SUPREME COURT CASE NO. 91878-3

SUPREME COURT OF THE STATE OF WASHINGTON

ABC HOLDINGS, INC., and CHEM-SAFE ENVIRONMENTAL, INC.,

Plaintiffs/Petitioners,

-vs-

KITTITAS COUNTY

Defendants/Respondents.

REPLY TO ANSWER TO PETITION FOR REVIEW

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I. **Outline of Kittitas County Errors**. Kittitas County argues erroneously that CSE conceded that Kittitas County had the authority to require that CSE obtain a Moderate Risk Waste ("MRW") facility Permit ("MRW Permit") by reference to a statement made by counsel in the hearing before the hearing examiner ("HE") which it takes out of context. It urges that Kittitas County had the legal authority to require the MRW Permit. It finally argues that RAP 13.4(b) precludes review because CSE failed to raise legality or constitutionality to the hearing examiner[1] and because CSE raises no conflict with appellate

[1] Without conceding that Kittitas County did not by actively representing its authority to CSE induce CSE in reliance thereon reasonably to rely on same, the issues relating to the legality of of Kittitas County's actions was more than 'hinted' at below. The Notice of Violation of January 27, 2011 was grounded on CSE's putative failure to have requisite state or county permits to operate its transporter/transfer facility business. Counsel for CSE confirmed the requisite state permits at the hearing before the hearing examiner as well as before the Superior Court in the motion for clarification. The HE ruled that CSE violated the Kittitas County Solid Waste Ordinance ("KCSWO") not only by operating without a permit but also for having regulated dangerous waste on the site. A position conflicted by the declaration of the Kittitas County Public Health District's ("KCPHD") responsible official, Mr. Rivard's declaration to the Court of Appeals and cover letter to the revised health order issued to CSE on the same day as the notice of violation ("NOVA"). The facts underlying CSE's due process arguments are presented but in the context of an equitable estoppel argument since the HE declined, properly, to hear legal and constitutional arguments. The proper test to determine whether a legal or constitutional issue can be newly raised on appeal looks to the adequacy of the record to determine the matter, not to the question whether there was more than a 'hint' presented to the HE. The Court of Appeals confused the parties terminology with the substantive issues addressed thereby. See KCSWO Para. VI(I)(2)(c)(2); RALJ 2.2; KCC 18.02.030(6)(f); *State v. WWJ Corp.* 138 Wn.2d 595, 603 (1999) linking adequacy of the record with the need to demonstrate that the error involving constitutional or legal issues is manifest; *Citizens of Mt. Vernon v. City of Mt. Vernon*, 133 Wn. 2d 861, 869, 947 P2d 1208 (1997) and *King County Washington St. Boundary Rev. Bd. For King County*, 122

authority, CSE's constitutional issues are trivial, no genuine public interest is raised, or that the and the issues have been resolved by prior decisions of this Court. Kittitas County's arguments are internally conflicted and demonstrate the need for this Court to resolve a conundrum effectively preventing constitutional arguments from being considered administratively while preventing mandatory judicial review thereof on the basis that such issues were not raised.

II. CSE Did Not 'Stipulate' that Kittitas County Had the Authority to Require MRW Permit Compliance.

A. CSE's Statement was in the Context of an Alternative Equitable Estoppel Argument because Hearing Examiner Would not Hear Constitutional or Legal Issues. As noted in CSE's petition for review, the HE, based on lack of jurisdiction, specifically and correctly, on the record, refused to consider the legality of Kittitas County's legal construction of the KCSWO to require DOE permitted transporters with transfer facilities to obtain MRW Permits or due process issues arising from the service of the NOVA on CSE for accepting and temporarily

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Wn.2d 648, 670, 860 P2d 1024 (1993); CP1 153; HE hearing transcript, filed with the Court of Appeals 9/20/12, p. 27; ABR 64; NOVA, ABR 40 (Rivard Declaration 3/8/11, Ex. MM).

storing waste without a DOE or KCPHD permit during periods when CSE did so under a valid DOE Permit and a license issued by KCPHD.[2] Hence, issues based on legality of Kittitas County's asserted legal basis to issue the NOVA and due process issues arising from the facts underlying same could not be and were not raised below as such.

Reference to the 'admission of Kittitas County's authority to require an MRW Permit must be understood within the context of the argument under which it was raised CSE's counsel argued that Kittitas County was legally barred from asserting a violation based on lack of MRW Permit during a period it licensed CSE to operate without same. Without the constitutional basis, the argument grounds in equitable estoppel.

B. **Based on its Prior Actions and Knowledge, Kittitas County is Equitably Estopped to Raise Estoppel under Dependency of KR.** In any case, Kittitas County's argument that CSE cannot raise the constitutional issue based on counsel's statement in its argument for equitable estoppel in reliance on *In re Dependency of KR*, 128 Wn.2d 129, 904 P2d 1132 (1995). That case stands for the proposition that a party cannot contribute to the creation of an error by stipulating to a position

[2] Hearing Examiner Transcript, filed with the Court of Appeals 9/20/12, p. 5; KCSWO VI(A)(2) and VI(I)(2).

that it later claims in error. To apply, there must be a stipulation, the stipulation must be acted upon by the trier of fact, and the action of the trier of fact must result in a favorable decision on the subject matter of the stipulation. There, counsel stipulated to the admission of polygraphs from both parties, based on the stipulation the court granted the motion to admit the polygraphs, counsel then claimed error based on the 'stipulation'. Here, counsel did not stipulate but rather stated in argument that even with the legality of Kittitas County's interpretation of KCSWO, its actions should be barred under principles of equitable estoppel. Further, the HE did not find in favor of CSE on the equitable estoppel argument. In fact as to questions relating to the legality of Kittitas County's interpretation of KCSWO and the constitutionality thereof, the HE confirmed it would not consider testimony based on the legality or constitutionality of KCSWO or Kittitas County's actions putatively based thereon.[3]

By clear, cogent and convincing evidence, CSE has proved that Kittitas County had directly and in writing authorized and licensed CSE to continue to operate without an MRW Permit pending its perfection of an

[3] See *In re Dependency of KR*, p. 147.

MRW Permit, CSE reasonably relied on the written authorization in attempting to comply by completing and timely filing the application for such MRW Permit and continuing to operate on the license granted by Kittitas County, and Kittitas County issued a NOVA punishing CSE for conducting just this operation during the period commencing with and covered by the License and retroactively cancelled CSE's license to operate effective upon November 4, 2010, the issuance date thereof.[4] While issues of substantive and procedural due process are raised and a record relating thereto was made by CSE to the hearing examiner upon which this Court can ground a decision, those constitutional issues were not themselves considered by the hearing examiner. This Court must see the statement of CSE's counsel within the context in which it was raised and considered an alternative argument based on equitable estoppel. After all, arguments in the alternative are allowed, even if inconsistent.[5]

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[4] *Kramarevcky v. Wash. Dep't of Soc. & Health Services* 122 Wn.2d. 738, 743, 744, 863 P2d 535 (1993). *Wash. Dep't of Ecol. v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 20, 21, 43 P3d 4 (2002). Therein, the Court additionally held that equitable estoppel does not apply to legal as opposed to factual matters. *Campbell & Gwinn*, p. 21. Kittitas County recognized this by arguing, incorrectly, that CSE's license was issued without authority. KCPHD clearly had the legal authority to issue the license because KCSWO provides that enforcement is entirely discretionary to KCSWO and its responsible official. See KCSWO, Sec. I, second paragraph, Para. VII(B), (E)(3)(a)(1) and F, all written in the permissive. Again, it is hard to see how 'legality' was not adequately raised before the hearing examiner.

[5] *Wash. St. Rules of Civil Procedure* 8(a), last sentence.

Kittitas County is foreclosed from raising an argument based on a putative admission by CSE that Kittitas County had the right to require it to obtain an MRW Permit to cover CSE's duly licensed associated transfer facility. On December 21, 2009 issued a demand letter to CSE (the "Demand Letter") in which Kittitas County represented that CSE was required to obtain such permit and demanded that it do so under threat of criminal penalty. CSE merely complied with the demand by filing an application for an MRW Permit containing an engineered plan for secondary containment as demanded by Kittitas County. Kittitas County again confirmed its demand that CSE obtain an MRW Permit for its transfer facility operations in letters of August 4, 2010 and November 4, 2010 licensing CSE's continued operation of its transfer facility pending completion of its MRW Permit application and its approval by KCPHO, collectively, (the "License"). CSE timely submitted the completed application and engineering plan on November 17, 2010. On January 27, 2011, Kittitas County with KCPHD issued the NOVA and health order ("HO") based on an allegation of public nuisance for operating an MRW facility without a requisite state or Kittitas County permit. The same day, KCPHD issued an amended HO to CSE confirming in its cover letter that

the HO did not cover CSE's operations under its DOE Permit, which covered receipt, temporary storage, loading and shipment of regulated dangerous waste ("DW") with MRWs and which covered CSE's transfer facility, because it had no jurisdiction over same, but failing to withdraw the HO and NOVA as to the claim that CSE operated an MRW Facility without requisite Kittitas County and state permits.

Mr. Granberg, a representative of the DOE dangerous waste division which oversees CSE confirmed to Ms. Becker on February 9, 2011 in response to her inquiry, that CSE had the requisite DOE permit to operate both its transporter and its associated transfer facility.[6] Notwithstanding her knowledge of the falsity of the allegation of public nuisance upon which the NOVA was based, she neither disclosed that knowledge nor withdrew the NOVA. Also, falsely, with knowledge thereof, Ms. Becker filed a comprehensive declaration of Mr. Rivard on March 8, 2011, the KCPHD responsible official, alleging the presence of P016 at CSE's transfer facility in violation of the KCSWO which covers

[6] The only 'permitting' requirement to the ownership or operation of a transfer facility is that the owner or operator have a DOE Permit and that it inform the DOE thereof and its location. The annual report filed by each transporter contains a check the box provision for incorporating a transfer facility. See WAC 173-303-240(6)(a) and transporter annual report form containing the 'check the box'. There is no question CSE has complied. Mr. Granberg, the then DOE DW Division representative with aegis over CSE confirmed such compliance. See Allphin Decl., Ex.K, CP1 127,130.

permitting and operation of MRW facilities, even though she knew that CSE was duly permitted to receive, temporarily store, load, and ship same under its DOE Permit and that CSE could not receive, temporarily store, load, and ship same if its transfer facility was required additionally to obtain and operate under an MRW Permit as a KCPHD permitted MRW facility. The hearing examiner accepted Kittitas County's position that CSE's transfer facility was an MRW facility, that Kittitas County had the authority to require CSE to operate under an MRW Permit, that CSE was operating without such MRW Permit, and that as an MRW facility, whether or not permitted in that capacity, it could not receive, temporarily store, load and ship DWs and that both its lack of an MRW Permit and its receipt, temporary storage, loading and shipping of DWs at and from CSE's transfer facility, constituted violations of KCSWO's requirements for MRW facilities and public nuisances under KCC 18.01.010 and, particularly, (1)(k) thereof and sufficient grounds for issuance of the NOVA under KCC 18.02.030.[7]

Nor can CSE be seen to have 'waived' its right to contest the legality or constitutionality of Kittitas County's actions in misconstruing

[7] ABR 1; CP1 355; ABR 9; ABR 26; ABR 26; ABR 40; ABR 42; CP1 127,130; CP1 229; Rivard Decl 11/16/12 to Court of Appeals; Motion for Stay to Court of Appeals filed 11/14/12, paras. 15, 16,17.

KCSWO to apply to CSE or in issuing the NOVA on the basis thereof. Waiver requires a voluntary relinquishment of a right. Clearly, CSE's actions toward perfecting an MRW Permit and acceding to the directions of Kittitas County thereon were not 'voluntary'. They were under threat of criminal prosecution. Waiver cannot even be implied because of the misrepresentation of authority by Kittitas County and CSE's reasonable reliance thereon, under circumstances of threat of criminal action.[8]

In short, at all times, Kittitas County under threat of criminal prosecution represented to CSE that its transfer facility was also an MRW facility, that it had the right to require CSE to obtain an MRW Permit for such transfer facility, and that it had the right to prohibit CSE from receiving, temporarily storing, loading, or shipping DWs at or from CSE's transfer facility without regard to the facility's proper permitting by the DOE as a transfer facility with specific authority to receive, temporarily store, load and ship such DWs. Such representation was false when made or continued, was made or continued with knowledge of its falsity to CSE and to the HE, was made with the intent that CSE rely thereon, CSE did in

[8] See generally *Kessinger v. Anderson*, 31 Wn.2d 157, 168, 169, 196 P.2d 289 (1948), *Weitzman v. Bergstrom*, 75 Wn. 2d 693, 699, 453 P.2d 860 (1969); *Westlake, LLC v. Engstrom Properties, LLC* 169 Wa.App. 700, 714, 281 P.3d 693 (2012) and cases cited therein.

fact rely thereon until it later discovered the falsity of the representation and Kittitas County's knowledge of that falsity, and, particularly considering threats of criminal prosecution, CSE's reliance was reasonable. Based thereon, Kittitas County should be estopped to claim that CSE had either waived or was estopped to deny that it had admitted Kittitas County's legal position.

III. **Contrary to Kittitas County's Claim, CSE Bases its Petition for Review on Public Interest and Constitutional Issues.**

Kittitas County's arguments based on the requirements for review are without merit or unsupported. CSE did not base its petition for review on the basis of any conflict among appellate decisions. Rather, it based its petition principally on the public interest raised by the conflict between the NOVA's and the Hearing Examiner's construction of KCSWO to require CSE's compliance with local MRW facility permitting requirements in direct conflict with WAC 173-350-360(1)(a)(ii) and (b)(i) which provide that transporters such as CSE are categorically exempt from MRW compliance and local government oversight in the handling, storage and shipment of MRWs as long as they, like CSE, are subject to DOE oversight under WAC 173-303-240 and ship mixed loads of MRWs and

DWs under a uniform hazardous waste manifest as provided in WAC 173-303-180.

A. **CSE Has Shown Public Interest**. CSE has adequately raised the issue of public interest under RAP 13.4(d) in its Petition for Review.. Summarizing, a conflict between the construction and application of an ordinance, KCSWO to require MRW facility permitting and compliance of transporter's transfer facilities, and carefully reticulated DOE regulation, WAC 173-350-360 which authorizes KCSWO's jurisdiction over MRW facilities, bars MRW facilities from receiving DWs, and categorically excepts transporters from MRW facility classification and local government, including KCSWO jurisdiction, and WAC 173-303-240 which expressly authorizes consistent with its purpose transporters with their associated transfer facility, fulfilling the regulatory purpose, demonstrates the public interest raised by the conflict. Likelihood of repetition is supported by the number of public health districts subject to the same regulation which could reach the same erroneous conclusion as to jurisdiction. .[9] In short, this is not a local

[9] *Dunner v McLauglin*, 100 Wn.2d 832, 838, 676 P.2d 444 (1984); *In re Swanson*, 115 Wn.2d 24, 25, 804 P.2d 1 (1990); *Snohomish County v. State*, 69 Wn.App. 655, 660, 850 P.2d 546 (1993) addressing the analogous test in a mootness context. See also authority, footnote 10 and analysis to which it applies.

regulatory enforcement action but an interference with a law of general application and a matter of public interest.

B. **Irreconcilable Conflict**. CSE has shown that Kittitas County's and the HE's construction and enforcement of KCSWO to give it permitting authority and jurisdiction over CSE irreconcilably conflicts WAC 173-350-360 and 173-303-240 categorically excluding transporters from local government MRW Permitting and oversight and expressly allowing transporters to receive, temporarily store, load and ship both DWs and MRWs, actions prohibited to MRW facilities. The field is preempted. There is a conflict with the DOE's general reticulated regulations to DW waste handling issued under its legislatively granted regulatory authority. This sufficiently shows irreconcilable conflict under Art. XI, Sec. 11 of the Wash. St. Const.[10]

C. ***Boundary Review Board*, *Mt. Vernon* and *WWJ* do not Bar CSE from Raising Constitutional Issues Initially on Appeal.**

Transporters transfer facilities at which waste is received, temporarily stored, loaded and shipped under uniform manifest to

[10] *State v. Wahkiamkum County*, 184 Wn.App. 372, 377-88, 337 P.3d 364 (2014); *Biggers v. City of Bainbridge Island*, 169 Wn.2d 683, 697, 698, 169 P.3d 14 (2007). *Larson v. City of Pasco*, 168 W2d 675, 679-84, 230 P3d 1038 (2010), *Rabon v. City of Seattle*, 135 W2d 278,287, 957 P2d 621 (1998), *Dioxin/Organchlorine v, Polution Control Hearings Board*, 131 W2d 345, 351, 932 P2d 158 (1997).

permitted disposal sites. Either Kittitas County and the HE misconstrued the requirements of KCSWO to grant the KCPHD jurisdiction over transporters with transfer facilities or KCSWO directly conflicts with WAC 173-350-360(1) which categorically denies KCPHD jurisdiction thereover. Art. XI, Para. 11 of the Wash. St. Const. is clear; where there is a conflict, local government authority must give way to laws of general application.[11] WAC 173-350-360, validly promulgated by the DOE under statutory authority to define local government's authority in the regulation of solid waste, which governs all MRW facilities and all local health districts in Washington must be seen as a law of general application.[12] Since it is validly issued, Kittitas County's construction of KCSWO must give way thereto. Otherwise, transporters with transfer facilities cannot execute their intended function in the chain of proper disposal of dangerous and moderate risk waste. While it is the case that oversight of MRW facilities is statutorily delegated to local government, it is not the case that all facilities that handle, store and ship MRWs are MRW facilities. It is this distinction that Kittitas County ignores.

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[11] *Weden v. San Juan Co.*, 135 Wn.2d 678, 693, 958 P2d 273 (1998); *City of Seattle v. Williams*, 128 Wn.2d 341, 346-7, 908 P2d 359 (1998). The Courts stated review is denovo because the issues are exclusively legal. Hence as in these cases the record should not be a bar to the appeal.

[12] RCW 70.105.005(8) and (10), 70.105.007(1) and (3), 70.105. 035 and 70.95.060.

While failure to raise matters to hearing examiners may generally bar raising them on appeal, Kittitas County is incorrect that this rule applies to questions that cannot be raised to hearing examiners.[13] This Court has recognized that RAP 2.5(a)(3) is a carve out to the general rule requiring issues to be raised to the trier of fact below and that in proper circumstance it applies to civil as well as criminal constitutional issues.

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[13] Kittitas County generally relies for this proposition on *Boundary Review Board*. Neither case supports Kittitas County's proposition.

In *Mt. Vernon*, Haggen argued that the City of Mt. Vernon failed to exhaust administrative remedies as required by RCW 36.70C.060(2) before challenging the effect of the comprehensive plan on specific land use decisions. This Court in recognition of the trier of fact's lack of jurisdiction and accordingly the impossibility of bringing the issue below, held that because 'the board does not have jurisdiction over these types of issues and cannot provide the remedy or relief sought...Citizens properly brought the issue to the superior court'. The principle is the same as that facing this Court. The HE lacked jurisdiction to hear CSE's legal and constitutional challenges to Kittitas County's construction of KCSWO as unconstitutional or illegal and accordingly should not be denied the right to a hearing and remedies thereon. Rather than support Kittitas County, Citizens of Mt. Vernon confirm that the Court of Appeals should have permitted CSE's legal and constitutional issues to be raised initially on appeal since they could not be raised to the hearing examiner. See *Mt. Vernon*, p. 869.

Boundary Review Board likewise provides no support for Kittitas County's position. It held that a general claim of failure to comply with law was sufficient to raise the claim for appeal purposes where the parties briefed and the trier of fact heard the briefing and evidence below. It also held that King County's failure to identify the ordinance that it believed controlled to the trier of fact precluded King County from appealing based on such ordinance. In the context that the ordinance could have been raised to the administrative board hearing the matter as trier of fact, this Court held that it would not consider the issue on appeal. The material distinction between Boundary Rev. Bd. and this case is that CSE was barred from bringing its legal and constitutional challenges to Kittitas County's construction of KCSWO below before the HE and the HE confirmed same in open hearing. See *Boundary Review Board*, pp. 661-2, 667-70.

Finally, neither *Boundary Review Board* nor *Mt. Vernon* deal with the jurisdiction of hearing examiners and, rather deal with jurisdiction of boards subject to specific statutory limitations. As such neither constitute authority for the proposition that hearing examiner lack of jurisdiction is irrelevant to the right of an appellant under RAP 2.5(a)(3).

This provision protects the litigants in instances where the constitutional issue could not be brought before the hearing examiner. This is here the case.[14] As noted in CSE's petition and its reply brief to the Court of Appeals, foreclosing CSE from raising the constitutional issues initially to the Court of Appeals would deprive CSE of the opportunity to have those constitutional issues heard. Even the RALJ, as currently issued, recognizes that an appeal on the record from a hearing examiner allows the Superior Court sitting in appeal to hear constitutional issues initially raised to it. The language is borrowed from RAP 2.5(a)(3). It clearly

[14] The Court in *State v. WWJ Corp.* 138 W2d 595, 602, 980 P2d 1257 (1999), cited by Kittitas County, recognized that a constitutional issue could be raised in a civil action and based on proper grounds would be heard by this Court. While the Court in WWJ rejected appellant's constitutional position either because it was not manifest or because the record showed that appellant's constitutional rights had not been violated, it recognized the excessive fine issue as a legitimate constitutional issue under the Eighth, Fifth, and Fourteenth Amendments that could be raised initially on appeal. In WWJ, there was no argument that the issues could not have been raised administratively. Here, in addition to legitmate constitutional issues, the issues could not even have been raised to the hearing examiner as the Court of Appeals must have erroneously believed. The hearing examiner so informed the parties. Obviously, Justice Fearing and the Court below did not see the issues as litigated. See also *State v. Scott,* 110 Wn.2d 682, 688, 757 P2d 492 (1988). While certain facts are in some dispute, particularly because Mr. Rivard, KCPHD's responsible officer and its chief witness, admittedly misrepresented the presence of P016 and thus dangerous waste at the CSE's transfer facility, considering the evidence that CSE had the requisite permit to handle DWs and MRWs as issued by the DOE was in the record without conflicting evidence, and this issue remained the only legal basis for the hearing examiner's decision to uphold the NOVA, the record contains the facts necessary to reach a decision on which CSE's petition is based. See ABR 1 at para. 46; CP 196 at para. 24.

resolves limitations on the jurisdiction of hearing examiners, a resolution that Kittitas County wishes this Court to disregard.[15]

D. **This Court's Review in *Open Door Baptist Church* is Dispositive.** This Court has recognized that constitutional challenges to local governments' and hearing examiners' may be raised and challenged upon judicial appeal, recognizing that hearing examiner's lack of jurisdiction over such issues below. In *Open Door Baptist Church v. Clark County,* 140 Wn. 2d 143, 995 P2d 33 (2000) appellant appealed an adverse ruling by Clark County, affirmed by its hearing examiner, requiring it to obtain a conditional use permit to build a church in an area not zoned for such use on the basis that the requirement violates the First Amendment constituting a burden on worship. The Court expressly recognized that the First Amendment issue could not be raised before the hearing examiner. However, accepted appeal from the decision of the

[15] As noted in CSE's petition, this Court has wrestled with fact that administrative tribunals have no jurisdiction to hear legal or constitutional challenges to the local or administrative ordinances or regulations and that places at further issue the obligation to exhaust administrative remedies prior to any judicial appeal. It has recognized that litigants are left with a Hobson's Choice. If they attack the action constitutionally by means of an action for declaratory relief they run the risk that the action will be dismissed for failure to exhaust administrative remedies. If they proceed with administrative remedies, they may be foreclosed to raise the core legal or constitutional issues. Litigants should not be left in such a position. Such a position would raise material issues of substantive and procedural due process. See *New Cingular Wireless PCS, LLC v. City of Clyde Hill,* 187 Wn.App. 210, 215-8, 349 P.3d 53 (2015) CSE Discussing issues relating to foreclosure of judicial review of local government ordinance or action.

Court of Appeals reversing the Superior Court that had accepted the appeal. This Court held that the local zoning requirements did not violate the appellant's First Amendment rights but constituted a reasonable and allowed use of the police authority of local government. It is obvious that the case was heard as a constitutional challenge and appeal to the Superior Court of an issue not raised before the hearing examiner. It was obviously initially heard under language contained in RALJ 2.2 or a predecessor thereof authorizing such appeals. Obviously, the appellate court and then this Court heard the constitutional issue despite the fact that it was not and could not have been raised to the hearing examiner. While the issues are different, both cases represent constitutional issues raised for the first time on appeal where the trier of fact, the hearing examiner, lacked jurisdiction to hear them. For the same reason that appellant in *Open Door Baptist Church* was subject to the exception to the 'issue' rule, so should CSE whose property has been rendered useless as a result of the application of an unconstitutional construction of KCSWO to require it to obtain an MRW Permit that would bar CSE from conducting its business of

accepting, temporarily storing, loading and shipping DWs with MRWs as a transporter licensed by the DOE from its transfer facility.[16]

This petition for review is not based on numerous factual issues. It is based on the Constitutional question whether the NOVA and Hearing Examiner's construction of the KCSWO is in conflict with WAC 173-350-360 and thus rendered nugatory under Art. XI, Sec. 11 of the Washington State Constitution, whether the retroactive effect of the NOVA in violation of CSE's license to operate an MRW facility pending perfection of its application violates Art. I, Sec. 3 of the Washington State Constitution and the Fifth and Fourteenth Amendments to the United States Constitution, and whether the decision of the Court of Appeals in conflict with this Court's decision in *Open Door Baptist Church* violates CSE's due process right to have its Constitutional issue with the NOVA and the Hearing Examiner decision heard by a court. It is further clear that the general effect of WAC 173-350-360(1) and its conflict with the KCSWO as construed by Kittitas County and the HE raise not only constitutional issues but issues of continuing public interest.

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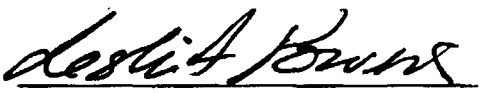
[16] Open Door Baptist was cited and limited in the unpublished opinion in *Emery v. Pierce County*, 2010 WL 545530, at p. 5, (W.D. Wa. 2010) recognizing Open Door Baptist for the proposition that constitutional issues that cannot be brought to a hearing examiner can be brought on appeal but declining to find such issues in the instant case.

IV. **Conclusion**. In its Petition for Review and herein, CSE has set forth its basis for requesting review of the Court of Appeals' dismissal of CSE's appeal based on its failure to raise constitutional and legal issues to the hearing examiner. It has shown that the hearing examiner could not and refused to hear such issues. It has further shown contrary to Kittitas County's claim that it did not and Kittitas County could not argue that it did stipulate Kittitas County's authority to require MRW facility compliance and to issue the NOVA with respect thereto. It has shown that Kittitas County's argument that failure to raise the constitutional and legal issues to the hearing examiner bars this Court's consideration thereof is not grounded in the authority which Kittitas County cites in support of the proposition and that this Court has indeed treated such issues as properly raised initially under RAP 2.5(a)(3) where the hearing examiner lacked jurisdiction to hear the issues at all. It has shown that absent the right to bring these issues on appeal, CSE would be deprived of the right to a judicial review thereof in conflict with judicial authority favoring such review and oversight. Finally, it has shown that the conflict of Kittitas County's interpretation of its own KCSWO to require an MRW Permit from KCPHD conflicts with a general law applicable to such oversight

and permitting that applies statewide and affects the ability of duly DOE permitted transporter/transfer operations such as CSE's operation from executing policy approved and declared by the Washington Legislature to entrust disposal of MRWs to DOE permitted transporters that, unlike solid waste operations permitted by local government, are legally authorized to accept, temporarily store, load, and transport for disposal MRWs with DWs to licensed disposal sites outside the jurisdiction of local government.

Respectfully submitted this 21st day of August, 2015.

Powers & Therrien, P.S.



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CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington, that on this day I served a true copy of this document on the following, properly addressed as follows:

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Dear Clerk of the Court:

Attached for filing in your usual manner is petitioners *Reply to Answer to Petition for Review* in the above-entitled matter. A hard copy will also be sent by regular mail.

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