Between February 2009 and March 2011, the Bergs continued to increase use of their Property as an outdoor storage lot, in spite of the

[36] CABR 37-38.
[37] *Sharon Clamp*, CP 1169-1170.
[38] CABR 14, 15, 16; and 37.

City's inspections and demands for them to decrease outdoor storage to the level of use that existed in 1996.[39] The City did not take action against the Bergs during that time period, however, because the Bergs always assured the City they would reduce the amount of outdoor storage on their Property.[40] But they did not, and instead continued to slowly increase use of the Property for outdoor storage.[41] For instance, in February 2011, the City conducted a site visit and saw numerous new vehicles stored on the east side of the site, including new RVs, a U-HAUL, a large gray storage container, and a van with some type of arm lift on top.[42] These vehicles and containers were clearly not related to the auto repair shop.

In March 2011, the City first met Tom Glenn, who came to the City and introduced himself as the "Property Manager" for Mr. Berg.[43] He initially told the City he was working to remove vehicles from the Property.[44] But once again, that did not occur. In August 2011, City Planner, Matt Gilbert, specifically told Mr. Glenn that the total amount of Property the Bergs could use for outdoor storage was limited to the level present in the 1996 photo. In fact, Mr. Gilbert drew an orange line on a photo from 1999 (which had better clarity than the 1996 photo) that

[39] CABR 39-44, 610-611,
[40] *Sharon Clamp*, CP 67-68; CABR 61, 611; CP 69.
[41] CABR 611; *Sharon Clamp*, CP 70.
[42] CABR 612; *Sharon Clamp*, CP 74-75.
[43] CABR 613; *Sharon Clamp*, CP 75.
[44] *Sharon Clamp*, CP 75.

outlined approximately **34,270 square feet** of Property on the west side of the site.[45] The City agreed the Bergs could use this amount of the Property for the auto repair business and outdoor storage.[46]

The City gave Mr. Glenn a copy of the photo with the orange line and asked him to come back in two weeks with a site plan aimed at bringing the Property into compliance.[47] In an effort to compromise, the City told Mr. Glenn that the Bergs could reconfigure the 34,270 square feet in any manner they wished, so long as it remained on the west side of the Property.[48] The City also reminded him that the Bergs could apply for a conditional use permit (CUP) if they wanted to use the Property in a manner inconsistent with the City's zoning.[49] It is uncontested that the Bergs never submitted a site plan to the City aimed at decreasing outdoor storage.[50] It is also uncontested that they never applied for a CUP.[51]

Several days later, on August 25, 2011, **the Bergs suddenly alleged, for the first time, that they were entitled to use the entire Property for outdoor storage as a matter of law.**[52] A couple weeks

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[45] CABR 16.
[46] CABR 16, 613; *Sharon Clamp*, CP 80-81; *Matt Gilbert*, CP 1131-1136, 1097-1098, 1102-1105; *Tom Glenn*, CP 960-961.
[47] CABR 613; *Matt Gilbert*, CP 1140, 1143-1144; *Tom Glenn*, CP 961-962.
[48] CABR 613; *Matt Gilbert,* CP 1138.
[49] *Matt Gilbert*, CP 1147.
[50] *Sharon Clamp*, CP 85, 87; *Tom Glenn,* CP 969; *Matt Gilbert,* CP 206, 1144.
[51] *Matt Gilbert*, CP 1115-1116.
[52] *Sharon Clamp*, CP 86.

later Mr. Glenn again met with the City.[53] At this meeting, he argued that as a result of the City's prior approval of the grocery store permits, the City had somehow tacitly approved use of the entire Property for outdoor storage.[54] Based on the Bergs' intransigent position on this issue, he flatly refused to advise the Bergs to come into compliance with the City's zoning code.

The City's Planning Director, Fred Satterstrom, instructed Staff to check all permits and business licenses issued for the Property, past and present, City and County, to determine if any of them had previously authorized "outdoor storage" at the site. The City never found any business license or permit allowing outdoor storage at the site.[55]

8. 2012 – The City is forced to issue a Notice of Violation

In February 2012, the City received a new complaint about increased use of the Property for outdoor storage and other commercial uses, such as the fact that a fence company was operating on the site and

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[53] CABR 614; *Sharon Clamp*, CP 80.

[54] *Tom Glenn,* CP 946-953; *Sharon Clamp*, CP 85.

[55] CABR 302; *Matt Gilbert*, CP 1109. The only thing the City found was that Mr. Spencer (the former owner) had been issued a Washington State Tax Registration Number for a business entitled "Shady Park RV and Boat Storage" in September 1, 2005. CABR 603-604. The business location was listed as 27918 152nd Ave SE (only half of the Property). But Spencer sold the Property to Berg in 2006 and the account was closed on December 31, 2006. CABR 603-604. The City never issued a business license to anyone for a business named "Shady Park RV and Boat Storage." *Glenn Miller*, CP 974-975. At most, this shows that in 2005 (nine years after annexation), the former owner had some intent to try to use the Property for outdoor storage. But the Bergs clearly let this Tax Registration Number with the State lapse after they bought the Property in 2006.

that three new dumpsters had been brought onto the Property.[56] On February 22nd, Director Satterstrom met with Mr. Glenn in a last attempt to resolve the parties' issues.[57] Mr. Glenn, however, continued to insist that the Bergs could – and would – use the entire Property for outdoor storage.[58] After this meeting it was crystal clear that the Bergs would never voluntarily comply with the City's zoning code, thus, Director Satterstrom was forced to direct Staff to prepare a Notice of Violation.[59]

On May 24, 2012, the City issued the 55-page Notice of Violation to the Bergs that is at issue in this LUPA appeal (the "2012 NOV").[60]

B. <u>The Bergs file an administrative appeal of the 2012 NOV</u>

The Bergs filed an administrative appeal of the 2012 NOV. The appeal resulted in eight hearings before the Hearing Examiner, expanding over a 10-month period from November 2012 to August 2013. The Bergs were was represented by counsel at the first hearing.[61] For the next seven hearings, they proceeded *pro se* with Tom Glenn as their representative.

C. <u>The Hearing Examiner finds that the Bergs violated the Kent zoning code as set forth in the City's Notice of Violation</u>

After careful consideration of the large administrative record in this matter, the Hearing Examiner issued his 13-page Decision on

[56] CABR 614.
[57] CABR 615; Tom Glenn, CP 973.
[58] Tom Glenn, CP 974-975.
[59] CABR 615; Sharon Clamp, CP 89.
[60] CABR 1-55.
[61] CP 33-259.

December 3, 2013.[62] Contrary to the Bergs' assertions otherwise, the Examiner's Findings and Conclusions are fully supported by substantial evidence in the Record. Also contrary to the Bergs' assertions, the written Findings are sufficient to provide a reviewing court with the opportunity for meaningful review. For instance, the Findings include the following:

> The City of Kent has the burden of proving[63] by a preponderance of the evidence that a violation has occurred. KCC 1.04.150.A
>
> 1. The Notice of Violation issued on May 24, 2012 alleged that violations of the Kent City Code have occurred at 27918 and 27924 152nd Avenue SE, in Kent, Washington 98043, Parcel Number 3522059154; and, named the following persons as being responsible for the Code Violations: Donald I. and Karen Berg[.] . ..
>
> 2. **The Notice of Violation dated May 24, 2012 referenced a, Correction Notice dated March 9, 2012 (which was attached and incorporated by reference) for the legal and factual basis for this violation**: "Outdoor storage including trucks, heavy equipment, Recreational Vehicles, boats and contractor storage yards."
>
> 3. * * *
>
> 4. Mr. and Mrs. Berg were notified of and were given several opportunities to correct the violations and/or work with the City of Kent to settle the dispute, which did not occur.
>
> 5. **A preponderance of the evidence supports a finding that Mr. and Mrs. Berg violated the King County [sic] Code.**[64] For violations of the Code, the Notice of Violation assess [sic] a total fine of $500.00.

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[62] CABR 973-986.

[63] The Bergs' contention that the Hearing examiner improperly shifted the burden of proof to him is not supported by the record. *Opening Brief, p. 21.* On the other hand, they indisputably bears the burden of proof in this LUPA appeal. RCW 36.70C.130.

[64] The Bergs argue that the Examiner's reference to a violation of the "King County Code," versus the Kent City Code, is grounds for remand. *Opening Brief, pp. 35-37.* Clearly, this is nothing more than a scrivener's error, which is supported by the

6. * * *

7. * * *

8. Mr. and Mrs. Berg <u>failed to provide credible evidence</u> regarding the nature of the violations, why the violations exist, and why the violations have not been abated or corrected. (Emphasis added.)[65]

The Hearing Examiner then made the following Conclusion No. 1 "Based on Findings": **"The Bergs violated the <u>Kent City Code</u> as set out in the Notice of Violation."** (Emphasis added.)[66]

In the present case, the large Record, including partial transcripts of the eight days of hearings, more than supports the Hearing Examiner's ultimate finding that the Bergs' use of the Property for "outdoor storage including trucks, heavy equipment, recreational vehicles, boats and contractor storage yards" constituted an illegal expansion of a nonconforming use under the City's zoning code and must immediately be abated.

D. <u>The superior court affirms the Hearing Examiner's Decision</u>

Examiner's Conclusion No. 1, which states that "The Bergs violated the <u>Kent City Code</u> as set out in the Notice of Violation." CABR 985 (emphasis added).

[65] CABR 984.

[66] CABR 985. The Bergs state, *Opening Brief, p. 32*, that the Examiner made only <u>one</u> written finding, and that this "finding consists entirely of the following statement: 'A preponderance of the evidence supports a finding that Mr. and Mrs. Berg violated the King County [sic] Code.'" This statement is untrue. The Examiner made numerous written findings and conclusions, and, in addition, incorporated by reference the findings from both the **March 9, 2012 Correction Notice** and the **May 24, 2012 Notice of Violation** into his written decision. The findings from these two City notices are extensive. Furthermore, the City presented live witness testimony at the eight public hearings that support the findings in these two City notices. Finally, the Examiner was not persuaded by the Bergs' witnesses and evidence, as set forth in Finding No. 8: **"Mr. and Mrs. Berg <u>failed to provide credible evidence</u> regarding the nature of the violations, why the violations exist, and why the violations have not been abated or corrected."** (Emphasis added.) CABR 984.

The Bergs filed a LUPA appeal to the King County Superior Court. The superior court judge affirmed the Hearing Examiner's Decision, setting forth her findings and conclusions in a clear and concise oral decision.[67]

E. The Bergs' CR 60(b) motion was properly denied

After this appeal was filed with Division I of the Court of Appeals, the Bergs filed a CR 60(b) motion back in superior court in an attempt to set aside the trial court's LUPA order, alleging newly discovered evidence in the form of testimony by the City's former employee Brian Swanberg, who retired in December 2012 for medical reasons. The Bergs claimed the City had concealed Mr. Swanberg from them.[68]

The superior court properly denied the Bergs' CR 60(b) motion, finding that the City never "concealed" Mr. Swanberg,[69] and, furthermore, that Mr. Swanberg's proffered testimony was not relevant to the material issues in this appeal.[70] The Bergs claim Mr. Swanberg would testify that the City made a formal determination allowing use of the entire Property for outdoor storage at the time of annexation (in 1996), which it then reaffirmed several times over the following years. This is not true. Even

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[67] VRP 03/06/2015, pp. 26-32.
[68] CP 702
[69] CP 904-907; VRP 08/28/2015, p. 38, l. 24 to p. 41, l. 9.
[70] VRP 08/28/2015, p. 41, l. 10 to p. 42, l. 19.

if the Court accepts Mr. Swanberg's declarations,[71] he does not, in fact, testify to the key fact that the Bergs are looking for, *i.e.,* he never identifies a City employee or City document containing an actual written determination that the entire Property could be used for commercial outdoor storage as a lawful nonconforming use. Thus, his testimony adds nothing new to the administrative record.

III. ARGUMENT

A. Standards of review under the Land Use Petition Act

The Land Use Petition Act (LUPA), codified at RCW Ch. 36.70C, provides the statutory standard of review for land use petitions. Under the LUPA, a reviewing court may grant relief from a land use decision only if the petitioner carries its burden of establishing that (a) the examiner engaged in unlawful procedure or failed to follow a prescribed process (unless the error was harmless), (b) the 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 decision is not supported by substantial evidence in light of the whole record, (d) the decision is a clearly erroneous application of the law to the facts, (e) the decision is outside the authority or jurisdiction of the hearing

[71] Pursuant to KCLR 56(e), the City continues its hearsay and relevance objections to Mr. Swanberg's declarations. CP 866-67. First Decl., CP 765-88; Second Decl., CP 897-901.

examiner, or (f) the decision violates the constitutional rights of the party seeking relief. RCW 36.70C.130(1). The Bergs challenge the Examiner's Decision under (a), (b), (c), (d) and (f). As the party seeking relief from the Decision, they bear the burden of proving one of the six bases for relief under LUPA. *Abbey Road v. Bonney Lake,* 141 Wn. App. 184, 192, 167 P.3d 1213, 1216 (2007), *aff'd,* 167 Wn.2d 242, 218 P.3d 180 (2009).

Subsections (b) and (f) present questions of law that the court must review *de novo*. *Cingular Wireless v. Thurston County,* 131 Wn. App. 756, 768, 129 P.3d 300 (2006). This court's review of any claimed error of law in the City's interpretation of city ordinances is *de novo* and the court must accord deference to the City's expertise. *Pinecrest HOA v. Cloninger,* 151 Wn.2d 279, 290, 87 P.3d 1176, 1181 (2004).

Under subsection (c), the court should defer to the Hearing Examiner on factual determinations and should not overturn the Examiner's findings of fact unless they are not supported by evidence that is substantial in view of the entire record before the examiner. *Miller v. Bainbridge Island,* 111 Wn. App. 152, 162, 43 P.3d 1250, 1254-55 (2002). The substantial evidence test is a deferential standard. Under this standard, the Court will not substitute its judgment for that of the fact finder. Instead, it shall accept the fact finder's views regarding the credibility of witnesses and the weight accorded to reasonable but competing inferences. *Hilltop Terrace HOA v. Island County,* 126 Wn.2d

22, 34, 891 P.2d 29 (1995). "We view the evidence and any reasonable inferences in the light most favorable to the party that prevailed in the highest forum exercising fact finding authority." *Schofield v. Spokane County,* 96 Wn. App. 581, 586-87, 980 P.2d 277 (1999).

Under subsection (d), the court should view questions requiring application of the law to facts under the clearly erroneous standard, reversing only when, after considering the entire record, it is firmly convinced the administrative body failed. *Quality Rock v. Thurston County*, 139 Wn. App. 125, 133, 159 P.3d 1 (2007).

The court applies the LUPA standards of review based solely on the record created before the Hearing Examiner. *Westside v. Pierce Cty,* 100 Wn. App. 599, 602-03, 5 P.3d 713 (2000). Here, the large Record, which includes partial transcripts of every day of the eight days of hearings, more than supports the Examiner's ultimate finding that the Bergs use of the entire Property for "outdoor storage of trucks, heavy equipment, Recreational Vehicles, boats and contractor storage yards" is an unlawful expansion of a nonconforming use.

B. The Hearing Examiner's written findings and conclusions are sufficient to support his Decision

The Bergs' argument that the Hearing Examiner's written findings and conclusions are insufficient has no merit. They fail to note that the Decision incorporated by reference a total of 55 pages of findings and conclusions. *See, for example*, Finding No. 2: "The Notice of Violation

dated May 24, 2012 referenced a Correction Notice dated March 9, 2012 (which was attached and incorporated by reference) for the legal and factual basis for this violation."[72] Additionally, Conclusion No. 1 holds: "The Bergs violated the Kent City Code as set out in the Notice of Violation." (Emphasis added.)[73]

While the Examiner could have retyped the legal and factual bases for the violations in his Decision, his reference to the **May 24, 2012 NOV** (CABR 1-55) and the **March 9, 2012 Notice of Correction** (CABR 1-5), is more than sufficient to advise the Court of the factual, evidentiary, and legal bases for his Decision. The Examiner relied on, and incorporated into his Decision, the legal and factual findings in CABR 1-55.

C. The Examiner's Decision is supported by substantial evidence

The Hearing Examiner's legal and factual findings constitute more than substantial evidence to support his Decision.

> Substantial evidence exists if the record contains evidence of sufficient quantity to persuade a fair-minded, rational person of the truth of the declared premise.

Tegland, 14A Wash. Prac., *at § 33:17* (emphasis added).

The Bergs cite *In re LaBelle*, 107 Wn.2d 196, 218-20, 728 P.2d 138, 151-52 (1986) for their contention that the findings in this case are not specific enough to permit review. First, the findings in *LaBelle* did not

[72] CABR 984.
[73] CABR 985.

include 55 pages of documents that had been incorporated by reference as has occurred here. Second, even if no documents had been incorporated by reference in this case, the Examiner's findings and conclusions are still sufficient to support his Decision under *LaBelle*. Although *LaBelle* noted the trial court's findings in that case were "not adequate," the Court was still was able to conduct review based upon the record as a whole; hence, *LaBelle* was not sent back to the trial court for further fact-finding and does not support the Bergs' position. Instead it supports the City's position, which is that if a decision is supported by substantial evidence in the record as a whole, then the decision should be affirmed.

> 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. . . .
>
> Although we conclude that the written findings here are inadequate, we think it appropriate in these cases to look to the entire record, including the trial courts' oral decisions, in order to determine the sufficiency of the evidence supporting the trial courts' ultimate findings of grave disability.

LaBelle, 107 Wn.2d at 219 (emphasis added).

Also, *LaBelle* was not a land use appeal, but dealt with a group of involuntary mental health commitments, which involve the loss of personal freedom and invoke the highest standard of constitutional scrutiny. *Id.* at 201. *LaBelle* noted that involuntary commitments require

an increased burden of proof, and findings must be supported not only by substantial evidence, but by "substantial evidence which the lower court could reasonably have found to be clear, cogent and convincing," *id.* at 209, versus the preponderance of the evidence standard at issue here. And yet, despite that heightened scrutiny, *LaBelle* noted that although the findings presented in those cases were "mostly conclusory and general," the record as a whole was still sufficient to support review.

The Bergs' citation to *Weyerhaeuser v. Pierce County*, 124 Wn.2d 26, 873 P.2d 498 (1994) is of no help to them either. *Weyerhaeuser* involved a combined appeal of an Environmental Impact Statement (EIS) and conditional use permit (CUP) to construct a municipal solid waste landfill on 317 acres of property that included wetlands, a fish-bearing stream, and numerous wells that provided the only drinking water for near-by residents. First, again (as in *LaBelle*), *Weyerhaeuser* did not involve a decision with 55 pages of findings and conclusions that had been incorporated by reference. Second, at the administrative hearings on the *Weyerhaeuser* permits, the County Code required the examiner to comply with enhanced requirements for entry of findings and conclusions. The examiner was not only required to enter "findings and [a] decision as required by law," but findings and conclusions which "set forth and demonstrate the manner in which the decision . . . carries out and helps to

implement the goals and policies of the [Pierce County] Comprehensive Plan and the standards set forth in the various land use regulatory codes." *Weyerhaeuser*, 124 Wn.2d at 35, citing to PCC 2.36.100. In addition to the County's enhanced standards, the size and severe adverse environmental impacts of the proposed project distinguish *Weyerhaeuser* from the present case. Finally, *Weyerhaeuser* was decided prior to the effective date of the LUPA; had the case been presented to the court under the LUPA standards the result may have been different.

D. <u>The Examiner's interpretation of the law was not erroneous</u>

The Bergs argue that the Examiner's Decision was an erroneous interpretation of the law as applied to the requisite burden of proof (*Opening Brief*, pp. 38-39); the City's alleged duty to produce former Code Enforcement Officer Brian Swanberg for the Bergs, *id.*, p. 25; and the Examiner's supposed finding that he based his Decision on the Bergs' failure to reach a settlement agreement with the City. *Id.*, pp. 45-46.

With regard to the burden of proof, it is true that the City has the initial burden to prove, by a preponderance of the evidence, that a code violation has occurred. KCC 1.04.150(A). That having been done, however, the burden shifts to the property owner to prove that a nonconforming use was lawfully established before the adoption of contrary zoning, and that such use was never abandoned or discontinued.

King Cy Dep't of Dev. and Envtl. Servs v. King Cy, 177 Wn.2d 636, 305 P.3d 490 (2013). The Bergs had the burden of proof to establish their case under both the LUPA, RCW 36.70C.130, and the law of legal nonconforming uses. *See First Pioneer Trading v. Pierce County*, 146 Wn. App. 606, 614, 191 P.3d 928 (2008)(holding that the hearing examiner properly applied the initial burden of proof on the property owner in a LUPA appeal regarding a legal nonconforming use). The Examiner did not err in applying the burdens of proof in this case.

With regard to securing witnesses for the City's administrative hearings, the Bergs conveniently disregard KCC 1.04.150.B, which requires them to be responsible for securing the appearance of their own witnesses: "The parties are responsible for securing the appearance of any witnesses they may wish to call; neither the city nor the hearing examiner shall have the burden of securing any witnesses on behalf of the person who is contesting the violation." (Emphasis added.) Thus, pursuant to the applicable code, the responsibility to locate Mr. Swanberg rested with the Bergs. Even if the Court were to assume that his testimony was admissible and provides new, relevant information to the Record, the very fact that the Bergs were able to easily locate him after the hearings indicates they could have located him at any time, had they simply chosen

to look for him. It was not the City's duty to locate Mr. Swanberg for the Bergs. Accordingly, no error of law occurred here.

Finally, the Bergs' contention that the Examiner supposedly based his Decision on the Bergs' failure to reach a settlement agreement with the City is nothing but a fallacy. This argument is based solely upon the Examiner's Finding No. 4: "[The Bergs] were notified of and were given several opportunities to correct the violations and/or work with the City of Kent to settle the dispute, which did not occur."[74] This is nothing more than an acknowledgment that the City provided the Bergs with requisite notice and opportunity to comply before taking action, which is a fundamental requisite of due process. The Examiner was simply noting that the Bergs' due process rights were not violated. The Examiner did not err in making this finding.

E. <u>This Court should affirm the Examiner's Decision that the Bergs unlawfully expanded a nonconforming use on their Property</u>

The issue on appeal is the Bergs unlawful expansion of outdoor storage on the Property. Their right to use the Property for commercial outdoor storage as a legal nonconforming use is dependent upon whether they can establish that such use was legally in existence <u>before</u> contrary zoning was enacted. As set forth below, under both Washington law and the City's zoning code, a property owner is not allowed to unilaterally

[74] CABR 984.

expand, enlarge, extend, increase or intensify a nonconforming use of his property. The City agrees the Bergs have the right to continue a certain specified amount of outdoor storage related to the auto repair business as a legal nonconforming use on the Property. But they do not have the right to unilaterally expand that use beyond the level that was in effect in 1996. For convenience, the Bergs uses of the Property are summarized here:

Grocery Store - the grocery store is permitted outright in the City's NCC zone, so the grocery store is not at issue in this appeal.

Auto Repair - the auto repair business is not a permitted use in the NCC zone; but it was accepted by the City as a legal nonconforming use in 1996; thus, it was allowed to continue after annexation and continues to be allowed at the present time. It is not at issue in this appeal.

Outdoor Storage - a portion of the west side of the Property had historically been used as "outdoor storage" for vehicles related to the auto repair business. After research and review, the City determined the Bergs could continue to use **34,270 square feet** of the west side of the Property for the auto business and outdoor storage as a legal nonconforming use.

1. Legal nonconforming uses under Washington law

Under Washington law, a "legal" nonconforming use is a use which lawfully existed prior to the enactment of a contrary 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 v. Snohomish County,* 136 Wn.2d 1, 6, 959 P.2d 1024 (1988). "A protected nonconforming status generally grants the right to continue the existing use but will not grant the right to significantly change, alter, extend, or enlarge the existing use." *Rhod-A-Zalea,* 136 Wn.2d at 7. "In Washington, local governments are free to preserve, limit or terminate nonconforming uses subject only to the broad limits of applicable enabling acts and the constitution." *Id.* Nonconforming uses are disfavored and courts have repeatedly held that the doctrine is a narrow exception to the government's power to regulate land through its police powers. Nonconforming uses limit the effectiveness of land use controls, imperil the success of community plans and injure property values. *Id.* at 8-9. An alleged nonconforming use must actually exist before it can be deemed a preexisting use and before a due process right attaches to the landowner. *King Cy Dep't of Dev. and Envtl. Servs v. King Cy*, 177 Wn.2d 636, 643, 305 P.3d 490 (2013).

Washington law prohibits the unlawful expansion of nonconforming uses. Under the common law, a nonconforming use may sometimes be intensified, but not expanded. *University Place v. McGuire,* 144 Wn.2d 640, 649, 30 P.3d 453 (2001). When an increase in volume or

intensity of use is of such magnitude as to effect a fundamental change in a nonconforming use, courts may find the change to be proscribed by local ordinance. Intensification is permissible where the nature and character of the use is unchanged and substantially the same facilities are used. The test is whether the intensified use is "different in kind" from the nonconforming use in existence when the zoning ordinance was adopted. *Keller v. Bellingham,* 92 Wn.2d 726, 730, 600 P.2d 1276 (1979).

2. Legal nonconforming uses under the City's zoning code

Local governments are free to preserve, limit or even terminate nonconforming uses subject only to the broad limits of applicable enabling acts and the constitution. *Rhod-A-Zalea*, 136 Wn.2d at 9. When a zoning regulation that limits a nonconforming use is reasonably related to the health, safety and welfare of the community, even if the ordinance would completely prohibit a use to which the property has previously been devoted, it will be found constitutional. *Goldblatt v. Town of Hempstead,* 369 U.S. 590, 592, 82 S. Ct. 987, 8 L.Ed.2d 130 (1962). Every regulation necessarily speaks to a prohibition, and if the zoning ordinance limiting or prohibiting a nonconforming use is otherwise a valid exercise of the government's police powers, the fact that it deprives the property of its most beneficial use does not render it unconstitutional. *Id.*

Consistent with Washington law, the City adopted nonconforming use regulations that preserve a property owner's right to use his/her property in a nonconforming manner, but only if the use is (1) legally established prior to the effective date of contrary zoning, and (2) neither a

nuisance nor has undesirable impacts on the surrounding conforming uses in the district. KCC 15.02.285[75] defines "nonconforming use" as follows:

> Nonconforming use means the use of land, a building, or a structure **lawfully existing prior to the effective date of this title** or subsequent amendments thereto, which does not conform with the use regulations of the district in which it is located on the effective date of such use regulations. (Emphasis added.)

Consistent with Washington law, Chapter 15.08 of the Kent City Code[76] provides further regulations applicable to nonconforming uses. Although these regulations state that a property owner has a "reasonable opportunity" to continue a nonconforming use if it has first been "legally established" (*see* KCC 15.08.100.A.3), they also clearly state that nonconforming uses are "not favored by law and this title [KCC Title 15]"; and if a nonconforming use is a "nuisance," or has "undesirable impacts on conforming uses" in the district where it is located, then the City's goal is to eventually "replace" it with a conforming use. KCC 15.08.100.A.4; and 15.08.100.B.[77]

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[75] CABR 616.

[76] CABR 404-421.

[77] CABR 95-96: KCC 15.08.100.A & B (emphasis added):

Purpose. The intent and purpose of this section is to:

* * *

3. Ensure reasonable opportunity for continuation of legally established uses which do not conform to use regulations for the district in which they are located.

4. Encourage the eventual replacement of nonconforming uses having potentially undesirable impacts on conforming uses.

* * *

B. *Applicability.* Nonconforming uses, structures, lots, or signs are not favored by law and this title, and it is to avoid injustice that this title accepts such elements. To benefit from the protection given to nonconforming development, such use, structure, or sign must have been lawfully established pursuant to a county resolution in effect at the time of annexation which rendered it nonconforming, or it must have been lawfully

Further, also consistent with Washington law, the City's code prohibits the expansion of nonconforming uses. The only permissible way to expand a nonconforming use is for the property owner to obtain a conditional use permit from the City.

> **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 except as follows: When authorized by **conditional use permit**, a nonconforming use may be expanded, enlarged, extended, reconstructed, intensified, or structurally altered.

KCC 15.08.100.C.2 (emphasis added).[78]

The local ordinance is crystal clear: expansion or intensification of a nonconforming use is not allowed unless it has first been authorized by the issuance of a conditional use permit.

3. An outdoor storage yard is not a permitted use in the NCC zone pursuant to KCC, Ch. 15.04

The Property was annexed into the City on January 1, 1996. Before annexation, the Property was zoned residential and commercial uses were not allowed. Upon annexation, the City zoned the Property NCC. The purpose of the NCC district is to "provide small nodal areas for

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established prior to the effective date of the ordinance codified in this chapter or subsequent amendments thereto, ... The degree of restriction made applicable to each separate category is **dependent upon the degree to which that category of nonconformance is a *nuisance* or *incompatible*** with the purpose and requirements of this title.

[78] CABR 409.

retail and personal service activities convenient to residential areas and to provide ready access to everyday convenience goods for the residents of such neighborhoods."[79] The NCC zone does not permit commercial outdoor storage lots outright; in order to use property located in an NCC zone for outdoor storage, one must first obtain a conditional use permit.[80]

4. The Bergs did not meet their burden of showing that use of the entire Property for outdoor storage existed before contrary (residential) zoning was enacted by King County

To establish a legal nonconforming use, the Bergs have the burden of proving that use of the entire Property as a commercial outdoor storage lot existed prior to King County first zoning the area as residential. *King County Dep't of Dev.*, 177 Wn.2d at 643. An applicant asserting a prior legal nonconforming use bears the initial burden to prove that (1) the use existed before contrary zoning was enacted; (2) the use was lawful at the time; and (3) the owner did not abandon or discontinue the use. *First Pioneer Trading v. Pierce County*, 146 Wn. App. 606, 614, 191 P.3d 928 (2008). The burden of proof does not shift to the City until after the applicant has met his burden of proving a valid pre-existing use. *Id.*

King County passed its first zoning regulations in 1937, when state legislation authorized local land use planning. No commercial uses were ever allowed in the zone where the Property is located. Even assuming zoning was not validly enacted by the County until 1958, it is undisputed that such zoning was "residential," and commercial uses were not allowed.

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[79] *KCC 15.03.010, CABR 618.*
[80] *KCC 15.04.020, CABR 623-624. Sharon Clamp, CP 61;* Matt Gilbert, CP 1129.

The Record is devoid of any evidence indicating that the entire Property was used for outdoor storage prior to King County first zoning it as residential.[81] Instead, the evidence undeniably shows that there were only two businesses operating on the Property when the first zoning resolution was enacted (in either 1937 or 1958). Those two businesses were a grocery store and an auto repair shop. Also, a discrete portion of the west side of the Property was used to store vehicles related to the auto repair business. But there is no evidence in the Record showing that the entire Property was used for commercial outdoor storage before 1958.[82]

Even viewing the evidence in the light most favorable to the Bergs (which the Court should not do; the appropriate standard is to view the evidence in the light most favorable to the party that prevailed at the fact-finding level, which is the City[83]), the only evidence they presented was that the former owner, David Spencer, may have intermittently stored vehicles on the Property, unrelated to the auto repair shop, starting in the mid-1970s. *(See discussion below.)* But even if true, the Property was zoned residential well before 1970, so such use would not have been lawful under the codes in effect *at that time*, and could not, upon annexation by the City, be considered a "legal" nonconforming use.

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[81] Berg did not submit any physical evidence to support use of the entire Property as an outdoor storage lot as a preexisting use (*i.e.,* a use fully in existence before 1958), such as historical photos, tax records, receipts, appraisals, *etc.*

[82] On the contrary, see photos from the 1950s and 1960s, submitted by the Bergs, showing the existence of only two businesses on the Property, the grocery store and auto shop, both of which are surrounded by tall trees. CP 171-179. A photo from 1939 shows only the grocery store (and a gas station that closed long ago). CP 185.

[83] *Schofield v. Spokane County,* 96 Wn. App. 581, 586-87, 980 P.2d 277 (1999).

Rhod-A-Zalea, 136 Wn.2d at 6; KCC 15.02.285. Not one scintilla of evidence was submitted that the entire Property was used for outdoor storage before being zoned residential in 1958. As set forth below, none of the Bergs' witnesses even testified to any use of the Property before the mid-1970s, much less 1958:

Jean Beanblossom – Ms. Beanblossom testified that when she owned the Property in 1972 there were only two businesses: the store and the auto repair. The most she offered was vague testimony that in 1972 she had some storage "there in the back," referring to behind some trees.[84] Mr. Spencer was the next purchaser in 1975. Ms. Beanblossom testified that it was not until "about 1990" that Mr. Spencer asked her for advice "on how to improve his storage yard."[85] And although he wanted to open a third business to store RVs and boats, it was her understanding that he was waiting for approval from the City and that as soon as he obtained such approval he would have her come run that business.[86] There is no evidence of the City ever approving this third business. And Ms. Beanblossom never came to the Property to run this "third" business.

Tom Glenn – Mr. Glenn testified that he did not have anything to do with the Property until after 2006.[87]

Roy Renecker – Mr. Reneker did not become familiar with the Property until the late 1980s or early 1990s.[88] The most he could say was

[84] *Jean Beanblossom*, CP 294.
[85] *Jean Beanblossom*, CP 296.
[86] *Jean Beanblossom*, CP 296-297.
[87] *Tom Glenn*, CP 1001.
[88] *Roy Renecker*, CP 250.

that the former owner, Mr. Spencer, sometimes parked vehicles all around the Property at that time.[89]

Loren Macaras – Mr. Macaras first became familiar with the Property in the 1970s.[90] He then worked there in the early 1990s for the former owner, David Spencer.[91] Mr. Macaras stated that in the 1990s, Mr. Spencer was using the Property for some outdoor storage, although there were many trees on the lot.[92]

Susan Spencer – Ms. Spencer is the widow of the former owner, David Spencer. The most she could state was that when they owned the Property together, from 1975 to 2006, they intended to use the entire Property as a storage yard.[93]

John Norris – Mr. Norris testified that he worked for the former owner, David Spencer, beginning in the mid-1970s.[94] He said Mr. Spencer sometimes parked vehicles all over the Property at that time.[95]

Lawrence Scheurer – Mr. Scheurer is an architect hired by the former owner, David Spencer, to design the new grocery store after the old one burned down in late 2001.[96] Mr. Scheurer testified that Mr. Spencer intended to use the entire Property for outdoor storage in the future.[97]

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[89] *Roy Renecker*, CP 251-253.
[90] *Loren Macaras*, CP 271.
[91] *Loren Macaras*, CP 271.
[92] *Loren Macaras*, CP 271-272.
[93] CABR 299.
[94] *John Norris*, CP 239.
[95] *John Norris*, CP 239-240.
[96] *Lawrence Scheurer*, CP 161-162.
[97] *Lawrence Scheurer*, CP 168.

Rick Jusenius – Mr. Jusenius is a real estate agent who represented the Bergs when they bought the Property in June 2006.[98] Mr. Jusenius said he spoke with a counter clerk at the City about the zoning and allowable uses of the Property. He said the counter clerk advised him that the outdoor storage adjacent to the auto repair was "grandfathered in."[99] Then, upon prompting, he changed his testimony to imply that outdoor storage was an allowed use on the entire Property.[100] Clearly, Mr. Jusenius did not define what storage area he was talking about with the counter clerk. Nor could a statement from a counter clerk bind the City,[101] especially where, as here, the Property was under continuous code enforcement proceedings on this very issue since 2002; a fact about which the counter clerk was apparently unaware.[102]

The Bergs' argument that a preexisting use can be established based upon the landowner's "intent" to use and/or "devote" property to a particular use in the future is not supported by law.[103] The key component of establishing a pre-existing use is that the use be lawfully established. *Rhod-A-Zalea*, 136 Wn.2d at 6. In order to be "lawfully established," the alleged pre-existing use must have been more than intermittent or occasional. *Meridian Minerals v. King Cy.*, 61 Wn. App. 195, 810 P.2d 31 (1991) *citing* 1 R. Anderson, Zoning § 6.32, at 550 (3d ed. 1986).

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[98] *Rick Jusenius*, CP 381.
[99] *Rick Jusenius*, CP 385.
[100] *Rick Jusenius,* CP 388-389.
[101] A city clerk does not have speaking authority for the municipal corporation. *See Wright by Wright v. Group Health,* 103 Wn.2d 192, 691 P.2d 564 (1984).
[102] *Rick Jusenius*, CP 386.
[103] Opening Brief, pp. 40-42.

Mere intention or contemplation of an eventual use of land is not sufficient to establish an existing use for protection as a nonconforming use. *Anderson v. Island Cy.*, 81 Wn.2d 312, 321-322, 501 P.2d 594 (1972).

> The use of property must actually be established prior to the adoption of the zoning ordinance to qualify as a nonconforming use thereafter. It is almost universally held that the mere purchase of property and occupation thereof are not sufficient factors, either severally or jointly, to establish an existing nonconforming use . . . "Before a supposed non-conforming use may be protected, it must exist somewhere outside the property owner's mind." Therefore, **mere intention or contemplation of an eventual use of land is insufficient to establish an existing use for protection as a nonconforming use** following passage of a zoning ordinance.

Anderson, 81 Wn.2d at 321-22 (emphasis added; citations omitted).

Based upon the testimony of their own witnesses, the Bergs failed to meet their burden to prove that use of the entire Property as an outdoor storage lot actually existed prior to the enactment of contrary zoning by King County in 1958. Nor did they submit any other evidence to establish the existence of outdoor storage on the entire Property before 1958, such as photos, business licenses, tax receipts, *etc.* The Record is completely devoid of such evidence.

At best, the Bergs submitted testimony that beginning in the mid-1970's, the former property owner had an intention or contemplation to eventually use the entire Property for outdoor storage, but such intention –

and intermittent use – does not rise to the level of use required to establish a nonconforming use. *Anderson,* 81 Wn.2d at 321-322; *Meridian Minerals,* 61 Wn. App. at 208.

Finally, even if the Bergs could prove that the entire Property was sometimes used for outdoor storage beginning in the 1970s and that this use was lawful at the time, it is uncontested the Property was never cleared of trees and/or other native plants and wholly used for outdoor storage as a commercial business before annexation by the City in 1996. Aerial photos of the site confirm this fact. The most the Bergs can establish, which the City does not challenge, is that a portion of the west side of the Property was lawfully used for the outdoor storage of vehicles related to the auto shop. Unfortunately, Bergs expansion of outdoor storage beyond this amount is an illegal expansion of a nonconforming use.

5. The Bergs' limited right to use a portion of the Property for outdoor storage related to the auto repair business has unlawfully expanded

A protected nonconforming status generally grants the right to continue the existing use but will not grant the right to significantly change, alter, extend, or enlarge the existing use. *Keller v. Bellingham*, 92 Wn.2d 726, 731-32, 600 P.2d 1276 (1979). Allowing the expansion of a nonconforming use is contrary to the policy of zoning legislation, which is to phase out nonconforming uses. *Anderson*, 81 Wn.2d at 323.

Here, the City agrees that a limited amount of outdoor storage for vehicles related to the auto repair business was lawfully in existence when the City annexed the Property, and is considered a legal nonconforming

use. The auto repair business began in the 1940s, before the Property was zoned, and City reasons that it would have required outdoor vehicle storage at that time. Thus, when residential zoning was first enacted in 1958, outdoor storage of vehicles attendant to the auto repair would have been lawful at that time.

Substantial evidence presented during the administrative hearings before the Hearing Examiner established that use of the Property for outdoor storage has unlawfully expanded. Title 15 of the Kent City Code explicitly prohibits the unilateral 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 except as follows: When authorized by **conditional use permit**, a nonconforming use may be expanded, enlarged, extended, reconstructed, intensified, or structurally altered.

KCC 15.08.100.C.2 (emphasis added). In Kent, expansion of a non-conforming use is not allowed unless it has first been authorized by the issuance of a CUP. Here, no CUP was issued to allow outdoor storage.

In analyzing whether a use has unlawfully expanded or intensified, the Kent City Code specifically defines "change of use" as follows:

> A change of use shall be determined to have occurred when it is found that the general character of the operation has been modified. This determination shall include review of . . . : (1) hours of operation, (2) materials processed or sold, (3) required parking, (4) traffic generation, (5) impact on public utilities, (6) clientele, and (7) general appearance and location.

KCC 15.02.533.

At a minimum, the Record clearly establishes a violation of subsections (2), (3), (4), (6) and (7) of KCC 15.02.533, which is more than is needed to sustain the City's NOV. When the Property was annexed in 1996, it is undisputed that there was a grocery store and an auto repair shop operating on the Property. But these were the only two businesses on the Property according to the then-owner, David Spencer. The auto repair shop had some vehicle storage associated with it. The City has determined that approximately 34,270 square feet of the Property was devoted to the auto shop and outdoor storage related to the auto shop. These businesses were located on the west side of the Property. The east side was primarily trees and wooded area.

Undisputed evidence shows that the Property remained substantially the same until about 2002 when David Spencer began to clear it to use as outdoor storage. It was not until about 2005 that Spencer started taking concrete steps to run a separate and distinct third business on the Property known as "Shady Park RV and Boat Storage," which is when he applied to the State of Washington for a tax number for this alleged business. The majority of trees and vegetation were removed at that time.[104] The Bergs bought the Property in 2006. The Record

[104] CABR 25-26; 141-166; *Loren Macaras*, CP 275-276.

indicates that from 2009 to 2012, the Bergs continued to increase use of the Property for outdoor storage, in the face of Correction Notices and Notices of Violation from the City. This increase in use resulted in increased vehicles and debris on the Property;[105] increased parking on the Property;[106] increased traffic around the site;[107] increased clientele;[108] and changes in the landscaping of the Property to expand the available square footage for use as this new commercial businesses.[109] This increase in outdoor storage was deliberate, willful, and in violation of the City's nonconforming use code. At this time, the City respectfully asks this Court to affirm the decisions of the Hearing Examiner and the superior court, which found the Bergs in violation of the City's zoning codes due to unlawful expansion of a nonconforming use.

F. The Bergs have not stated a constitutional claim

The Bergs claim the City's decision not to allow outdoor storage on the Property in excess of the level of use in 1996 violates their vested rights and right to due process under the state and federal constitutions. *Opening Brief,* pp. 47-48. But all of the vested rights cases cited by the Bergs are based upon development permit approvals, which have nothing

[105] A violation of subsection (2) of KCC 15.02.533.
[106] A violation of subsection (3) of KCC 15.02.533.
[107] A violation of subsection (4) of KCC 15.02.533.
[108] A violation of subsection (6) of KCC 15.02.533.
[109] A violation of subsection (7) of KCC 15.02.533.

to do with nonconforming uses. Nonconforming use is its own body of law, subject to much different standards than vested development rights.

As noted previously, a property owner asserting nonconforming use bears the initial burden to prove that (1) the use existed before contrary zoning was enacted; (2) the use was lawful at the time; and (3) the owner did not abandon or discontinue the use. *First Pioneer Trading v. Pierce County*, 146 Wn. App. 606, 614, 191 P.3d 928 (2008). **A use must lawfully and legally exist before it can be deemed a preexisting use and before a due process right attaches to the landowner.** *King Cy Dep't of Dev. v. King Cy*, 177 Wn.2d 636, 643, 305 P.3d 490 (2013). Where, as here, the property owner cannot show the nonconforming use was ever legally established, then the landowner's right to the nonconforming use never "vested" and does not implicate any due process concerns. *McMilian v. King Cy,* 161 Wn. App. 581, 596, 255 P.3d 739, 747 (2011).

G. The Bergs' CR 60(b) motion was properly denied

The superior court properly denied the Bergs' CR 60(b) motion to set aside its LUPA Order, allegedly based on "newly discovered evidence" that the Bergs claimed was "highly material to the issues in this LUPA appeal."[110] Such evidence was alleged to be testimony by the City's

[110] CP 702.

former code enforcement officer, Brian Swanberg. The Bergs claimed this testimony was newly discovered because the City had allegedly "concealed" Mr. Swanberg's whereabouts.[111] First, the Bergs did not submit any new evidence with his motion material to the issues in this appeal. Furthermore, they did not submit evidence that the City "concealed" a witness. Instead, the Bergs' failure to exercise their sole responsibility to secure the appearance of a witness they wished to call constituted inexcusable neglect under CR 60(b).

Whether or not to grant a motion to vacate a judgment filed pursuant to CR 60(b) is up to the discretion of the trial judge. The decision to vacate a judgment under CR 60(b) will not be overturned on appeal unless it plainly appears that the trial court has abused its discretion. *In re Adamec,* 100 Wn.2d 166, 173, 667 P.2d 1085 (1983). Discretion is abused where it is exercised on untenable grounds or for untenable reasons. *In re Schuoler,* 106 Wn.2d 500, 512, 723 P.2d 1103 (1986). Here, the trial judge's valid and well-articulated reasons for denying the Bergs' CR 60(b) motion are set forth in her oral decision[112] and should not be overturned on appeal.

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[111] CP 702.
[112] VRP 08/28/2015, pp. 37-45.

Mr. Swanberg's declarations[113] demonstrate that he has no new information to add to the Record. He does not testify to the key fact that the Bergs are looking for, *i.e.*, he never once identifies the name or position of a City employee who supposedly made a formal determination, at any time, that the entire Property could be used for outdoor storage as a legal nonconforming use. Mr. Swanberg did not have authority to make this determination.[114] At most, Mr. Swanberg merely speculates that such a determination must have been made by "someone" at the City at "some" time.[115] Mr. Swanberg's declarations, even if accepted by this Court, do not contain any information or evidence that disputes actual physical evidence in the Record to the contrary.

Nor is there evidence that the City tried to conceal Mr. Swanberg's whereabouts from the Bergs. The most the Bergs submitted in support of this claim was an email from the Chief Prosecutor for the City Attorney:

> Mr. Swanberg no longer works for the City, I do not know where he lives and I have no intention of presenting him as a witness. I did not call him in my case in chief and I will not be calling him in rebuttal. **As you appear to know where he lives**, perhaps you could have a subpoena sent to him via a process server. (Emphasis added.)[116]

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[113] CP 765-788 and 897-901.
[114] CP 825.
[115] CP 768, 899-901.
[116] CP 728-729.

There is nothing about this email that can be construed as "concealment." In fact, it is clear the Chief Prosecutor believes the Bergs know where Mr. Swanberg lives, so any implication that she is trying to conceal his whereabouts is completely unfounded.

The Bergs claim that because they did not have an attorney, they did not know how to subpoena Mr. Swanberg.[117] Basically, this is an "ignorance of the law" defense. Ignorance of the law has never been an adequate defense. *Kingery v. Dep't of Labor & Indus.*, 132 Wn.2d 162, 175, 937 P.2d 565 (1997); *Harman v. Dep't of Labor Industries*, 111 Wn. App. 920, 47 P.3d 169 (2002). Furthermore, whether or not the Bergs knew how to subpoena a witness for a land use hearing is irrelevant, because he took no reasonable steps to locate Mr. Swanberg during the administrative hearing process. The City did not "conceal" Mr. Swanberg, the Bergs just never looked for him beyond asking the City to produce him. Their accusations otherwise are belied by the fact that they easily located Mr. Swanberg after the hearings, as evidenced by the declarations he signed for the Bergs' CR 60(b) motion. Based on these circumstances, the superior court did not err in denying the Bergs' CR 60(b) motion.

[117] CP 721.

H. The City is entitled to an award of reasonable attorney's fees and costs pursuant to RCW 4.84.370 and RAP 14.2

As the prevailing party on the merits at the local jurisdiction's level and the superior court level, the City requests an award of reasonable attorney's fees and costs pursuant to RCW 4.84.370 in the event it is also the prevailing party here in the Court of Appeals. The City also requests fees and costs as the prevailing party on appeal pursuant to RAP 14.2.

IV. CONCLUSION

The key issue in this appeal is whether there is substantial evidence in the Record as a whole to support the Decision of the Hearing Examiner, which held that the Bergs unlawfully expanded use of their Property for outdoor storage. Even if the Bergs could show that the entire Property was devoted to use as an outdoor storage lot when it was annexed by the City in January 1996 (a claim that is unsupported by overwhelming physical evidence in the Record, *see, for example*, an aerial photo from 1996, CP 15), they miss the mark completely by focusing on activity that was occurring on the Property at that time. The correct standard for proving the establishment of a legal nonconforming use is whether such use was lawfully established prior the enactment of the contrary zoning. Nothing in the Record supports the Bergs' argument that the entire Property was used for commercial outdoor storage, completely separate

and apart from a small amount of outdoor storage related to the auto repair business, before King County zoned the Property residential in 1958. Thus, outdoor storage could not possibly have been lawfully established prior to the City's annexation. The City's generosity in agreeing to allow the Bergs to conduct outdoor storage operations on the Property at the same level that existed in 1996 should not be mistaken for a legal requirement to do so.

The Decision of the Hearing Examiner was fully supported by substantial evidence in the Record. The superior court had no trouble reviewing the Record below in upholding the Hearing Examiner's Decision, and did not err in affirming that decision. The City respectfully requests that the decisions of both the Hearing Examiner and the superior court be affirmed on appeal, and that the City be awarded its reasonable attorney's fees and costs pursuant to RCW 4.84.370 and RAP 14.2.

Respectfully submitted this 6th day of May, 2016.

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DECLARATION OF SERVICE

I declare under penalty of perjury of the laws of the State of Washington that on May 6, 2016, a true and correct copy of the foregoing document, **RESPONSE BRIEF BY THE CITY OF KENT,** was filed and served upon the parties listed below via the method indicated:

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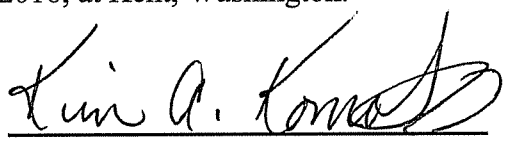
Via email service as agreed by the parties.

DATED this 6th day of May, 2016, at Kent, Washington.



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