

No. 75710-5-I

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**In The  
Court of Appeals of the State of Washington  
Division One**

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ROGER W. KNIGHT,  
*Appellant,*

v.

CITY OF KENMORE,  
*Respondent.*

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**On Appeal from the Superior Court of Washington  
County of King**

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**BRIEF OF APPELLANT**

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 STATE OF WASHINGTON  
 COURT OF APPEALS  
 DIVISION ONE  


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## **I. INTRODUCTION**

This is an appeal of a denial of an application for a writ of prohibition against the City of Kenmore. The City posted a correction notice, CP 16-22, a revised correction notice, CP 23-29, and a notice of violation, CP 30-35 on the property upon which the appellant's 1966 Pontiac Lemans was parked. Each correction notice alleged two "junk vehicles" on the property without describing them or identifying them. The Notice of Violation, page 2, CP 31, describes the "brown car in the lower parking area of the lot" as one of the "junk vehicles."

These documents do not identify the last registered owner of either of these vehicles. The Notice of Violation, page 5, CP 34, assessed \$78,000 in fines for these two "junk vehicles" and total fines of \$1,436,350 including a 15% administrative fee. Owen Benson, Paul King, and David Thompson were named as responsible for these violations. CP 30. Roger W. Knight was not named in this notice of violation.

Only Owen Benson was able to appeal this notice of violation to the City of Kenmore's Hearing Examiner. The other two attempted to appeal and clearly indicated their intent to appeal. CP 37.

BRIEF OF APPELLANT

1

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The City's Exhibits for the Hearing Examiner in Benson's appeal included a photograph taken on or about December 1, 2015 of the 1966 Pontiac Lemans bearing the Washington license plate 550 KUL. CP 48. Mr. Knight is the registered owner of this vehicle, CP 49. Mr. Knight was never provided any notice or opportunity to be heard with regard to the status of his car as a junk vehicle, as to any abatement of said vehicle or any fines or abatement orders imposed upon Mr. Benson because he allowed Mr. Knight to park his vehicle on Mr. Benson's property.

Mr. Benson's appeal resulted in the Hearing Examiner's Findings, Conclusions, and Order (FC&O), CP 36-47. Its page 5, CP 40, identifies the "junk vehicles" including the 1966 Pontiac Lemans. The City presented no evidence of contact with the Department of Licensing to ascertain the registered owner of the Pontiac bearing the license plate 550 KUL. Page 9 of the FC&O, CP 44, assessed \$72,000 in fines for the two junk vehicles. Page 10, CP 45, assessed \$198,000 in total fines and added a 15% administrative fee of \$29,700. Page 11, CP 46, ordered that the total fine and administrative fee of \$227,700 be paid within 30 days. Instead, Mr. Benson appealed to the superior court, *Benson v. City of*

*Kenmore*, King Co. Superior Court No. 16-2-08077-4 SEA.

The fine imposed upon Mr. Benson for allowing Mr. Knight to park his car can be determined to be \$36,000 plus 15% administrative fee, for a total of \$41,400. This alone is a serious interference in Mr. Knight's personal and business relationship with Mr. Benson and the other persons who can claim an ownership interest in the real property. Also on page 11 of the FC&O, CP 46, is this order:

B. Remove any junk vehicles from the property, or store them in accordance with KMC 8.25.020(B)(1)

This is an abatement order, imposed without any notice given to the registered owner of the 1966 Pontiac Lemans bearing license plate 550 KUL as required by RCW 46.55.240(3)(a).

On page 12 of the FC&O, CP 47, is this:

4. Abatement of the violations by the City is authorized, at the expense of Mr. Owen Benson who is the person responsible for the violation(s). *KMC 1.20.160.A.4.*

Out of concern that he might find his Pontiac gone after purchasing new parts for it, Mr. Knight brought the action below.

## **II. ASSIGNMENTS OF ERROR**

A. Superior court erred in denying motion for an order to show cause

BRIEF OF APPELLANT

3

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why a writ of prohibition should not be granted.

**B.** Superior court erred in denying the motion for reconsideration.

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

#### **For Assignment of Error A:**

1) Mr. Knight is the registered owner of the 1966 Pontiac Lemans bearing the license plate 550 KUL, CP 48-49. Because Mr. Benson was ordered to remove or to house the Pontiac in an enclosed building, CP 46, and fined for allowing the Pontiac to be on his property, CP 44, there is a clear interference with Mr. Knight's business and personal relationships with Mr. Benson. There is no difference between the City abating the Pontiac and ordering Mr. Benson to abate the Pontiac. Therefore the superior court erred in her oral ruling that Mr. Knight lacked standing to bring his action for a writ of prohibition. RP 20-21.

2) The suggestion that Mr. Knight interplead in a lawsuit brought to enforce the Hearing Examiner judgment against Mr. Benson, *City of Kenmore v. Benson and 3S Management Services*, King County Superior Court No. 16-2-08161-4 SEA, Sub No. 15 pages 1-3, CP 161-163, RP 16, 21 lines 1-4, is not a plain, speedy and adequate remedy in the ordinary

course of the law. Nor is intervention in Mr. Benson's direct appeal of the FC&O, CP 36-47, RP 16. Nor any hypothetical lawsuit Mr. Knight could bring against either Mr. Benson or the City of Kenmore.

3) The City of Kenmore and its Hearing Examiner system clearly did not establish in personam jurisdiction over the appellant, Roger W. Knight, as the owner of the 1966 Pontiac Lemans.

4) Because it is not a complete system for hearing and reviewing alleged infractions, for imposing fines and abatement orders pursuant to such findings of infractions, and for the lack of numerous procedural protections available in the courts of limited jurisdiction, the City of Kenmore's Hearing Examiner system, spelled out in Chapter 1.20 Kenmore Municipal Code (KMC) as it existed at all relevant times, is not the City's own system for hearing infractions within RCW 7.80.010(5). Therefore, this Hearing Examiner system lacks subject matter jurisdiction over infractions.

**For Assignment of Error B:**

Because it is not a complete system for reviewing and imposing orders for the abatement of automobiles parked on privately owned

property, lacking any requirement to ascertain the last known registered owner of such automobile and to provide him with notice and opportunity to be heard as to such abatement, within Chapters 1.20 and 8.25 KMC as required by RCW 46.55.240(3), the City of Kenmore and its Hearing Examiner system lacks subject matter jurisdiction over the abatement of vehicles alleged to be junk while parked on private property.

#### **IV. STATEMENT OF THE CASE**

On or about November 4, 2015, the City of Kenmore posted a Correction Notice, CP 16-22, upon the house at 16424 72nd Avenue North East, Kenmore Washington 98028 and named Paul King and Owen Benson as persons responsible for the alleged violations. Its page 3, CP 18, alleged the presence of two junk vehicles on the property but did not otherwise describe or identify them.

On or about December 16, 2015, the City of Kenmore posted a Revised Correction Notice, CP 23-29, upon the house at 16424 72nd Avenue North East, Kenmore Washington 98028 and named Paul King and Owen Benson as persons responsible for the alleged violations. Its page 3, CP 25, alleged the presence of two junk vehicles on the property

but did not otherwise describe or identify them.

On or about February 4, 2016, the City of Kenmore posted a Notice of Violation, CP 30-35, upon the house at 16424 72nd Avenue North East, Kenmore Washington 98028 and named Paul King, Owen Benson, and David Thompson as persons responsible for the alleged violations. Its page 2, CP 31, alleged the presence of two junk vehicles on the property, identifying one of them as “the brown car in the lower parking area of the lot.” Its page 5, CP 34, assessed \$78,000 in fines for the two vehicles.

On March 4, 2016, the Hearing Examiner for the City of Kenmore held a hearing on the appeal of this Notice of Violation by Owen Benson. Declaration of Roger W. Knight Authenticating Transcript of Hearing (Benson Transcript), Sub No. 8, CP 97-151. During this hearing, one of the alleged junk vehicles was positively identified as a 1966 Pontiac Lemans. FC&O page 5, CP 40 and Benson Transcript page 35, CP 133. The City presented 49 photographs taken on December 1, 2015 for this hearing, CP 36, one of which is of the 1966 Pontiac Lemans bearing the Washington license plate with the number 550 KUL, CP 48. Benson Transcript page 44, CP 144.

On March 17, 2016, the Findings, Conclusions, and Order (FC&O), was entered by the Hearing Examiner, CP 36-47. Page 9, CP 44, found that the City proved that there were two junk vehicles on the property and assessed a fine of \$72,000 for this infraction. Page 11, CP 46, finds that Mr. Benson must pay the fines assessed and to remove any junk vehicles from the property, or store them in an enclosed building. Page 12, CP 47, authorizes the City to abate the violations.

On May 27, 2016, the appellant, Roger W. Knight, filed his Application for Statutory Writ of Prohibition, Sub No. 1, CP 1-8, and Declaration of Roger W. Knight in Support of Application for Statutory Writ of Prohibition, Sub No. 3, CP 9-53.

On June 28, 2016, Mr. Knight brought his Motion for Order to Show Cause Why Statutory Writ of Prohibition Should Not Be Granted, Sub No. 6, CP 54-96.

On August 5, 2016, the superior court entered the Order Denying Plaintiff's Request for a Show Cause Hearing, Sub No. 42A, CP 180-181. The superior court stated her reasons in her oral ruling, RP 19-21.

On August 8, 2016, Mr. Knight filed his Motion for

Reconsideration Civil Rule 59, Sub No. 43, CP 182-190.

On August 18, 2016, the superior court entered its Order Denying Motion for Reconsideration, Sub No. 48, CP 191-192.

On August 19, 2006, Mr. Knight filed the Notice of Appeal to the Court of Appeals, Division One, Sub No. 51, CP 193-195.

**V. ARGUMENT**

**A. Mr. Knight's Standing**

The Hearing Examiner made no findings as to the identity of the owner of the 1966 Pontiac Lemans, but he ordered Mr. Owen Benson to:

B. Remove any junk vehicles from the property, or store them in accordance with KMC 8.25.020(B)(1);

FC&O page 11, CP 46. This is a direct interference with Mr. Knight's personal and business relationship with Mr. Benson and others who have an interest in the property upon which Mr. Knight's vehicle sits.

During the hearing on August 5, 2016, the superior court inquired that if Mr. Knight is concerned about the City taking his vehicle, couldn't he simply remove the vehicle and take it somewhere else? RP 4 lines 16-21. He could, RP 4 lines 23-24 and the superior court agreed, RP 20 lines 11-12. But if he is obliged to remove the vehicle before completing

repairs as necessary to make the vehicle safe and lawful to drive, he would have to hire a tow truck to move it somewhere else and he would have to obtain a new location to place the vehicle so as to continue the repairs. This would entail expenses and inconvenience directly attributable to this interference in his business and personal relationships with Mr. Benson by the City of Kenmore. In spite of this, the superior court found that Mr. Knight lacked standing to challenge the FC&O, RP 20.

*Cherberg v. People's National Bank*, (1977) 88 Wn. 2d 595, 602, 564 P. 2d 1137 found:

The elements of the tort of interference with business relationships are: (1) the existence of a valid contractual relationship or business expectancy; (2) knowledge of the relationship or expectancy on the part of the interferor; (3) intentional interference inducing or causing a breach or termination thereof; (4) resultant damage. *Calbom v. Knudzton*, 65 Wn.2d 157, 396 P.2d 148 (1964). The existence of a valid enforceable contract is not necessary to the maintenance of the action and the possibility of a remedy in contract does not preclude it. *F.D. Hill & Co. v. Wallerich*, 67 Wn.2d 409, 407 P.2d 956 (1965)

*Calbom v. Knudzton*, (1964) 65 Wn. 2d 157, 161-162, 396 P. 2d 148 found:

Intentional and unjustified third-party interference with valid contractual relations or business expectancies constitutes a tort, with its taproot embedded in early decisions of the courts of England, . . . (citations of English decisions omitted).

From and with the English decisions, the tort has become engraved upon American law, generally unsullied in principle, although with some case by case distinctions. See, Carpenter, *Interference with Contract Relations*, 41 Harv. L. Rev. 728; Prosser on Torts (3d ed.) § 123, p. 950; 30 Am. Jur., *Interference* § 61, p. 95; 84 A.L.R. 43; 9 A.L.R. (2d) 228; 26 A.L.R. (2d) 1227.

We have recognized the tort in its various forms. *Jones v. Leslie*, 61 Wash. 107, 112 Pac. 81 (1910); *Seidell v. Taylor*, 86 Wash. 645, 151 Pac. 41 (1915); *Pacific Typesetting Co. v. International Typographical Union*, 125 Wash. 273, 216 Pac. 358, 32 A.L.R. 767 (1923); *Sears v. International Brotherhood of Teamsters, Chauffeurs, Stablemen & Helpers of America, Local No. 524*, 8 Wn. (2d) 447, 112 P. (2d) 850 (1941); *Hein v. Chrysler Corp.*, 45 Wn. (2d) 586, 277 P. (2d) 708 (1954); *Titus v. Tacoma Smeltermen's Union Local No. 25, International Union of Mine, Mill & Smelter Workers*, 62 Wn. (2d) 461, 383 P. (2d) 504 (1963).

The fundamental premise of the tort - that a person has a right to pursue his valid contractual and business expectancies unmolested by the wrongful and officious intermeddling of a third party - has been crystallized and defined in Restatement, Torts § 766, as follows:

“Except as stated in Section 698 [betrothal promises], one who, without a privilege to do so, induces or otherwise purposely causes a third person not to

"(a) perform a contract with another, or

"(b) enter into or continue a business relation with another is liable to the other for the harm caused thereby.”

Clause (a) relates to those cases in which the purposeful interference of a third party induces or causes a breach of an existing and valid contract relationship. Clause (b) embraces two types of situations. One is that in which the interferor purposely induces or causes a party not to enter into a business relationship with another. The second is where a business relationship, terminable at the will of the parties thereto, exists, and the intermeddler purposely induces or causes a termination of such relationship. The distinction between the situations propounded by clauses (a) and (b) lies not so much in the nature of the wrong, as

in the existence or nonexistence, and availability as a defense, of privilege or justification for the interference. Restatement, Torts § 766, Comment c.

Imposing fines totaling \$41,400 upon Mr. Benson for allowing Mr. Knight to park his Pontiac on his property certainly interferes with their business and personal relationships with each other. The FC&O requiring Mr. Benson to remove junk vehicles, CP 46, and that Mr. Knight's car was found to be a junk vehicle, CP 40, most certainly imposes an injury and a potential injury upon Mr. Knight. There is no difference between the City abating Mr. Knight's vehicle and the City ordering Mr. Benson to abate Mr. Knight's vehicle.

Therefore Mr. Knight has the requisite standing to challenge the jurisdiction of the City of Kenmore and its Hearing Examiner to impose these conditions upon Mr. Benson concerning his 1966 Pontiac Lemans.

**B. Plain, Speedy, and Adequate Remedies Are Not Available**

As Mr. Knight was not a party in Mr. Benson's appeal of the Notice of Violation, CP 30-35, to the City of Kenmore's Hearing Examiner, he certainly cannot appeal the resulting FC&O, CP 36-47. The superior court suggested intervening in Mr. Benson's direct appeal of the

FC&O, *Benson v. City of Kenmore*, King County Superior Court No. 16-2-08077-4 SEA. RP 7 lines 15-23. Mr. Knight is not a party to *City of Kenmore v. Benson and 3S Management Services*, King County Superior Court No. 16-2-08161-4 SEA. Any intervention in that case, as also suggested by the superior court, RP 16, 21 lines 1-4, would be a collateral attack against the FC&O. *In re Fourth Avenue South, Seattle*, (1943) 18 Wn. 2d 167, 169, 138 P. 2d 667 found:

An attack upon a judgment in defense of an action to enforce it is a typical example of collateral attack.

cited by *Williams v. Steamship Mutual Underwriting Ass'n*, (1954) 45 Wn. 2d 209, 213, 273 P. 2d 803.

*Batey v. Batey*, (1950) 35 Wn. 2d 791, 798-801, 215 P. 2d 694 considered collateral attacks on judgments based on fraud. *Estate of Finch*, (2012) 172 Wn. App. 156, 165, 294 P. 3d 1 found:

A stranger to the original proceeding has the right to collaterally impeach a judgment that was procured through the fraud of either or both of the parties for the purpose of defrauding that stranger. *Peyton v. Peyton*, 28 Wash. 278, 299, 68 P. 757 (1902) (quoting 1 A.C. FREEMAN, A TREATISE ON THE LAW OF JUDGMENTS § 334 (4th ed. 1892)).

This is an entirely different matter than the issue of jurisdiction which can

be reached in a writ of prohibition case. Because the enforcement of judgment action is not a case wherein the superior court can ordinarily relitigate such judgment, an intervention by Mr. Knight is not a plain, speedy and adequate remedy in the ordinary course of the law.<sup>1</sup>

No hypothetical civil action for tort or injunction against the City of Kenmore,<sup>2</sup> Owen Benson, or any other party is a plain, speedy and adequate remedy in the ordinary course of the law.

*Barnes v. Thomas*, (1981) 96 Wn. 2d 316, 318-319, 635 P. 2d 135, found that prohibition is available only when there is inherent, entire lack of jurisdiction. Total and inarguable absence of jurisdiction cannot be adequately remedied by appeal citing *State ex rel. Maurer v. Superior Court*, (1922) 122 Wash. 555, 211 P. 764 and *State ex rel. Waterman v. Superior Court*, (1923) 127 Wash. 37, 220 P. 5. *Waterman* at 127 Wash. 40 found:

Some contention is made that relator has an adequate remedy by appeal, or should have sought relief by writ of review. Since the superior court was without jurisdiction to proceed, there seems no good reason why relator should be put to the expense, trouble and delay of defending against the petition in the superior court and

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<sup>1</sup> As argued in Reply to Answer and Response to Plaintiff's Request for an Order Show Cause, Sub No. 15, pages 1-3, CP 161-163.

<sup>2</sup> Suggested by the superior court, RP 6 lines 23-24.

appealing from a final judgment; nor would a writ of review be any more adequate to raise the question of jurisdiction than the means employed. The office of a writ of prohibition is to prohibit an inferior tribunal from proceeding in excess of its jurisdiction, which it was here attempting to do, and therefore the permanent writ will issue.

*State ex rel. Mower v. Superior Court*, (1953) 43 Wn. 2d 123, 125-

126, 260 P. 2d 355 found:

Assuming that relators have a right of appeal in this case (see *State ex rel. Northwestern Electric Co. v. Superior Court*, 27 Wn.2d 694, 179 P.2d 510), we are of the opinion that it is not a plain, speedy, and adequate remedy. In the event that relators' contention is correct, to compel them to involuntarily lose title to, and possession of, their homes to an entity that had no legal authority to pre-empt them and then to restrict their right of redress for the restoration of their homes to an appeal, would impose an undue hardship. It is to the advantage of all parties to have this court, prior to a lengthy trial, determine the vital question of the power of the metropolitan park district to condemn private property, thus avoiding undue hardship, delay, and expense.

and also quoted *Waterman*.

*State ex rel Peterson v. Superior Court*, (1912) 67 Wash. 370, 373,

121 P. 836 found:

In this case, it is apparent that the trial court made the order complained of without authority of law, that the order is not an appealable order, and that the court will adjudge the relator in contempt of court unless this writ is issued. The relator may, no doubt, appeal from a judgment of contempt; but before he may do so he must be fined and possibly taken from one county to another and imprisoned, in direct violation of the statute. Rem. & Bal.

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Code, SS 1215. We are of the opinion, therefore, that such remedy is not adequate.

The writ is therefore granted.

If an appeal is not a plain, speedy and adequate remedy at law, then neither is intervening in an appeal nor is interpleading in a case wherein the plaintiff is not a party and has not been served, or any hypothetical lawsuit for any tort or equitable relief.

C. **The City of Kenmore and its Hearing Examiner System Never Acquired In Personam Jurisdiction Over Mr. Knight as the Registered Owner of the 1966 Pontiac Bearing License Plate 550 KUL**

Mr. Knight was not named in the Correction Notice, CP 16-22, the Revised Correction Notice, CP 23-29, and the Notice of Violation, CP 30-35. The FC&O that resulted from Mr. Benson's appeal to the Hearing Examiner, CP 36-37, of the Notice of Violation identifies the 1966 Pontiac Lemans as a junk vehicle, CP 40, but does not cite any evidence that any effort was made to identify the registered owner of the vehicle. A photograph of the vehicle, CP 48, was presented to the Hearing Examiner by the City of Kenmore, Benson Transcript page 46, CP 144, clearly shows that it is a Pontiac Lemans bearing the Washington license plate 550 KUL. Mr. Knight is the registered owner of this vehicle, CP 49.

*Post v. City of Tacoma*, (2009) 167 Wn. 2d 300, 313, 217 P. 3d

1179 found:

Though the procedures may vary according to the interest at stake, the fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner. *Mathews v. Eldridge*, 424 U.S. 319, 333, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976). To determine whether existing procedures are adequate to protect the interest at stake, a court must consider the following three factors:

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

*Id.* at 335; *Tellevik v. 31641 W. Rutherford St.*, 120 Wn.2d 68, 78, 838 P.2d 111 (1992) (adopting and applying the *Mathews* test).

Mr. Knight has a substantial private interest that will be affected by any abatement by the City of Kenmore or by the owner of the property as ordered by the City. *Post* found at 167 Wn. 2d 313-4:

Although Post was provided an opportunity to be heard on the initial findings, he had no similar opportunity to bring potential errors to Tacoma's attention with regard to any subsequent findings or penalties. In other words, the addition of *any* procedural safeguards would provide exceedingly greater mitigation against the risk of erroneous deprivation, rather than no safeguards at all.

Mr. Knight was not provided any opportunity to be heard. Any procedural

safeguard would have provided him with an opportunity to show that the engine runs, new license tabs purchased, new tires and parts purchased and repairs being made. While Kenmore has an interest in abating junk vehicles, there is no reason that this interest would be unduly burdened by a requirement to determine the registered owner of such vehicle, to contact the owner, and to grant the owner notice and opportunity to be heard.

RCW 46.12.635(6) allows the City of Kenmore, as a governmental entity, to request the name and address of the owner of any vehicle by its license plate, including the plate 550 KUL. *State v. McKinney*, (2002) 148 Wn. 2d 20, 23-32, 60 P. 3d 46 found that access to license plate records by a governmental entity does not disturb a person in his privacy of affairs in violation of Article I Section 7 of the Washington Constitution.

RCW 46.55.240(3)(a) reads:

(3) Ordinances pertaining to public nuisances shall contain:

(a) A provision requiring notice to the last registered owner of record and the property owner of record that a hearing may be requested and that if no hearing is requested, the vehicle will be removed;

During the hearing on August 5, 2016, counsel for the City of Kenmore admitted that this was not done. RP 13-14, 17.

*State ex rel. Western Canadian Greyhound Lines v. Superior Court*, (1946) 26 Wn. 2d 740, 749, 175 P. 2d 640 granted a writ of prohibition where the superior court was proceeding without first having acquired jurisdiction and that in such circumstances a direct appeal is not a speedy and adequate remedy, citing *State ex rel. Wood v. Superior Court*, (1913) 76 Wash. 27, 135 P. 494. And *Wood*, at 76 Wash. 30.

**D. The City of Kenmore and its Hearing Examiner System Lacks Subject Matter Jurisdiction Over Infractions, and Over Fines and Abatement Orders Resulting From Infraction Findings, As It Is Not a Complete System for Hearing Such Within RCW 7.80.010(5)**

**1. Introduction**

The City of Kenmore has almost the same system as was declared unconstitutional in *Post v. City of Tacoma*, (2009) 167 Wn. 2d 300, 308, 310-312, 217 P. 3d 1179 and which found that the Land Use Petition Act (LUPA), chapter 36.70C, does not apply to such city's determination of violations and assessments of penalties:

Because LUPA does not authorize petitions on the subject of ordinances that must be enforced "in a court of limited jurisdiction," former RCW 36.70C.020(1)(c), we must determine whether the MBSC is such an ordinance. We hold that it is. The MBSC provides for the issuance of notice of violation letters and the assessment and collection of civil penalties. These actions are elements of what chapter 7.80 RCW calls "a system of civil

infractions.” In fact the MBSC explicitly refers to violations as infractions. And the notice letters Tacoma sends to property owners designate violations of the ordinance as civil infractions. Thus in both name and substance, violations of Tacoma’s MBSC are civil infractions.

The authority of local jurisdictions to issue civil infraction notices and impose and enforce related penalties is governed by chapter 7.80 RCW. This statute provides local jurisdictions two options for issuing and enforcing civil infractions. Under the default/judicial track, the entire civil infraction system is administered and supervised by the courts, i.e., courts of limited jurisdiction. RCW 7.80.010(1)-(4), .050(5) (“A notice of infraction shall be filed with a court having jurisdiction . . .”). The statute does provide that a local jurisdiction may enforce civil infractions “pursuant to its own system established by ordinance.” RCW 7.80.010(5). But, to the extent cities do not establish a system for hearing and determining infractions, the judicial track is by default the system authorized by law.

RCW 36.70C.020(2)(c) now contains this language:

The enforcement by a local jurisdiction of ordinances regulating the improvement, development, modification, maintenance, or use of real property. However, when a local jurisdiction is required by law to enforce the ordinances in a court of limited jurisdiction, a petition may not be brought under this chapter.

A civil infraction in an appeal heard by a hearing examiner and reviewed LUPA, chapter 36.70C RCW, with no right of review of further penalties as was the system then used by Tacoma was declared unconstitutional.

A civil infraction is ordinarily filed in and heard by the courts of limited jurisdiction, RCW 7.80.010(1)-(4). In the City of Kenmore, a civil

infraction arising out of Kenmore Municipal Code (KMC) violations other than traffic infractions are assessed through notices of violations that are then appealed to its Hearing Examiner, as provided by Chapter 1.20 KMC. The adjustment that Kenmore appears to have made to *Post* was to provide that where infractions alleged and fines assessed in a notice of violation are affirmed by the Hearing Examiner, or where no appeal was made to the notice of violation, then if the code violations identified therein continue, a new notice of violation can be issued which can then be appealed to the Hearing Examiner. This does not mean that there aren't other lacks of procedural protections that can render Kenmore's system to not be a valid RCW 7.80.010(5) system. In such circumstance, Kenmore's Hearing Examiner lacks jurisdiction to hear any notice of violation alleging infractions, which then must be filed in a court of limited jurisdiction. Per RCW 36.70C.020(2)(c), LUPA does not apply to such notices of violations alleging infractions.

The Notice of Violation, CP 30-35, claimed total fines of \$1,436,350.00 and declared these penalties to be immediately due. The Hearing Examiner reviewed these allegations and determined that the

Appellant must be assessed a monetary penalty of \$198,000 with an additional 15 percent administrative fee of \$29,700, as required by KMC 1.20.200.A, KMC 1.20.030, and KMC 1.20.160.A.2.

FC&O page 10, CP 45. On this same page and the next page, CP 46, the

Hearing Examiner found:

The authority of local jurisdictions to issue civil infraction notices and impose and enforce related penalties is governed by Chapter 7.80 Revised Code of Washington (RCW). RCW 7.80.010(5) states that a local jurisdiction may enforce civil infractions “pursuant to its own system established by ordinance.” In Kenmore, that system is implemented by Chapter 1.20 KMC. Under the express language of Chapter 1.20 KMC, the Hearing Examiner has little authority to reduce fines in a contested appeal hearing. *KMC 1.20.200.A*. Thus, the penalties assessed by the City must be upheld by the Hearing Examiner if he finds that a violation has occurred. It is appropriate, however, to correct any miscalculation and to determine the number of days a fine should be assessed consistent with statements made by the City in the evidence presented, and in accord with guidance offered by caselaw. *See, Post v. City of Tacoma*, 167 Wn.2d 300 (2009).

The City requests that penalties be assessed for each violation and for each day of each violation. the Hearing Examiner therefore calculated the appropriate penalty based upon the day on which the alleged violation was to be corrected, until the date of the Notice of Violation when any additional per day fines were suspended pending outcome of their appeal. A fine per day for each violation may continue to be assessed from the date of delivery of this order until the violation is corrected or abated in accord with the Kenmore Municipal Code.

and imposed the fines totaling \$227,700.00, FC&O page 11, CP 46.

## **2. Article XI Section 11 of the Washington Constitution, Supremacy of the General Laws**

Article XI Section 11 specifically provides that counties, cities, towns, and townships may make and enforce within their limits such police, sanitary, and other regulations as are not in conflict with the general laws. Wherever there is a conflict between a city ordinance and Acts of the Legislature and/or the Washington Constitution, the conflict must be resolved in favor of the statewide laws.

A municipality is deprived of concurrent jurisdiction over a subject matter when the Legislature intends its jurisdiction over the same subject matter to be exclusive, *Lenci v. City of Seattle*, (1964) 63 Wn. 2d 664, 669, 388 P. 2d 926. An ordinance conflicts with the general laws in two ways: 1) it can intrude into a field the Legislature intends to be occupied exclusively by the State, *Kennedy v. City of Seattle*, (1980) 94 Wn. 2d 376, 383, 617 P. 2d 713, or 2) it can conflict directly with a state statute. See also *City of Seattle v. Shin*, (1988) 50 Wn. App. 218, 220, 748 P. 2d 643, rev. den. 110 Wn. 2d 1025. A local regulation that conflicts with state law fails in its entirety. *Parkland Light & Water Co. v. Tacoma-Pierce County Bd. of Health*, (2004) 151 Wn. 2d 428, 434, 90 P. 3d 37 citing *Adams v.*

*Thurston County*, (1993) 70 Wn. App. 471, 482, 855 P. 2d 284 and *Employco Pers. Serv., Inc. v. City of Seattle*, (1991) 117 Wn. 2d 606, 618, 817 P. 2d 1373. A local regulation conflicts with a statute when it “permits what is forbidden by state law or prohibits what state law permits.” *HJS Development, Inc. v. Pierce County*, (2003) 148 Wn. 2d 451, 482, 61 P. 3d 1141 citing *Rabon v. City of Seattle*, (1998) 135 Wn. 2d 278, 292, 957 P. 2d 621. No conflict will be found, if the provisions can be harmonized, *Parkland*, at 151 Wn. 2d 433, citing *HJS* at 148 Wn. 2d 482 citing *Heinsma v. City of Vancouver*, (2001) 144 Wn. 2d 556, 29 P. 3d 709.

The concurrences by Justices Alexander and Sanders found that Article XI Section 11 requires the disallowance of Tacoma’s system because of conflict with the statewide law. *Post* at 167 Wn. 2d 315-316.

Specifically Justice Alexander found:

Although a city may, pursuant to RCW 7.80.010(5), establish by ordinance a nonjudicial system to hear and determine civil infractions, that provision must be construed with reference to the entire chapter within which it is located. That chapter primarily deals with the handling of civil infractions in a judicial setting in a district or municipal court. Ch. 7.80 RCW. The Tacoma ordinance, which creates a nonjudicial system for assessing penalties for violations of the city's building code, lacks a key procedural protection that would be available to an individual charged with a

building code infraction in a judicial setting, to wit, an opportunity for a hearing on each monetary penalty that is assessed. Thus, it conflicts with a general law and should be struck down on that basis.

**3. Key to Understanding *Post* is its Footnote 11.**

*Post* found that Tacoma's hearing examiner system was not a complete system for determining and reviewing fines for infractions and therefore was not an alternative system as provided by RCW 7.80.010(5). It found that LUPA did not apply to situations where a local jurisdiction is required by law to enforce its ordinances in a court of limited jurisdiction, *Post* at 167 Wn. 2d 309 citing former RCW 36.70C.020(1)(c). The identical language is now in RCW 36.70C.020(2)(c).

*Post* at 167 Wn. 2d 312-315 found that Tacoma's code enforcement system was not complete because it provides for an appeal only of the initial notice of violation and first monetary penalty, and not of any penalties assessed thereafter. This denied him procedural due process of law as to these subsequent fines. Footnote 11 on 167 Wn. 2d 312-313 sets forth that because the court granted summary judgment for *Post* on the procedural due process issue it did not address *Post*'s claims as to the penalties exceeding statutory and constitutional limits.

*Post's* findings as to procedural due process are sufficient to grant *Post* complete relief, because as he lacked such opportunity to be heard on the subsequent fines, the hearing examiner system was not a complete system authorized by RCW 7.80.010(5). Therefore the hearing examiner had no jurisdiction to hear the initial notice of violation. And if there is no way to appeal a notice of violation to a tribunal with jurisdiction to hear such matter, then such notice and its fines are null and void on that basis.

**4. Kenmore's Hearing Examiner System Does Not Meet Requirements of RCW 7.80.010(5), Table Concerning Procedural Protections**

RCW 7.80.010 reads:

- (1) All violations of state law, local law, ordinance, regulation, or resolution designated as civil infractions may be heard and determined by a district court, except as otherwise provided in this section.
- (2) Any municipal court has the authority to hear and determine pursuant to this chapter civil infractions that are established by municipal ordinance or by local law or resolution of a transit agency authorized to issue civil infractions, and that are committed within the jurisdiction of the municipality.
- (3) Any city or town with a municipal court under chapter 3.50 RCW may contract with the county to have civil infractions that are established by city or town ordinance and that are committed within the city or town adjudicated by a district court.
- (4) District court commissioners have the authority to hear and determine civil infractions pursuant to this chapter.
- (5) Nothing in this chapter prevents any city, town, or county from hearing and determining civil infractions pursuant to its own

system established by ordinance.

The Hearing Examiner claims that his procedure is the City of Kenmore's "own system established by ordinance", the ordinance being Chapter 1.20 KMC, FC&O page 10, CP 45. Herein below is a table of the procedural protections available in the courts of limited jurisdiction that are not available or limited in Kenmore's Hearing Examiner System:

	Courts of Limited Jurisdiction	Kenmore's HE
Infraction Allegation Filed	Within 2 or 5 days	Not filed unless appealed
Fee to Contest	Not required	Required, \$125
Rules of Evidence	Applies	Not Applies
Hearsay Testimony	Not allowed, with certain exceptions	Allowed
IRLJ	Followed	Not followed.
Power of Subpoena	Yes.	No.
Power to Find Code Provisions Invalid	Yes	No
Mitigation of Penalties in Contested Hearings	Yes.	No.

Independence of Officers	Elected directly by voters or appointed for 4 year terms	Appointed by City Council, Serves at their pleasure
Clear Lines of Appeal	Yes	LUPA or Extraordinary Writ

Each of these issues is addressed in the following subsections.

**5. No Means to Challenge Correction Notice**

Before a notice of violation is issued, KMC 1.20.070 requires a correction notice and the code enforcement officer may attempt to contact the person responsible and try to work out a plan for correction of the code violation. The problem here is that if the person so contacted and served the correction notice disagrees with the premise of the correction notice, the KMC provides no opportunities for such person to contest the correction notice. This alone deprives procedural due process.

**6. Notice of Violation Not Filed With a Court or RCW 7.80.010(5) Alternative System Within 48 Hours As Required by RCW 7.80.050(5)**

The Notice of Violation, CP 30-35, was not filed with a district court, municipal court, or with an RCW 7.80.010(5) alternative system having jurisdiction within 48 hours excluding Saturdays, Sundays, and holidays as required by RCW 7.80.050(5). IRLJ 2.2(d) requires a filing

within five days exclusive of Saturdays, Sundays, and holidays. Citations for other infractions, such as traffic violations, are filed with the courts of limited jurisdiction by the charging authority and the named defendants do not have to pay any filing fee to contest the charge. They are advised as to which court the citation will be filed in, a cause number, and procedures to contest, to mitigate, or to concede the infraction and to pay the fine. However, Kenmore's Hearing Examiner System as set up by Chapter 1.20 KMC does not provide for any such filings. Thus neither RCW 7.80.050(5) nor IRLJ 2.2(d) is followed in this System.

This is a key procedural protection available in a judicial setting that Kenmore's Hearing Examiner System lacks.

#### **7. Filing Fee Required to Contest Notice of Violation in the City of Kenmore**

Mr. Benson was required by Kenmore's Hearing Examiner System to pay a filing fee of \$125 to obtain the appeal to the Hearing Examiner. KMC 19.30.080.C deprives the Hearing Examiner of jurisdiction where the appeal is not timely and appeal fee not paid.

Article I Section 22 of the Washington Constitution reads in significant part:

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In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to meet the witnesses against him face to face, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed and the right to appeal in all cases: . . . In no instance shall any accused person before final judgment be compelled to advance money or fees to secure the rights herein guaranteed.

KMC 1.20.120.A.2 reads:

Contesting the *notice of violation* by requesting a contested hearing in writing and sending the request to the City as described in subsection B of this section and submitting appropriate fees.

KMC 1.20.080.A reads:

Issuance of Notice of Violation. When the City determines that a *violation* has occurred or is occurring, and does not secure voluntary correction pursuant to KMC 1.20.070, the *code enforcement officer* may issue a *notice of violation* to any *person responsible for the violation*, or the city manager may request the city attorney (prosecutor) to file a *violation* as a criminal misdemeanor.

If charged as a misdemeanor, the charge would have to be filed in the King County District Court and no fee can be required to be advanced for such defendant to secure his right to contest the charge with the rights to the means to do so. It is a significant difference that to contest a notice of

violation that a party has to “appeal” the notice to the Hearing Examiner and pay “appropriate fees”, KMC 1.20.120.A.2 and KMC 19.30.080.C.

*State ex rel Wallen v. Judges Noe, Towne, Johnson*, (1970) 78 Wn. 2d 484, 475 P. 2d 787 found the Seattle’s traffic code provisions requiring a person who has been released to post bail prior to obtaining a trial violated the Article I Section 22 prohibition of any requirement to advance money to secure rights before any final judgment.

This is a key procedural protection available in a judicial setting that Kenmore’s Hearing Examiner System lacks.

#### **8. Rules of Evidence and Hearsay Testimony**

A notice of violation provides for an appeal to a hearing examiner.

However, KMC 1.20.150.C reads:

Formal rules of evidence shall not apply to any such hearing. The *hearing examiner* shall allow hearsay testimony by the parties and not require a proof of chain of custody for evidence that is presented; provided, the hearing examiner shall determine the weight to be assigned to any evidence to be presented.

District courts and municipal courts follow the Rules of Evidence, ER 1101, and can be reversed on appeal based upon their decisions involving admissibility of evidence. None of the exceptions listed in ER 1101 apply

to hearings and trials to determine civil infractions. ER 802 provides that hearsay evidence is not admissible except as provided by the Rules of Evidence, other court rules, or statutes. ER 803 and ER 804 provide for exceptions to the hearsay rule.

The right to confront, meaning cross examine, witnesses and to compel attendance in Article I Section 22 of the Washington Constitution and in the Sixth Amendment incorporated upon the states by the Fourteenth Amendment is one of the bases of the Hearsay Rule. *Crawford v. Washington*, (2004) 541 U.S. 36, 158 L. Ed. 2d 177, 124 S. Ct. 1334. *State v. Walker*, (2005) 129 Wn. App. 258, 267-271, 118 P. 3d 935 found that even excited utterances are testimonial and therefore excluded without opportunity for cross examination.

This is a key procedural protection available in a judicial setting that Kenmore's Hearing Examiner System lacks.

**9. Infraction Rules Required by RCW 7.80.090(1) Not Followed in Kenmore's Hearing Examiner System**

RCW 7.80.090(1) provides that procedures for all hearings provided by the chapter, including a city's own system established under RCW 7.80.010(5), may be established by rule of the Supreme Court of

Washington. The Supreme Court promulgated the Infraction Rules for the Courts of Limited Jurisdiction (IRLJ). None of these rules were followed by the Hearing Examiner nor is there any requirement by Chapter 1.20 KMC that the IRLJ be followed by the Hearing Examiner. IRLJ 3.1 provides for subpoenas and discovery. KMC 1.20.150.C directly conflicts with this and is therefore invalid under Article XI Section 11 of the Washington Constitution. The Kenmore Hearing Examiner has not filed any local rules for infraction not inconsistent with the IRLJ with the Administrator of the Courts as required by IRLJ 1.3.

The IRLJ are followed by the courts of limited jurisdiction. This is a key procedural protection available in a judicial setting that Kenmore's Hearing Examiner System lacks.

#### **10. Power of Subpoena**

Courts of limited jurisdiction may issue process anywhere in the State in infraction cases, RCW 7.80.020. In criminal cases the power and right to subpoena is set forth in Article I Section 22 of the Washington Constitution and the Sixth Amendment which is incorporated upon the states by the Fourteenth Amendment. *State v. Burri*, (1978) 87 Wn. 2d

175, 180-181, 550 P. 2d 507. However, KMC 1.20.150.B reads:

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(s)* or seeking to mitigate the penalties.

Witnesses cannot be subpoenaed by the hearing examiner. Chapter 1.20 KMC has no provision for a subpoena duces tecum to obtain documents and other physical evidence. This supersedes KMC 19.30.190 which provides the Hearing Examiner with the power of subpoena.

During the hearing on Guirguis El-sharawy's appeal of a notice of violation on June 29, 2016, Kenmore's Hearing Examiner, Theodore Hunter, WSBA # 8453, expressed his concerns about how Mr. El-sharawy can obtain the examination of an absent witness without the power of subpoena. Declaration of Roger W. Knight Authenticating Transcript (El-sharawy Transcript), Sub No. 12, CP 152-160. This Court should take judicial notice under ER 201 that the next day, June 30, 2016, the City of Kenmore fired Mr. Hunter and he is no longer their Hearing Examiner.

This is a key procedural protection available in a judicial setting that Kenmore's Hearing Examiner System lacks.

### **11. Power to Find Code Provisions Invalid.**

KMC 1.20.160 provides that the Hearing Examiner can determine whether alleged violations were committed and the consequences thereof. However, he is without any power to determine whether any Code provision is unconstitutional or otherwise invalid on its face or as applied.

*Bare v. Gorton*, (1974) 84 Wn. 2d 380, 383, 529 P. 2d 379 found:

An administrative body does not have authority to determine the constitutionality of the law it administers; only the courts have that power. *United States v. Kissinger*, 250 F.2d 940 (3d Cir.1958); *cert. denied*, 356 U.S. 958, 2 L.Ed.2d 1066, 78 S. Ct. 995 (1958). 3 K. Davis, *Administrative Law Treatise* § 20.04, at 74 (1958).

District courts and municipal courts have the power to hear and rule on motions to dismiss because the statutes or ordinances involved are unconstitutional or otherwise invalid on their face or as applied.

This is a key procedural protection available in a judicial setting that Kenmore's Hearing Examiner System lacks.

### **12. Mitigation of Penalties in Contested Hearings**

KMC 1.20.200.A includes this following language:

Except where the *person responsible for the violation* has requested mitigation of the monetary penalty pursuant to KMC 1.20.120, the *hearing examiner* shall have no authority to reduce the monetary penalty. Where the person has requested to mitigate the monetary penalty, the examiner may reduce the amount of the

monetary penalty for each *violation*, but in no case shall the penalty be reduced to an amount less than \$100 for each *violation* found committed.

In order to gain any reduction in the penalty the person must admit the notice of violation and request mitigation instead. KMC 1.20.170.A reads:

*The person responsible for the violation shall, as a condition of proceeding with the mitigation hearing, agree that he or she has committed the violations as set forth in the notice of the violation.*

The definition of violations is found in KMC 1.15.020:

Every person violating any of the provisions of any ordinance of the City is guilty of a separate offense for each and every day during any portion of which the violation is committed, continued or permitted by any such person.

And this is how we come to mandatory penalties totaling \$198,000 plus a 15% administrative fee of \$29,700 for a total of \$227,700, FC&O pages 10-11, CP 45-46.

District courts and municipal courts can mitigate the fines for infraction in contested hearings if they find the infraction committed, RCW 7.80.120(2) and IRLJ 3.3(e).

This is a key procedural protection available in a judicial setting that Kenmore's Hearing Examiner System lacks.

### 13. Independence of Officers

Judges of the district courts are elected, RCW 3.34.050. The City of Kenmore could establish a municipal court, RCW 3.50.010, and designate that its judges be elected, RCW 3.50.050, and therefore directly accountable to the people, independent of any mayor or city council. In the alternative, a city of less than 400,000 people could appoint the judges of its municipal court for terms of 4 years, RCW 3.50.040. KMC 19.30.030 authorizes the city manager to appoint a hearing examiner.<sup>3</sup> However, it does not define any term of any set amount of time. The Hearing Examiner therefore does not have the independence of any elected judge or of any judge appointed for a specific term of 4 years.

This Court should be able to take judicial notice under ER 201 that on June 30, 2016, the day after a hearing on Mr. El-sharawy's appeal of a notice of violation, the City of Kenmore fired Theodore Hunter, WSBA # 8453, and he is no longer their Hearing Examiner.

*Holiday v. City of Moses Lake*, (2010) 157 Wn. App. 347, 349-350, 236 P. 3d 981 described such a hearing before a commissioner of a

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<sup>3</sup> Theodore Hunter said he was chosen by the Mayor and Council of Kenmore, Benson Transcript page 1, CP 99.

district court serving pro tem in a municipal court, as appointed by the municipal court's judges as thus:

At the infraction hearing, the code enforcement officer explained the MLMC prohibited storing vehicles on an empty lot. The officer explained the Holidays would be compliant with the MLMC if they went through a boundary line adjustment to attach their two separate lots to each other, and then placed their vehicles on a city approved surface; the process would cost around \$ 3,000. A Grant County District Court commissioner sitting as a judge pro tempore for the municipal court responded, "That is the dumbest thing I ever heard," and dismissed the infraction.

Thus the independence of judges elected separately from other public officials. While court commissioners are not elected, they are appointed by the court's elected judges. Theodore Hunter was fired the day after a hearing for expressing concerns about the lack of subpoena power.

This is a key procedural protection available in a judicial setting that Kenmore's Hearing Examiner System lacks.

#### **14. Clear Lines of Appeal**

District courts and municipal courts have clear lines of appeal. Article IV Section 6 of the Washington Constitution, RCW 2.08.030 and the Rules for Appeal of Decisions of Courts of Limited Jurisdiction (RALJ) provide appellate jurisdiction and procedures for the superior

courts to review decisions of the courts of limited jurisdiction in civil, criminal, infraction, and other cases. Further review may be had by this Court, the Supreme Court of Washington and the Supreme Court of the United States. Article I Section 22 of the Washington Constitution provides for the right to an appeal in all criminal cases.

Kenmore's Hearing Examiner system is designed to be appealed by petition under LUPA. However, if the Hearing Examiner system is not a complete system within RCW 7.80.010(5), then not only does the Hearing Examiner lack jurisdiction over infractions, but because such notices of violation then must be filed in the courts of limited jurisdiction, LUPA does not apply either, RCW 36.70C.020(2)(c). That leaves extraordinary writs, such as review, certiorari, and prohibition. The Writs Act, chapter 7.16 RCW and Article IV Section 6 of the Washington Constitution grant the superior courts jurisdiction over writs of certiorari and prohibition.

The *Post* Court found that Tacoma's system was not governed by LUPA, and in effect, granted Mr. Post a writ of prohibition or certiorari without calling it that. Therefore, Kenmore's Hearing Examiner system is reviewable under LUPA, but if not LUPA, under the Writs Act and under

Article IV Section 6 for extraordinary writs.

**15. RCW 35.63.130 Does Not Authorize Hearing Examiners to Review Infractions**

RCW 35.63.130 reads:

(1) As an alternative to those provisions of this chapter relating to powers or duties of the planning commission to hear and report on any proposal to amend a zoning ordinance, the legislative body of a city or county may adopt a hearing examiner system under which a hearing examiner or hearing examiners may hear and decide applications for amending the zoning ordinance when the amendment which is applied for is not of general applicability. In addition, the legislative body may vest in a hearing examiner the power to hear and decide those issues it believes should be reviewed and decided by a hearing examiner, including but not limited to:

- (a) Applications for conditional uses, variances, subdivisions, shoreline permits, or any other class of applications for or pertaining to development of land or land use;
- (b) Appeals of administrative decisions or determinations; and
- (c) Appeals of administrative decisions or determinations pursuant to chapter 43.21C RCW.

The legislative body shall prescribe procedures to be followed by the hearing examiner.

(2) Each city or county legislative body electing to use a hearing examiner pursuant to this section shall by ordinance specify the legal effect of the decisions made by the examiner. The legal effect of such decisions may vary for the different classes of applications decided by the examiner but shall include one of the following:

- (a) The decision may be given the effect of a recommendation to the legislative body;
- (b) The decision may be given the effect of an administrative decision appealable within a specified time limit to the legislative body; or
- (c) Except in the case of a rezone, the decision may be given the

effect of a final decision of the legislative body.

(3) Each final decision of a hearing examiner shall be in writing and shall include findings and conclusions, based on the record, to support the decision. Such findings and conclusions shall also set forth the manner in which the decision would carry out and conform to the city's or county's comprehensive plan and the city's or county's development regulations. Each final decision of a hearing examiner, unless a longer period is mutually agreed to in writing by the applicant and the hearing examiner, shall be rendered within ten working days following conclusion of all testimony and hearings.

Nothing in there about infractions. Therefore a hearing examiner is not authorized to review or determine infractions.

The law favors rational, sensible construction, *Krystad v. Lau*, (1965) 65 Wn. 2d 827, 844, 400 P. 2d 72. See also *In re Marriage of Kinnan*, (2006) 131 Wn. App. 738, 751, 129 P. 3d 807 citing *State v. Thomas*, (1993) 121 Wn. 2d 504, 512, 851 P. 2d 673. Absurd constructions are to be avoided, *Oden Investment Co. v. City of Seattle*, (1981) 28 Wn. App. 161, 165, 622 P. 2d 882 rev. den. 95 Wn. 2d 1015 citing *Blondheim v. State*, (1975) 84 Wn. 2d 874, 879, 529 P. 2d 1096. Statutes are not to be construed in a way that would lead to a strained or unrealistic interpretation. *Dept. of Labor and Industries v. Granger*, (2007) 159 Wn. 2d 752, 757, 153 P. 3d 839. See also, *Post, supra*, at 167

Wn. 2d 310:

Our objective in interpreting a statute is to determine legislative intent. *State v. Jacobs*, 154 Wn. 2d 596, 600-01, 115 P. 3d 281 (2005). When statutory language is plain and unambiguous, the statute's meaning must be derived from the wording of the statute itself. *Nykreim*, 146 Wn.2d at 926. The "plain meaning" of a statutory provision is to be discerned from the ordinary meaning of the language at issue, as well as from the context of the statute in which that provision is found, related provisions, and the statutory scheme as a whole. *Jacobs*, 154 Wn.2d at 600-01. A reading that produces absurd results should be avoided, if possible, because we presume the legislature does not intend them. *State v. Vela*, 100 Wn.2d 636, 641, 673 P.2d 185 (1983).

*Nykreim* is *Chelan County v. Nykreim*, (2002) 146 Wn. 2d 904, 52 P. 3d 1.

Kenmore's Hearing Examiner cited RCW 35.63.130 as granting him authority to conduct a hearing on a civil violation, FC&O page 7, CP 42. Except that the Legislature was legislating on land use decisions, such as permit applications or amendments to zoning ordinances. The Legislature did not intend to grant a hearing examiner any authority to hear or review any matter involving a violation of such land use codes assessing fines and ordering abatements in this amendment to a land use and planning commission act. No rational, sensible construction of the statute can create such authority in the hearing examiner system.

The entire chapter 35.63 RCW concerns the establishment and

regulation of planning commissions, particularly for land use planning. There is nothing in this chapter concerning establishing and enforcing fines and other monetary penalties for any code violations, including land use code violations. In terms of separation of powers, chapter 35.63 RCW concerns the legislative functions of local councils and planning commissions to make land use regulations and zoning laws. The enforcement of such codes is not and under separation of powers doctrine, cannot be entrusted to the same people responsible for making these local laws. Different entities must be used to bring claims for infractions with fines or other penalties, and a third set of people must be given the judicial function of deciding and reviewing such fines for violations of the code. The Washington Constitution and the Legislature provides for county district courts and municipal courts to serve this judicial function. While RCW 7.80.010(5) provides that chapter 7.80 RCW does not preclude a City from hearing infractions and assessing fines based upon such infractions in its own system, such system must nevertheless be one that the Legislature authorized the cities to establish.

Chapter 1.20 KMC is thus in irreconcilable conflict with RCW

35.63.130 if Kenmore is relying upon it as a grant of power to a hearing examiner to determine infractions as an alternative system under RCW 7.80.010(5). Article XI Section 11 requires a different source of legislative authority for a hearing examiner to determine infractions.

**E. The City of Kenmore and its Hearing Examiner System Lacks Subject Matter Jurisdiction Over the Abatement of Junk Vehicles As It Is Not a Complete System Within RCW 46.55.240(3)**

During the hearing on August 5, 2016 before the superior court, the City of Kenmore cited RCW 46.55.240(3) and admitted they had yet to comply with its requirement that Mr. Knight, as the owner of the 1966 Pontiac Lemans, be given notice and opportunity to be heard. RP 17.

RCW 46.55.240(3) reads:

- (3) Ordinances pertaining to public nuisances shall contain:
  - (a) A provision requiring notice to the last registered owner of record and the property owner of record that a hearing may be requested and that if no hearing is requested, the vehicle will be removed;
  - (b) A provision requiring that if a request for a hearing is received, a notice giving the time, location, and date of the hearing on the question of abatement and removal of the vehicle or part thereof as a public nuisance shall be mailed, by certified mail, with a five-day return receipt requested, to the owner of the land as shown on the last equalized assessment roll and to the last registered and legal owner of record unless the vehicle is in such condition that identification numbers are not available to determine ownership;
  - (c) A provision that the ordinance shall not apply to (i) a vehicle or

part thereof that is completely enclosed within a building in a lawful manner where it is not visible from the street or other public or private property or (ii) a vehicle or part thereof that is stored or parked in a lawful manner on private property in connection with the business of a licensed dismantler or licensed vehicle dealer and is fenced according to RCW 46.80.130;

(d) A provision that the owner of the land on which the vehicle is located may appear in person at the hearing or present a written statement in time for consideration at the hearing, and deny responsibility for the presence of the vehicle on the land, with his or her reasons for the denial. If it is determined at the hearing that the vehicle was placed on the land without the consent of the landowner and that he or she has not subsequently acquiesced in its presence, then the local agency shall not assess costs of administration or removal of the vehicle against the property upon which the vehicle is located or otherwise attempt to collect the cost from the owner;

(e) A provision that after notice has been given of the intent of the city, town, or county to dispose of the vehicle and after a hearing, if requested, has been held, the vehicle or part thereof shall be removed at the request of a law enforcement officer with notice to the Washington state patrol and the department of licensing that the vehicle has been wrecked. The city, town, or county may operate such a disposal site when its governing body determines that commercial channels of disposition are not available or are inadequate, and it may make final disposition of such vehicles or parts, or may transfer such vehicle or parts to another governmental body provided such disposal shall be only as scrap.

KMC 8.25.020 reads:

A. The storage and retention of junk vehicles on private property is unlawful and constitutes a public nuisance subject to removal and impoundment. The community development director or his/her designee shall inspect and investigate complaints relating to junk vehicles, or parts thereof, on private property. Upon discovery of any such a violation, the community development director or

BRIEF OF APPELLANT

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his/her designee shall pursue enforcement actions as set forth in Chapter 1.20 KMC.

B. This section shall not apply to:

1. A junk vehicle, or part thereof, which is completely enclosed within a building in a lawful manner, where it is not visible from the highway and/or roadway or other public or private property; or
2. A junk vehicle, or part thereof, which is stored or parked in a lawful manner on private property in connection with the business of a licensed dismantler or licensed vehicle dealer, and fenced according to the provisions of RCW 46.80.130.

KMC 8.25.020.B complies with RCW 46.55.240(3)(c). Chapter 1.20 KMC does not contain any provision requiring notice to the last registered owner of record of the vehicle and the property owner of record that a hearing may be requested and that if no hearing is requested, the vehicle will be removed, as required by RCW 46.55.240(3)(a). The City did not comply with this statutory requirement when taking action against Owen Benson and charging him with having junk vehicles on his property. RP 17. Notice requirements of this nature are jurisdictional, to confer in personam jurisdiction, RCW 4.28.020; *Mid-City Materials v. Heater Beaters Custom Fireplaces*, (1984) 36 Wn. App. 480, 674 P. 2d 1271; and *In re Marriage of Hill*, (1989) 57 Wash. App 687, 769 P. 2d 881. Mr. Knight has the requisite standing to challenge this failure to meet this jurisdictional notice requirement as the owner of one of the vehicles in

question who was not notified as required by RCW 46.55.240(3)(a).

KMC 8.25.030 reads:

The City may remove any abandoned, wrecked, dismantled or inoperative vehicle, automobile hulk or part thereof, after complying with the notice and hearing requirements of this chapter. The proceeds of any such a disposition shall be used to defray the costs of the abatement and removal of any such a vehicle, including costs of administration and enforcement.

The proceedings against Mr. Benson were pursuant to Chapter 1.20 KMC and Mr. Knight's Pontiac was found to be a junk vehicle subject to abatement by the Hearing Examiner. FC&O page 5, CP 40. It is undisputed that the last registered owner of the Pontiac, the plaintiff, was not granted any notice as required by RCW 46.55.240(3)(a).

The FC&O, CP 36-47, does not cite RCW 46.55.240(3) even though it considers an alleged violation for junk vehicles, and found that the 1966 Pontiac Lemans is a junk vehicle and ordered Mr. Benson to remove any junk vehicles, CP 46. This is yet another way in which Kenmore's Hearing Examiner system is not a complete system within RCW 7.80.010(5). Not only that, it is not a complete system for abating junk vehicles as required by RCW 46.55.240(3) and therefore, consistent

with *Post, supra*, lacks subject matter jurisdiction over consideration of the abatement of junk vehicles.

## VI. CONCLUSION

For the reasons stated herein, the decisions by the superior court should be reversed.

Respectfully submitted this 26th day of September, 2016,



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ROGER W. KNIGHT, appellant

