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Court of Appeals No. 64868-3-I

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

KING COUNTY,

Appellant,

v.

LEO MCMILIAN

Respondent.

RESPONDENT'S OPENING BRIEF

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TABLE OF CONTENTS

I.	INTRODUCTION.....	1
II.	ASSIGNMENTS OF ERROR.....	2
III.	RESPONDENT’S STATEMENT OF THE CASE.....	3
III.	ARGUMENT.....	8
A.	LUPA STANDARD OF REVIEW.....	8
1.	Court Reviews Administrative Record.....	8
2.	LUPA’s Standards for Relief.....	9
3.	RCW 36.70C.130(1)(b): Errors of Law.....	9
4.	RCW 36.70C.130(1)(c): Errors of Fact.....	10
5.	RCW 36.70C.130(1)(d): Error of Application of Law to Facts.....	11
6.	RCW 36.70C.130(1)(f): Constitutional Violations	11
B.	OWNERSHIP OF REAL PROPERTY DOES NOT AFFECT ITS STATUS AS A LEGAL NONCONFORMING USE.....	12
1.	Hearing Examiner Decision.....	12
2.	Washington Law Protects Property Rights, Including Legal Nonconforming Uses.....	13

3.	Law Outside Washington is Consistent with the Proposition that Ownership is Irrelevant when Establishing a Legal Nonconforming Use.....	15
4.	King County Code is Consistent with Case Law by Analyzing the Use of Property as Opposed to its Ownership.....	26
5.	Status as a Trespasser is Also Irrelevant to Establishing a Legal Nonconforming Use.....	27
C.	MCMILIAN SATISFIED THE BURDEN OF PROOF TO SHOW A LEGAL NONCONFORMING USE.....	30
1.	The Reviewing Court Defers to the Finding that the Subject Parcel’s Continued Use as a Storage Yard Existed Prior to King County’s Zoning Laws of 1958.....	31
2.	The Use of the Subject Parcel as a Storage Yard was Lawful Prior to King County’s New Zoning Laws.....	34
3.	Use of Subject Parcel for Storage was Never Abandoned or Discontinued.....	37
D.	MCMILIAN WAS NOT CITED FOR ILLEGAL INTENSIFICATION AND THE ISSUE IS NOT PROPERLY BEFORE THIS COURT, THE HEARING EXAMINER REACHED NO LEGAL CONCLUSION ON THE ISSUE OF INTENSIFICATION, AND ANY INCREASE IN STORAGE IS LEGALLY PERMISSIBLE.....	40
E.	LAND USE DECISION VIOLATES MCMILIAN’S CONSTITUTIONAL RIGHTS.....	43

F.	KING COUNTY HELD MCMILIAN'S PERMIT HOSTAGE AND TOOK THE POSITION THAT THE STORAGE YARD WAS NOT A LEGAL NONCONFORMING USE.....	45
V.	REQUEST FOR ATTORNEY'S FEES	47
VI.	CONCLUSION.....	50

TABLE OF AUTHORITIES

Cases

<i>Abbey Road Group, LLC v. City of Bonney Lake</i> , 167 Wn.2d 242, 218 P.3d 180 (2009).....	43
<i>Akron v Klein</i> 171 Ohio St 207, 12 Ohio Ops 2d 331, 168 NE2d 564 (1960).....	21
<i>Bachman v. Zoning Hearing Bd. of Bern Tp.</i> , 508 Pa. 180, 494 A.2d 1102 (1985).....	18
<i>Baker v. Town of Sullivan's Island</i> , 279 S.C. 581, 310 S.E.2d 433 (Ct. App. 1983).....	20
<i>Barrett v. Hinds County</i> , 545 So. 2d 734 (Miss. 1989).....	20
<i>Bartz v. Board of Adjustment</i> , 80 Wn.2d 209, 492 P.2d 1374 (1972).....	20
<i>Beers v Board of Adjustment</i> 75 NJ Super 305, 183 A2d 130. (1962).....	19
<i>Biener v. Incorporated Village of Thomaston</i> , 85 A.D.2d 730, 445 N.Y.S.2d 808 (2d Dep't 1981).....	17
<i>Bowling Green v Miller</i> 335 SW2d 893, 87 ALR2d 1. (1960, Ky).....	21
<i>Brookville v Paulgene Realty Corp.</i> , 24 Misc 2d 790, 200 N.Y.S.2d 126 (1960), <i>aff'd</i> (2d Dept) 14 App Div 2d 575, 218 N.Y.S.2d 264, <i>aff'd</i> 11 NY2d 672, 225 NYS2d 750, 180 NE2d 905.....	16
<i>Bryant v. Joseph Tree, Inc.</i> , 119 Wn.2d 210, 829 P.2d 1099 (1992).....	39
<i>Budget Inn of Daphne, Inc. v. City of Daphne</i> , 789 So. 2d 154 (Ala. 2000).....	24
<i>Builders Builders Supply & Lumber Co. v. Village of Hillside</i> , 26 Ill. App. 2d 458, 168 N.E.2d 801 (1st Dist. 1960).....	22
<i>Citizens to Preserve Pioneer Park LLC v. City of Mercer Island</i> , 106 Wn. App. 461, 24 P.3d 1079 (2001).....	33

<i>City of University Place v. McGuire</i> , 102 Wn. App. 658, 9 P.3d 918 (2000).....	10, 13, 14
<i>Compton v. Zoning Hearing Bd. of Pennsbury Tp.</i> , 708 A.2d 871 (Pa. Commw. Ct. 1998).....	18
<i>County of Fayette v. Cossell</i> , 60 Pa.Cmwlt. 202, 430 A.2d 1226 (1981).....	24
<i>Cizek v. Concerned Citizens of Eagle River Valley, Inc.</i> , 49 P.3d 228 (2002).....	36
<i>Derby Refining Co. v Chelsea</i> , 407 Mass 703, 555 NE2d 534 (1990).....	16
<i>Donham v E.L.B., Inc.</i> 8 Ohio Misc 2d 31, 8 Ohio BR 573, 457 NE2d 953. (1983, CP Ct).....	21
<i>Dotson v. Haddock</i> , 46 Wn.2d 52, 278 P.2d 338 (1955).....	29
<i>Du Pont v. Dep't of Labor & Indus.</i> , 46 Wash.App. 471, 730 P.2d 1345 (1986).....	34
<i>Eitnier v. Kreitz Corp.</i> , 404 Pa. 406, 172 A.2d 320 (1961).....	19
<i>Enersen v. Anderson</i> , 55 Wn.2d 486, 348 P.2d 401 (1960).....	29
<i>Faircloth v Lyles</i> 592 So 2d 941(1991, Miss).....	20
<i>First Pioneer Trading Co., Inc. v. Pierce County</i> , 146 Wn. App. 606, 191 P.3d 928 (2008).....	31, 35
<i>Gibbons & Reed Co. v. North Salt Lake City</i> , 19 Utah 2d 329, 431 P.2d 559 (1967).....	23
<i>Griffin v. Thurston County</i> , 127 Wn. App. 609, 620, 154 P.3d 296 (2007).....	11
<i>Habitat Watch v. Skagit County</i> , 155 Wn.2d 397, 120 P.3d 56 (2005).....	48

<i>Harmel Corp. v. Members of Zoning Bd. of Review of Town of Tiverton</i> , 603 A.2d 303 (R.I. 1992).....	15
<i>Hawkins v Talbot</i> , 248 Minn 549, 80 NW2d 863 (1957).....	23
<i>Heroman v. McDonald</i> , 885 So. 2d 67 (Miss. 2004).....	20
<i>Hunter v. North Mason High School</i> , 85 Wash.2d 810, 539 P.2d 845 (1975).....	49
<i>Hyams v Amchir</i> , 57 N.Y.S.2d 77 (1945, Sup).....	16
<i>Iazzetti v Tuxedo Park</i> , 145 Misc 2d 78, 546 NYS2d 295 (1989, Sup)....	17
<i>Jefferson County v. Lakeside Industries</i> , 106 Wash.App. 380, 23 P.3d 542 (2001), review denied, 145 Wash.2d 1029, 42 P.3d 974 (2002).....	30
<i>Johnny Cake, Inc. v. Zoning Bd. of Appeals of Town of Burlington</i> , 180 Conn. 296, 429 A.2d 883 (1980).....	17
<i>Kastendike v Baltimore Asso. for Retarded Children, Inc.</i> 267 Md 389, 297 A2d 745 (1972)	19
<i>Keith v Saco River Corridor Com.</i> , 464 A2d 150 (Me. 1983).....	15
<i>Keller v. City of Bellingham</i> , 92 Wn.2d 726, 600 P.2d 1276 (1979).....	42
<i>Law v. City of Maryville</i> , 933 S.W.2d 873 (Mo. Ct. App. W.D. 1996)....	23
<i>Lobdell v. Sugar 'N Spice, Inc.</i> , 33 Wn. App. 881, 658 P.2d 1267, review denied, 99 Wash.2d 1016 (1983).....	39
<i>Mathews v. Eldridge</i> , 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976).....	41
<i>Miami Beach v Arlen King Cole Condominium Asso.</i> 302 So 2d 777, cert den (Fla) 308 So 2d 118 (1974, Fla App D3).....	23
<i>Minquadale Civic Association v. Kline</i> , 42 Del.Ch. 378, 212 A.2d 811 (1965).....	36

<i>Mission Springs, Inc. v. City of Spokane</i> , 134 Wn.2d 947, 954 P.2d 250 (1998).....	45
<i>Nagle v. Snohomish County</i> , 129 Wn. App. 703, 119 P.3d 914 (2005).....	10
<i>N. Pugliese, Inc. v. Palmer Tp. Zoning Hearing Bd.</i> , 140 Pa. Commw. 160, 592 A.2d 118 (1991).....	18
<i>Norco Constr., Inc. v. King Cy.</i> , 97 Wash.2d 680, 649 P.2d 103 (1982).....	44
<i>Pavlina v. City of Vancouver</i> , 122 Wn. App. 520, 94 P.3d 366 (2004).....	8
<i>People ex rel. Trebat v. City of Park Ridge</i> , 110 Ill. App. 2d 404, 249 N.E.2d 681 (1st Dist. 1969).....	22
<i>Peste v. Mason County</i> , 133 Wn. App. 456, 136 P.3d 140 (2006).....	12
<i>Poole v. Berkeley County Planning Com'n</i> , 200 W. Va. 74, 488 S.E.2d 349 (1997).....	19
<i>Post v. City of Tacoma</i> , 167 Wn.2d 300, 217 P.3d 1179 (2009).....	41
<i>Putnam Armonk, Inc. v Southeast</i> , 52 App Div 2d 10, 382 NYS2d 538 (1976, 2d Dept).....	17
<i>Rhod-A-Zalea & 35th, Inc. v. Snohomish Co.</i> , 136 Wn.2d 1, 959 P.2d 1024 (1998).....	13
<i>Rotter v. Coconino County</i> , 169 Ariz. 269, 818 P.2d 704 (1991).....	15
<i>Schofield v. Spokane County</i> , 96 Wn. App. 581, 980 P.2d 277 (1999).....	11
<i>Schneider v. Board of Appeals of City of Ottawa</i> , 402 Ill. 536, 84 N.E.2d 428 (1949).....	22
<i>Skokie v Almendinger</i> , 5 Ill App 2d 522, 126 NE2d 421. (1955, 1st Dist).....	22
<i>State v. Maloney</i> , 1 Wn. App. 1007, 465 P.2d 692 (1970).....	30

<i>State ex rel. Keeven v. City of Hazelwood</i> , 585 S.W.2d 557, 560 (Mo. Ct. App. E.D. 1979).....	23
<i>State ex. rel. Lige & Wm. B. Dickson Co. v. County of Pierce</i> , 65 Wn. App. 614, 829 P.2d 217 (1992).....	34, 39
<i>State ex rel. Miller v. Cain</i> , 40 Wn.2d 216, 242 P.2d 505 (1952).....	12
<i>State ex rel. Smilanich v. McCollum</i> , 62 Wn.2d 602, 384 P.2d 358 (1963).....	42
<i>The Lamar Co., LLC v. City of Fremont</i> , 278 Neb. 485, 771 N.W.2d 894 (2009).....	22
<i>Town of Coventry v. Glickman</i> , 429 A.2d 440 (R.I. 1981).....	16
<i>Town of Lyons v Bashor</i> , 867 P2d 159. (1993, Colo App).....	23
<i>Triangle Fraternity v. City of Norman Bd of Adjustment</i> , 2002 OK 80 (Okla 2002).....	23
<i>Warner v. Jerusalem Twp. Bd. of Zoning Appeals</i> , 63 Ohio Misc. 2d 385, 629 N.E.2d 1137 (C.P. 1993).....	21
<i>Watts v Helena</i> , 151 Mont 138, 439 P2d 767 (1968).....	15
<i>Wells v. Whatcom County Water Dist. No. 10</i> , 105 Wn. App. 143, 19 P.3d 453 (2001).....	8
<i>Wentworth Hotel, Inc. v. Town of New Castle</i> , 112 N.H. 21, 287 A.2d 615 (1972).....	16
<i>Willowbrook Farms LLP v. Dept. of Ecology</i> , 116 Wn. App. 392, 66 P.3d 664 (2003).....	10
<i>Wilson v. Employment Sec. Dep't</i> , 87 Wn. App. 197, 940 P.2d 269 (1997).....	11
<i>Urban v. Planning Bd. of Borough of Manasquan</i> , Monmouth County, N.J., 124 N.J. 651, 592 A.2d 240 (1991).....	19

<i>Valley View Industrial Park v. City of Redmond</i> , 107 Wn.2d 621, 733 P.2d 182 (1987).....	44
<i>Van Sant v. City of Everett</i> , 69 Wn. App. 641, 849 P.2d 1276 (1993).....	13
<i>Village of Valatie v. Smith</i> , 83 N.Y.2d 396, 610 N.Y.S.2d 941, 632 N.E.2d 1264 (1994).....	18
<i>Village of Skokie v. Almendinger</i> , 5 Ill.App.2d 522, 126 N.E.2d 421 (1955).....	25
<i>West Main Assocs. v. Bellevue</i> , 106 Wn.2d 47, 720 P.2d 782 (1986).....	44

Statutes

RCW 36.70C.....	1, 8
RCW 36.70C.120.....	9
RCW 36.70C.130(1).....	9
RCW 36.70C.130(1)(b).....	9,13
RCW 36.70C.130(1)(c).....	10
RCW 36.70C.130(1)(d).....	11, 34, 37
RCW 36.70C.130(1)(f).....	11
RCW 4.74.370.....	47
RCW 4.84.370.....	47, 48, 49
RCW 90.58	47

Other Authorities

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(Kenneth H. Young ed., 4th ed. 1996).....13

8A E. McQuillin, Municipal Corporations § 25.191 (3d.ed.1986).....38

RAP 18.1.....47,49

U.S. Const. amends. 5, 14.....44, 49

Washington Const. art. 1, § 12.....49

I. INTRODUCTION

McMilian owns an auto-wrecking business, and the real property upon which it is operated located at 37307 Enchanted Parkway South in unincorporated King County. His real property consists of two parcels (King County Parcel Nos. 3321049005 and 3321049038); the latter parcel number is the subject parcel of this appeal.

Despite the fact that the auto-wrecking business and adjoining storage yard had been consistently in use since prior to 1958, the date King County changed the zoning laws, King County cited McMilian. McMilian claimed a legal nonconforming use that permitted him to continue to operate his business despite the change in zoning.

A quasi-judicial hearing was held to determine if McMilian violations of King County Code with respect to the subject parcel. When the Hearing Examiner found against McMilian, he appealed pursuant to the Land Use Petition Act, RCW 36.70C (“LUPA”).

Respondent sought review by the King County Superior Court of a King County Hearing Examiner’s decision. The King County Superior Court found for McMilian in all respects as the first reviewing court.

King County now seeks review of the Hearing Examiner’s decision by this Appellate Court.

II. ASSIGNMENTS OF ERROR

McMilian hereby sets forth the following assignments of error. Consistent with the King County Superior Court opinion, the Hearing Examiner's erred in the following respects:

1. The Hearing Examiner erred in holding that McMilian could not establish a legal nonconforming use because of the status of his predecessor in interest, Mr. Horan, as a trespasser;
2. The Hearing Examiner erred in failing to find a legal nonconforming use given the substantial evidence presented that the subject parcel had been continually utilized as a storage yard in conjunction with the adjacent automobile wrecking business, since prior to 1958, the year King County implemented zoning laws;
3. The Hearing Examiner erred in failing to dismiss King County's untimely assertion of illegal intensification, given the fact that neither the initial Notice and Order, nor the Bill of Particulars, set forth any such charge;
4. The Hearing Examiner erred in issuing a decision that violated the Constitutional rights of McMilian;
5. The Hearing Examiner erred in failing to dismiss King County's charge for its own failure to issue McMilian's clearing permit which King County wrongfully withheld.

III. RESPONDENT'S STATEMENT OF THE CASE

McMilian owns two adjacent lots in King County. CP 941. There is no physical, visual, or topographic separation of the two lots. CP 941-42. McMilian and his predecessors in interest have used the two parcels, including the subject parcel at issue, for the auto wrecking yard operation, continuously since before 1957. CP 942; 285-286; 288; 811. In March 2002, McMilian purchased Astro Auto Wrecking (née Advanced Auto Parts, née Secome Salvage and Towing, Inc., née Mecklenberg Auto Wrecking). CP 939. When McMilian purchased his business, he believed he was purchasing an operation that included the storage yard on the property.¹ CP 941. When McMilian purchased Astro Auto Wrecking, LLC, the subject parcel had always been used by its prior owners to store trailers, equipment, vehicle hulks, and auto parts. CP 942; 285-286; 288. From in the 1940's and continuing into the late 1970's, an office and shed had been situated on the subject parcel as part of the wrecking yard operation. CP 811. McMilian initially, and naturally, observed that the storage yard on the subject parcel comprised part of Astro Auto Wrecking, LLC. Even Suzanne Pagett, a Washington State Patrol Trooper who

¹ The subject parcel at issue in this matter is primarily used for storage of vehicle hulks and automobile parts, while the parcel to the north contains the operational infrastructure for the auto wrecking business.

monitored (and still monitors) this particular auto wrecking operation for the past 12 years or more, believed that the auto wrecking operation spanned both parcels. CP 849-851; 857. Upon purchasing the business, McMilian discovered that the prior owner, Ritchie Horan, did not hold title to the subject parcel, but used the subject parcel as a storage yard from 1977 through 2002, with the full knowledge of the owners. The owners had even offered to sell the property to Mr. Horan. CP 814.

McMilian purchased the subject parcel in August of 2002, just five months after purchasing the business and continued to use the subject parcel in precisely the same manner and function as every prior owner of the business had, as a storage yard for the ongoing auto wrecking business. CP 945-948.

When McMilian took occupation of the parcels, he discovered massive amounts of auto parts stored upon the subject parcel, some clearly dating back to the 1930s. CP 942. For example, he found antique auto parts, including bus wheels that were so old they had wooden spokes. CP 942. Among other auto parts, he found and removed over 24 million pounds of tires alone that cost \$37,199.67 to remove. CP 104; 946. The sheer volume of parts attests to the long term use of the subject parcel as an auto wrecking yard; one cannot possibly acquire millions of pounds of tires without accumulating them for many, many years. The car parts he

and his predecessor, Mr. Horan, discovered on the subject parcel demonstrate the long-standing use of the site as a wrecking yard: they found parts from an Essex (produced from 1918 to 1922, when it was assumed by Hudson, that produced it until 1932), the Model A (1927-1931) and the Model T Ford (1908-1927). CP 942.

McMilian and the predecessor owners enjoyed loyal customers who patronized the wrecking yard in search of parts for decades. Those witnesses testified to continuously observing use of the subject parcel in conjunction with the auto wrecking business. CP 279-292. These witnesses' affidavits were provided to King County's Department of Development and Environmental Services ("DDES"), upon its request, attesting to their long-term familiarity with the subject parcel, and its continual use as a storage yard for its adjoining auto wrecking business. CP 81-88.

McMilian continued use of the subject parcel for nearly three years, removing old auto hulks and parts, and storing new auto hulks and parts. CP 948. In approximately March of 2005, McMilian wanted to remove some of the overgrown vegetation on the subject parcel in order to facilitate the removal of tens of thousands of tires lying beneath the vegetation, and to help facilitate more efficient use of the parcel for his auto wrecking operation. CP 945-948. McMilian hired Tim Pennington

to remove several large tree stumps that had been felled for lumber years before. CP 945-946. Pennington pushed the alders and underbrush to the west of the subject parcel in order to provide for more efficient use and maintenance of the subject parcel. CP 946-947.

When the alders were removed, McMilian installed silt fencing and planted 8-10 foot high native evergreen cedars along the border of the residential subdivision; the neighbors erected a 10-foot fence anyway. CP 944. Afterward, the storage yard that existed on the subject parcel for over 60 years was far more visible to the adjoining neighborhood.

In late March of 2005, King County DDES inspectors inspected the Property in response to complaints from the neighboring sub-division that McMilian had cleared the Property. CP 101. The inspectors concluded that the extent of McMilian's clearing warranted the issuance of a clearing/grading permit from King County DDES. CP 101-103. A case was opened and DDES asked McMilian to submit a clearing/grading permit application in approximately April of 2005. CP 101. On June 23, 2005, DDES inspector, Al Tijerina, visited the Property and concluded that there were no hazardously parked cars on the Property, and noted that McMilian's engineer, Bruce McVeigh, would be submitting the application forthwith. CP 102. Tijerina also noted that McMilian had erected the requisite 8-foot high, sight obscuring fence on the east side of

the Property, adjacent to the highway, but made no notation as to its being in violation of code. CP 102. On June 29, 2005, Tijerina noted he required a notarized affidavit from McMilian that describes the use of the subject parcel to verify dates of operation. CP 102. On June 30, 2005, Tijerina noted that the clearing/grading application had been completed. CP 102. On July 14, 2005, Tijerina noted that the clearing/grading permit had been issued and was awaiting documentation regarding the legal nonconforming use of the subject parcel. CP 103. In late July, McMilian submitted five affidavits from individuals with knowledge of the subject parcels' continuous use as a wrecking yard storage facility and wrecking yard office site dating back to before changes in zoning dating in 1958. CP 278-292. On January 27, 2006, some five and a half months later, inspector Robert Manns claims that the "issued permit" entry by Tijerina was erroneous, but gave no further explanation. CP 103. On January 26, 2007, one year later, DDES Supervisor Randy Sandin, issued a letter to Bruce McVeigh stating that the affidavits submitted with the clearing/grading packet are insufficient to establish nonconforming use. CP 89-93. On September 11, 2007, after another nine months, and after nearly two and a half years had lapsed, the DDES issued the Notice and Order to McMilian that is the genesis of this appeal. CP 39-41.

The specific violations cited by King County DDES were:

1. Operation of an auto wrecking business from a residential site that does not meet the requirements for a home occupation in violation of Section 21A.30.080 (and the allowed use section that the use would be under such as contractor's storage yard etc) of the King County Code.
2. Cumulative clearing and grading of over 7,000 square feet without the required permits, inspections, and approvals.
3. Construction of a fence over 6 feet in height without the required permits, inspections, and approvals in violation of Sections 21A.12.170, 21A.14.220 of the King County Code, and Section 105.2 of the International Building Code.

These were the violations before the Examiner, and now, this Court in its appellate capacity to review a quasi-judicial administrative proceeding.

IV. ARGUMENT

A. LUPA STANDARD OF REVIEW

1. Court Reviews Administrative Record

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

RCW 36.70C.120 provides:

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

2. LUPA's Standards for Relief

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

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

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

3. RCW 36.70C.130(1)(b): Errors of Law

Issues of law and legal conclusions are reviewed *de novo*.

Willowbrook Farms LLP v. Dept. of Ecology, 116 Wn. App. 392, 397, 66 P.3d 664 (2003) (internal citations omitted). “We defer to the agency’s interpretation of the law where the agency has special expertise in the relevant field. But we are not bound by the agency’s interpretation. And we may substitute our interpretation of the law for that of the agency.” *Id.*

The crux of the issue of law determined by the Hearing Examiner in this case is whether a nonconforming use status runs with the land, not with the *owner* of the land. See *City of University Place v. McGuire*, 102 Wn. App. 658, 669, 9 P.3d 918 (2000) (*rev’d on other grounds*). This is a pure issue of law, which enables the reviewing court to retain the ultimate authority to review the legal conclusion without deference to the Hearing Examiner, a non-lawyer. Despite King County’s assertion to the contrary, this narrow issue of law as determined by the agency is not within the King County Hearing Examiner’s special expertise to require deference.

4. RCW 36.70C.130(1)(c): Errors of Fact

Factual issues are judged by the reviewing court under the “substantial evidence” test, pursuant to RCW 36.70C.130(1)(c). “Under the substantial evidence standard, there must be a sufficient quantum of evidence in the record to persuade a reasonable person that the declared premise is true.” *Nagle v. Snohomish County*, 129 Wn. App. 703, 709, 119 P.3d 914 (2005) citing *Wilson v. Employment Sec. Dep’t*, 87 Wn. App.

197, 203, 940 P.2d 269 (1997).

5. RCW 36.70C.130(1)(d): Error of Application of Law to Facts

If the challenge is to the application of the law to the facts, “[t]he test is whether the reviewing court is left with the definite and firm conviction that a mistake has been committed. A reviewing court must be deferential to factual determinations by the highest forum below that exercised fact-finding authority.” *Citizens to Preserve Pioneer Park LLC v. City of Mercer Island*, 106 Wn. App. 461, 473-74, 24 P.3d 1079 (2001) (citing *Schofield v. Spokane County*, 96 Wn. App. 581, 980 P.2d 277 (1999)).

6. RCW 36.70C.130(1)(f): Constitutional Violations

The constitutionality of land use decisions are legal issues that are reviewed *de novo*. *Griffin v. Thurston County*, 127 Wn. App. 609, 620, 154 P.3d 296 (2007).

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

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

(internal citations omitted).

B. OWNERSHIP OF REAL PROPERTY DOES NOT AFFECT ITS STATUS AS A LEGAL NONCONFORMING USE

1. **Hearing Examiner Decision**

In his decision, the Hearing Examiner concluded, “The subject property does not benefit from a nonconforming use right to an auto wrecking yard or an auto storage yard.” CP 22. The Hearing Examiner provided the basis for reaching that legal conclusion:

Particularly given the context of nonconforming uses being disfavored in the law, and of the allowance of nonconforming uses to continue chiefly in order to respect private property rights [*State ex rel. Miller v. Cain*, 40 Wn.2d 216 at 221, 242 P.2d 505 (1952)], the requirement that there be a lawful establishment of the nonconforming use must logically conclude that it had been established under due property ownership or permission, *i.e.*, not merely by trespass, criminal or not. Mere silent acquiescence (as asserted) by lack of expression of a demand to vacate is insufficient to accord Mr. Horan a possessory or permission claim which would support a conclusion of legal nonconforming rights. It belies common sense to conclude that a person who operates a land use on property not owned by that person, without permission to operate such use, and without adverse possession, has established a lawfully operated use and a property right which must then be accorded disfavored nonconforming use status.

CP 22. Because this legal conclusion is completely inconsistent with Washington law, the land use decision is an erroneous interpretation of the law and McMilian is entitled to relief pursuant to RCW 36.70C.130(1)(b).

2. Washington Law Protects Property Rights, Including Legal Nonconforming Uses

Washington recognizes legal nonconforming uses as "vested rights" that cannot be taken away without the municipality having first satisfied a high burden of proof. *Van Sant v. City of Everett*, 69 Wn. App. 641, 649, 849 P.2d 1276 (1993). "A nonconforming use is a use which lawfully existed prior to the enactment of a zoning ordinance, and which is maintained after the effective date of the ordinance, although it does not comply with the zoning restrictions applicable to the district in which it is situated." *Rhod-A-Zalea & 35th, Inc. v. Snohomish Co.*, 136 Wn.2d 1, 6, 959 P.2d 1024 (1998) (quoting 1 ROBERT M. ANDERSON, AMERICAN LAW OF ZONING §.01 (Kenneth H. Young ed., 4th ed. 1996).

It is clear that in Washington, the nonconforming use status runs with the land, not with the owner of the land. *City of University Place v. McGuire*, 102 Wn. App. 658, 669, 9 P.3d 918 (2000) (*rev'd on other grounds*), provides:

The right to maintain a nonconforming use does not depend upon ownership or tenancy of the land on which the use is situated. The right attaches to the land itself; it is not personal to the current owner or tenant. Accordingly, a change in the ownership or tenancy of the nonconforming business or structure does not affect the right to continue the nonconforming use. 1 ANDERSON, *supra*, & 6.40, at 569-70 (footnotes omitted).

In City of University Place, supra, Division 2 of the Court of Appeals concluded that a landowner had abandoned a nonconforming use on the property in question. The Supreme Court reversed that decision, holding that the landowner had not abandoned the nonconforming use. *City of University Place v. McGuire*, 144 Wn.2d 640, 653, 30 P.3d 453 (2001). Despite the factual dispute involved in that case, the Court of Appeals and the Supreme Court agreed on the applicable law, as both courts repeatedly cite Anderson's American Law of Zoning with approval, and both courts held that a change in ownership or tenancy does not extinguish a nonconforming use. Cf. 102 Wn. App. at 669 and 144 Wn.2d at 459-460.

Despite all of the briefing on this legal issue to date, and despite the fact that the opinion of *City of University Place* is the only Washington law that squarely addresses the legal issue in this case, King County completely ignores the case in its Opening Brief. King County does not cite to any Washington authority questioning the soundness of the reasoning in *City of University Place*. King County fails in its Opening Brief to offer a principled reason for disturbing or distinguishing the holding of *City of University Place* from the instant case. Nor does a review of case law reveal a subsequent decision disagreeing with the reasoning or holding announced in *City of University Place*. Consequently, *City of University Place* remains good law to this day.

3. Law Outside Washington is Consistent with the Proposition that Ownership is Irrelevant when Establishing a Legal Nonconforming Use

The laws of the 9th Circuit, and other Circuit and State Courts are no different than Washington law in holding that ownership is not relevant to the evaluation of the manner in which real property has been used.²

9th Circuit

- *Watts v Helena*, 151 Mont 138, 439 P.2d 767 (1968) (subsequent purchasers of premises upon which nonconforming trailer parking business had been conducted had the right to continue the nonconforming use, just as it had been used prior to the passing of a zoning ordinance)
- *Rotter v. Coconino County*, 169 Ariz. 269, 272, 818 P.2d 704 (1991) (“the vested right to continue the nonconforming use runs with the land and is not personal to the owner of the use at the time the right vests.”)

1st Circuit

- *Keith v Saco River Corridor Com.*, 464 A.2d 150 (Me. 1983) (With nonconforming buildings or uses, it is building or land that is "grandfathered" and not the owner; once nonconforming use or building is shown to exist, neither is affected by user's title or possessory rights in relation to owner of land; when nonconformity legally exists, it is vested right which adheres to land or building itself, and right is not forfeited by purchaser who takes with knowledge of regulations inconsistent with existing use.)
- *Harmel Corp. v. Members of Zoning Bd. of Review of Town of Tiverton*, 603 A.2d 303 (R.I. 1992) (Lease of premises by non-

² The foreign jurisdiction cases cited in section II are not federal circuit court cases, but are listed by these geographical “circuit” regions simply for the benefit of a more organized presentation.

business corporation to business corporation did not destroy pre-existing non-conforming use where lessee business corporation's proposed use of premises was not substantially different from lessor non-business corporation's prior use of same premises.)

- *Town of Coventry v. Glickman*, 429 A.2d 440 (R.I. 1981) (Nonconforming use is alienable property interest and mere change in ownership does not destroy nonconforming use.)
- *Derby Refining Co. v Chelsea*, 407 Mass 703, 555 NE2d 534 (1990) (Trial court properly ruled that new owner of property, formerly used as nonconforming use, could continue to operate it as liquid asphalt storage facility in same manner as previous owner since mere sale of property lawfully used as nonconforming use did not, by itself, constitute abandonment, and since new owner's use of property did not constitute "change or substantial extension" of former owner's prior use.)
- *Wentworth Hotel, Inc. v. Town of New Castle*, 112 N.H. 21, 27, 287 A.2d 615 (1972) ("the proposed condominiums differ from apartments only in the type of ownership and the ordinance is not concerned with the type of ownership but with the number of families per building, the size of lots, and the character of the use.")
- *Town of Coventry v. Glickman*, 429 A.2d 440 (R.I. 1981) ("A mere change in ownership does not destroy the nonconforming use.")

2nd Circuit

- *Hyams v Amchir*, 57 N.Y.S.2d 77 (1945, Sup) (Subsequent purchasers of property on which nonconforming business was operated have right to continue such business to extent that prior owner did.)
- *Brookville v Paulgene Realty Corp.*, 24 Misc 2d 790, 200 N.Y.S.2d 126 (1960), affd (2d Dept) 14 App Div 2d 575, 218 N.Y.S.2d 264, affd 11 NY2d 672, 225 NYS2d 750, 180 NE2d 905 (Where defendants operated a school as an established pre-

existing nonconforming use when amendment to zoning ordinance was passed and school operator's predecessor in title had been duly issued certificate of occupancy permitting use of school premises as school and summer school and premises had been so used, amendment to zoning ordinance could not curtail defendants' right to continue its nonconforming use.)

- *Biener v. Incorporated Village of Thomaston*, 85 A.D.2d 730, 732, 445 N.Y.S.2d 808 (2d Dep't 1981) (“The fact that the petitioner purchased these lots subsequent to the amendment to the zoning ordinance is irrelevant. It is well settled that a change in the ownership of a nonconforming business or structure does not affect the right to continue the use and that a purchaser of land developed prior to the enactment of an ordinance is entitled to continue its use, although it does not conform to the zoning ordinance.”)
- *Putnam Armonk, Inc. v Southeast*, 52 App Div 2d 10, 382 NYS2d 538 (1976, 2d Dept) (Purchaser of land was entitled to same vested right to nonconforming use that vendor had established.)
- *Iazzetti v Tuxedo Park*, 145 Misc 2d 78, 546 NYS2d 295 (1989, Sup) (Municipality could base order to cease nonconforming use of property based on transfer in ownership of business that conducted nonconforming use where transfer occurred approximately 18 years before municipality issued order and where change in ownership of business was not grounds for termination under zoning ordinance, use that municipality sought to restrict had not changed by change in ownership, municipality could not condition allowance of nonconforming use on personal participation by owner of property in business conducted on property, and public interest was only affected by use of property, not by who was using property.)
- *Johnny Cake, Inc. v. Zoning Bd. of Appeals of Town of Burlington*, 180 Conn. 296, 429 A.2d 883 (1980) (“Where a nonconformity exists, it is vested right which adheres to the land itself. ‘And the right is not forfeited by a purchaser who takes with knowledge of the regulations which are inconsistent

with the existing use.’ 1 Anderson, American Law of Zoning (2d Ed.) s 6.37, p. 445.”)

- *Village of Valatie v. Smith*, 83 N.Y.2d 396, 404, 610 N.Y.S.2d 941, 632 N.E.2d 1264 (1994) (“It is true that, in the absence of amortization legislation, the right to continue a nonconforming use runs with the land.”)

3rd Circuit

- *N. Pugliese, Inc. v. Palmer Tp. Zoning Hearing Bd.*, 140 Pa. Commw. 160, 592 A.2d 118 (1991) (In action in which court determined that it was error for zoning hearing board to hold that purchaser of non-conforming property was not entitled to zoning variance due to fact that he had created own hardship when he bought with knowledge that lot was undersized, court stated that right to develop non-conforming lot was not personal to owner of property at time of enactment of ordinance but ran with land and vested in subsequent buyers; inasmuch as right ran with land, it made no difference whether application for variance had been sought by original owner or successor in title.)
- *Compton v. Zoning Hearing Bd. of Pennsbury Tp.*, 708 A.2d 871 (Pa. Commw. Ct. 1998) (Right to continue nonconforming use, once established and not abandoned, runs with the land, and right is not confined to any individual or corporation.)
- *Bachman v. Zoning Hearing Bd. of Bern Tp.*, 508 Pa. 180, 494 A.2d 1102 (1985) (Owner's sale of portion of his property on which buildings used for nonconforming purposes were located to federal government in lieu of condemnation extinguished his right to continue nonconforming use, so that buildings could not be moved to remaining portion of his property and nonconforming use resumed, since nonconforming uses are allowed for only so long as owner does not receive adequate compensation from government and sale of property under threat of condemnation provided such compensation.)
- *Arkam Machine & Tool Co. v Lyndhurst* 73 NJ Super 528, 180 A2d 348. (1962). (Where proofs revealed constriction rather

than enlargement of nonconforming use even though the premises were used by two different manufacturing concerns instead of one as before, there was no cogent reason to sustain action of board of adjustment in denying certificate of occupancy for nonconforming use in residence zone in view of the fact that the test to be applied is "use" and not ownership or tenancy.)

- *Urban v. Planning Bd. of Borough of Manasquan*, Monmouth County, N.J., 124 N.J. 651, 656-57, 592 A.2d 240 (1991) (“At the same time, the nonconforming rights run with the land irrespective of changes in ownership. That principle is consistent too with our view that the status of land use does not turn on the status of ownership.”)
- *Eitnier v. Kreitz Corp.*, 404 Pa. 406, 172 A.2d 320 (1961) (Right to continue nonconforming use, once established and not abandoned, runs with land and this right is not confined to any one individual or corporation.)
- *Beers v Board of Adjustment* 75 NJ Super 305, 183 A2d 130. (1962) (Owner of dwellings constituting valid nonconforming use under zoning ordinance setting minimum residential lot size and frontage requirements was entitled to convey dwellings to tenants, mere change from tenant occupancy to owner occupancy not being extension or alteration of previous nonconforming use of dwellings.)

4th Circuit

- *Kastendike v Baltimore Asso. for Retarded Children, Inc.* (1972) 267 Md 389, 297 A2d 745 (citing annotation). (Change of ownership of property, and change from nursing home to home for retarded adults, would not destroy nonconforming use.)
- *Poole v. Berkeley County Planning Com'n*, 200 W. Va. 74, 488 S.E.2d 349 (1997) (Change of ownership through salvage yard owner's acquisition of yard after enactment of county zoning ordinance requiring permit for salvage yards did not terminate preexisting lawful, nonconforming use of property as salvage

yard and, thus, owner was entitled to grandfather exception to ordinance permit requirement, in light of Division of Highways regulation allowing yard to continue to be operated in accordance with statutes and regulations in effect when yard was initially licensed by Division to prior yard owner, where there was no interruption or abandonment of preexisting nonconforming use of property. Code, 17-23-3, 17-23-4; Berkeley County, W.Va., Ordinance No. 1201.4.)

- *Baker v. Town of Sullivan's Island*, 279 S.C. 581, 310 S.E.2d 433 (Ct. App. 1983) (Proposed conversion of real property from apartment building to condominiums was change of ownership rather than change of use, requiring town to approve despite building's nonconformance to current zoning regulation.)

5th Circuit

- *Faircloth v Lyles* 592 So 2d 941(1991, Miss). (Prohibition in ordinance against transfer of non-conforming uses with land was invalid; right to continue non-conforming use is not personal right, but one that runs with land, and that right may not be terminated or destroyed by change of ownership of property.)
- *Heroman v. McDonald*, 885 So. 2d 67, 70-71 (Miss. 2004) (“In balancing the respective rights and duties of property owners, zoning boards, and community intervenors in continuation of nonconforming use disputes, the Court must be reminded that the right to continue a nonconforming use is not a personal right but one that runs with the land. It follows, as night follows day, that this right may not be terminated or destroyed by change of ownership of property alone.”)
- *Barrett v. Hinds County*, 545 So. 2d 734, 737 (Miss. 1989) (“The nature of the right to a non-conforming use is a property right. It has been held that the right to continue a non-conforming use, once established and not abandoned, runs with the land.”)

6th Circuit

- *Akron v Klein* 171 Ohio St 207, 12 Ohio Ops 2d 331, 168 NE2d 564 (1960)
(Junk yard owner, who purchased land on which former junk yard operated, but did not succeed in any way to former owner's junk yard business, was entitled to continue operating business as nonconforming use in residential use district in that where zoning ordinance provided that lawful use of any land or premises existing at time of its enactment may be continued as nonconforming use, ordinance continued right to use land or premises in residential use district in business of same kind as, although it did not represent any continuation or part of, particular business that was being conducted on land or premises at time of enactment of zoning ordinance.)
- *Bowling Green v Miller* 335 SW2d 893, 87 ALR2d 1. (1960, Ky) (Where new city zoning ordinance was enacted designating as residential area a street on which there was then located a commercial-type building which had been vacant for 9 months but had previously been occupied by a furnace company and used to display furnaces and parts, 9 months' vacancy did not terminate buildings well-established commercial use within meaning of ordinance providing that established use of land or structure existing at time of its enactment might be continued although not in conformity with permitted use specified by ordinance.)
- *Donham v E.L.B., Inc.* 8 Ohio Misc 2d 31, 8 Ohio BR 573, 457 NE2d 953. (1983, CP Ct) (Change of ownership is not considered a change of use.)
- *Warner v. Jerusalem Twp. Bd. of Zoning Appeals*, 63 Ohio Misc. 2d 385, 629 N.E.2d 1137 (C.P. 1993) (“Use, predating zoning resolution, which is made impermissible by such resolution, may be continued by owner and her successors until such pre-existing use is voluntarily discontinued.”)

7th Circuit

- *Skokie v Almendinger*, 5 Ill App 2d 522, 126 NE2d 421. (1955,

1st Dist) (Where lot was used by plaintiffs for operation of trailer camp without knowledge or consent of owner and lot thereafter was placed by village ordinance in residential zone and plaintiffs afterward acquired title to such lot, plaintiffs were entitled to continue nonconforming use of lot under statute creating doctrine of nonconforming uses even though they had not owned lot at the time the ordinance became effective.)

- *Schneider v. Board of Appeals of City of Ottawa*, 402 Ill. 536, 84 N.E.2d 428 (1949) (Purchasers, although having knowledge of provisions of zoning ordinance and physical condition of property, are entitled to same right to nonconforming use under ordinance as grantors, and fact that property was designated on zoning map which was part of ordinance as occupied by conforming use when in fact it was occupied by lawful nonconforming use does not deprive property of its nonconforming use.)
- *People ex rel. Trebat v. City of Park Ridge*, 110 Ill. App. 2d 404, 249 N.E.2d 681 (1st Dist. 1969) (There was no abandonment of nonconforming use where former owner of premises operated as nonconforming restaurant filed petition in bankruptcy and use of property was discontinued for seven months before its acquisition by new owners who shortly thereafter applied for restaurant remodeling permit.)
- *Builders Builders Supply & Lumber Co. v. Village of Hillside*, 26 Ill. App. 2d 458, 168 N.E.2d 801 (1st Dist. 1960) (Rights of former owner of property protected by zoning ordinance exemption were not extinguished by foreclosure and sale for delinquent taxes, so that one holding title through such foreclosure succeeded to rights of predecessor in title.)

8th Circuit

- *The Lamar Co., LLC v. City of Fremont*, 278 Neb. 485, 771 N.W.2d 894 (2009). (The right to maintain a legal nonconforming use runs with the land, meaning it is an incident of ownership of the land, and is not a personal right; therefore, a change in the ownership or tenancy of a

nonconforming business or structure which takes advantage of the nonconforming rights does not affect the current landowner's right to continue the nonconforming use.)

- *Hawkins v Talbot*, 248 Minn 549, 80 NW2d 863 (1957) (citing annotation). (Mere change in ownership of land does not, in itself, constitute an extension of nonconforming use.)
- *Law v. City of Maryville*, 933 S.W.2d 873 (Mo. Ct. App. W.D. 1996) (Use of property by prior owner conformed to new zoning restriction so that purchaser could not claim nonconforming use protection.)
- *State ex rel. Keeven v. City of Hazelwood*, 585 S.W.2d 557, 560 (Mo. Ct. App. E.D. 1979) (“The legality of a nonconforming use of property is vested by the use and not by the ownership or tenancy.”)

10th Circuit

- *Gibbons & Reed Co. v. North Salt Lake City*, 19 Utah 2d 329, 431 P.2d 559 (1967). (Lawful existing nonconforming uses are not eradicated by a mere change in ownership.)
- *Town of Lyons v Bashor*, 867 P2d 159. (1993, Colo App) (Property's exemption from town's zoning regulations as prior nonconforming use runs with land; therefore, right to continue nonconforming use did not terminate with division of lot by dissolution of marriage court and/or sale by ex-wife of her half of lot to third party.)
- *Triangle Fraternity v. City of Norman Bd of Adjustment*, 2002 OK 80 (Okla 2002) (“use must remain the same for change of ownership not to effect status as valid nonconforming use”)

11th Circuit

- *Miami Beach v Arlen King Cole Condominium Asso.* 302 So 2d 777, cert den (Fla) 308 So 2d 118 (1974, Fla App D3) (Where owner desired to convert valid nonconforming use apartment building into condominium, changing type of ownership of real

estate did not destroy valid existing nonconforming use.)

- *Budget Inn of Daphne, Inc. v. City of Daphne*, 789 So. 2d 154 (Ala. 2000) (“[A]n existing nonconforming use is a vested property right that a zoning ordinance may not abrogate except under limited circumstances. The general rule is that a mere change in legal ownership or operating name is not one of those circumstances.”)

One case from Pennsylvania is directly on point. In *County of Fayette v. Cossell*, 60 Pa.Cmwlt. 202, 430 A.2d 1226 (1981), the property owner operated an automobile recycling business in conflict with zoning ordinances.

The chancellor found that, from a period pre-dating the zoning ordinance until the Cossells purchased the property, Mr. Rose, an adjacent landowner, had used 40% of the land at issue to store junked automobiles. Although Mr. Rose did not have a lease or any other formal permission from the Cossells' predecessor in title to use the property to store junked vehicles, the trial court held that Mr. Rose's use of the property established a nonconforming use in the nature of an auto junkyard which the Cossells had a right to continue.

Id. at 203-04. The County of Fayette asserted that the lack of permission (“trespass”) precluded the establishment of a non-conforming use. The Pennsylvania Supreme Court disagreed.

Here the county does not contend, nor does the record indicate, that storage of junked automobiles on the property was unlawful as an activity or land use before the zoning ordinance became effective. In the case before us, the only unlawful aspect was Mr. Rose's possession of the property without the owner's permission.

Zoning law has no application to the resolution of disputes between private parties over real estate interests. Our Supreme Court and this court have enunciated that principle in analogous cases holding that zoning status is unaffected by building and use restrictions created by private contract, and, if they are violated, the remedy is enforcement of the restrictions in a court by the persons entitled to enforcement, not by way of zoning proceedings. Therefore, we hold that the existence of a nonconforming use is not affected by the user's title or possessory rights in relation to the owner of the land.

Consequently, we are convinced by the record before us that a nonconforming junkyard use exists as to the property. Once a nonconforming use has been established, it runs with the land and the continued right so to use the land is not confined to any one individual.

Id. at 205 (internal citations omitted). Just as in *County of Fayette*, this Court should hold that the subsequent (alleged, but unproven) “trespass” by Mr. Horan (a “trespass” that would had had to occur for over 25 years, from 1977 through 2002) has no bearing on the status of the subject parcel’s status as a nonconforming use, which was established pre-1958.

Other jurisdictions have also held in similar situations to the instant case that the status of the owner of real property is not relevant to its use. In *Village of Skokie v. Almendinger*, 5 Ill.App.2d 522, 126 N.E.2d 421 (1955), the business owner used adjoining lots for a trailer park. In that case, the business had no title, nor consent, to such use of one of the lots, until a subsequent purchase of the lot. The municipality claimed that the business could not benefit as it was a trespasser or squatter and therefore, a

“wrongdoer”. The Illinois Court rejected that argument:

Consequently we think defendants should have the benefit of the nonconforming-use provision of the statute. What the rights of the owner of lot 57 were with respect to the use of the property made by defendants before they acquired title were matters of concern only to the owner and the defendants. The former owner had an election, and he could have claimed that use as a nonconforming one. Having acquired title, defendants now stand in the same position that the owner occupied before the conveyance was made.

Id. at 528. Just as in *Village of Skokie*, McMilian purchased the property from its former owner so that he would have legal title to the subject parcel upon which to continue his business. Just as in *Village of Skokie*, McMilian should stand in the same position as the prior owner, and should be able to benefit from the status of a nonconforming use.

4. King County Code is Consistent with Case Law by Analyzing the Use of Property as Opposed to its Ownership

In the present case King County Code 21A.06.080,

Nonconformance, provides:

Nonconformance: any *use*, improvement, or structure established in conformance with King County rules and regulations in effect at the time of establishment that no longer conforms to the range of *uses* permitted in the site’s current zone or to the current development standards of the code due to changes in the code or its application to the subject property.

King County Code 21A.08.010, Establishment of uses, provides:

The *use* of a property is defined by the activity for which

the building or lot is intended, designed, arranged, *occupied*, or *maintained*. The *use* is considered permanently established when that *use* will or has been in continuous operation for a period exceeding sixty days. A use which will operate for less than sixty days is considered a temporary use, and subject to the requirements of K.C.C. 21A.32 of this title. All applicable requirements of this code, or other applicable state or federal requirements, shall govern a use located in unincorporated King County.

The plain and unambiguous language of the King County Code does not incorporate language such as: “ownership”, “possessory interest”, “legal occupation”, or anything of that nature as a prerequisite to establishing a legal nonconforming use. Instead, consistent with Washington law, the King County Code emphasizes the “use” of the land and whether or not that “use” was “established in conformance with King County rules and regulations in effect at the time of establishment...” Nothing in the King County Code requires ownership of real property to establish nonconformance.

5. Status as a Trespasser is Also Irrelevant to Establishing a Legal Nonconforming Use

In this case, the evidence showed that storage yard of the automobile wrecking business commenced on the subject parcel as early as the 1940s and continues through this day. King County asserts that because Mr. Horan did not hold legal title to the subject parcel, he should be deemed a “trespasser” and that status alone should defeat the status of

the nonconforming use.

The King County Superior Court, in review of this case, held, “lawful sue relates to whether the use was lawful under the zoning laws in effect, not whether the user was a trespasser.” CP 732-738. The King County Superior Court cited *Keith v. Saco River Corridor Com.*, 464 A.2d 150 (Me 1983) in support of that holding. The relevant language of the Supreme Judicial Court of Maine is as follows:

Also, the central point to be kept in mind when dealing with nonconforming buildings or uses is, that it is the building or the land that is "grandfathered" and not the owner. Once a nonconforming use or building is shown to exist, neither is affected by the user's title or possessory rights in relation to the owner of the land. Where a nonconformity legally exists, it is a vested right which adheres to the land or building itself and the right is not forfeited by a purchaser who takes with knowledge of the regulations which are inconsistent with the existing use. *Keith* at 154 (internal citations omitted).

King County’s argument also fails on the facts. Significantly, there is no evidence on the record that Mr. Horan was, in fact, a trespasser. The Hearing Examiner never found that Mr. Horan was a “trespasser” but merely analyzed Mr. Horan’s interest in the property as neither an owner nor someone who had express permission to use the subject parcel. CP 21-22. On that basis, the Hearing Examiner then concluded that Mr. Horan lacked the legal basis to establish a “lawfully operated use”.

Mr. Horan continued the operation of the storage yard on the

subject parcel from 1977 through 2002, with the knowledge of the title holder. CP 812-815. Mr. Horan was never asked to leave, was never sued, was never evicted, nor prosecuted. Instead, the evidence demonstrates that Mr. Horan could have asserted a successful claim for adverse possession, and, at one point, the heirs to the property offered to sell it to Mr. Horan. King County has no standing to assert, much less litigate, the property interests of two private parties.³ Regardless, King County presented no evidence of trespass, but cites only Mr. Horan's admission that he used the property without having an express invitation. A licensee is defined as "one who goes upon the premises of another, either without any invitation, express or implied, or else for some purpose not connected with the business conducted on the land, but goes nevertheless with the permission or at the toleration of the owner." *Enersen v. Anderson*, 55 Wn.2d 486, 488, 348 P.2d 401 (1960) *citing* *Dotson v. Haddock*, 46 Wn.2d 52, 278 P.2d 338 (1955). Mr. Horan was certainly a licensee and not a trespasser.

Notably, the term "trespass" appears nowhere in the King County Code, yet, the King County asserts a self-serving conclusion that a

³ The Hearing Examiner acknowledged at CP 22, fn. 3 that he had no authority to adjudicate a claim of adverse possession.

trespasser cannot establish a legal nonconforming use under its Code.⁴

King County seeks a ruling from this Court to “not extend legal nonconforming use protection to those who enter property without permission of the owner.”⁵ Not only is King County asking this Court to disregard Washington’s well-established precedential law, but it is seeking an advisory opinion because there is no evidence that McMilian and/or any predecessors in interest ever entered the property against the will of the owner. “Appellate courts do not give advisory opinions.” *State v. Maloney*, 1 Wn. App. 1007, 1009, 465 P.2d 692 (1970).

The question of whether or not an occupant of property has legally entered the property bears no relevance to the lawful use of the property as a storage yard prior to King County zoning laws.

C. MCMILIAN SATISFIED THE BURDEN OF PROOF TO SHOW A LEGAL NONCONFORMING USE

Washington law allows preexisting legal nonconforming uses to continue in spite of a subsequent contrary zoning ordinance. *Jefferson County v. Lakeside Industries*, 106 Wash.App. 380, 385, 23 P.3d 542 (2001), *review denied*, 145 Wash.2d 1029, 42 P.3d 974 (2002). But an applicant asserting a prior legal nonconforming use bears the initial burden to prove that (1) the use existed before the county enacted the zoning ordinance; (2) the use was lawful at the time; and (3) the applicant did not abandon or discontinue

⁴ Appellant’s Opening Brief, page 17.

⁵ Appellant’s Opening Brief, page 19.

the use for over a year.

First Pioneer Trading Co., Inc. v. Pierce County, 146 Wn. App. 606, 614, 191 P.3d 928 (2008).

1. The Reviewing Court Defers to the Finding that the Subject Parcel's Continued Use as a Storage Yard Existed Prior to King County's Zoning Laws of 1958.

In support of the use of the subject parcel being used as a storage yard for the adjoining automobile wrecking yard, McMilian produced a) testimony from Mr. Horan, who had personal knowledge of the operation and office that had been located on the subject parcel since the 1930s, when he was a young boy (CP 811); b) photographs of an office and shed on the subject parcel from King County Tax Records dated in 1945 (CP 97); c) affidavits from long-time patrons of the business (CP 81-88), including Harry Horan (from 1957), Bert Willard (from 1957), James Hutchens (from 1971), and A. Richard Hilton (from 1980); d) live testimony from Washington State Patrol inspector Suzanne Pagett (from 1997) (CP 848-857); e) live testimony from McMilian (from 2001) (CP 939-990); f) live testimony from contractor Tim Pennington (from 2002); g) live testimony from civil engineer Bruce MacVeigh (CP 927-938); and h) vendor reports relating to the extensive amount of tires removed and disposed of from the subject parcel (from 2005) (CP 104). All of the

testimony presented from the long-time patrons supported the continuous use of the subject parcel as a storage yard.

The Hearing Examiner found the evidence presented by McMilian sufficiently compelling to establish that the subject parcel had, in fact, been continually used as a storage yard for auto parts since before 1958, the date King County implemented its zoning laws:

An auto wrecking business has long been conducted on the property directly abutting to the north, under a series of ownerships. During prior ownerships, some spillover of the auto wrecking operation occurred onto the subject property, which was not owned by the prior ownerships of the auto wrecking business (it was purchased by Appellants after their purchase of the main Astro Auto Wrecking site abutting to the north). The spillover consisted of *storage* of some wrecked and dismantled cars and *numerous* junk auto parts and tires. The property was not utilized in active auto wrecking operations as was the main operation to the north.

(CP 20). The Examiner concluded that McMilian presented sufficient evidence of *storage* of wrecked and dismantled cars that occurred on the Property since before 1958. The Examiner also concluded that storage occurred on the Property during prior ownerships, i.e. multiple ownerships. The record demonstrates “a sufficient quantum of evidence in the record to persuade a reasonable person that the declared premise is true.” *Nagle* at 709.

Now, King County asks this reviewing court to independently *evaluate* and *weigh* the evidence presented in order to hold that Ms.

Mecklenberg's affidavit from 1978 is more pertinent and critical to the issue⁶, and thus, the evidence presented by McMilian is insufficient to conclude that the subject parcel was used as a storage yard since prior to 1958. (CP 105). A reviewing court "view[s] the evidence and any reasonable inferences in the light most favorable to the party that prevailed in the highest forum exercising fact finding authority." Significantly, this is because when reviewing factual issues under the substantial evidence test, the reviewing court defers to "the factfinder's views regarding the credibility of witnesses and the weight to be given reasonable but competing inferences." *City of University Place* at 652. In this case, the Hearing Examiner's factual findings favored McMilian's position, while the ultimate legal conclusion favored King County because of the manner in which the Hearing Examiner applied the law. Nevertheless, it is the function of the reviewing court to defer to the fact finding authority, irrespective of which party prevailed under an erroneous application of the law. "A reviewing court must be deferential to factual determinations by the highest forum below that exercised fact-finding authority." *Citizens to Preserve Pioneer Park* at 473-74. "A tribunal with only appellate jurisdiction is not permitted or required to make its own findings, and such

⁶ Ms. Mecklenberg's declaration does not contradict McMilian's evidence at all, but King County focuses on the reference to a fence and its own interpretation of her testimony to support its assertion.

findings, if entered, are surplusage.” *State ex. rel. Lige & Wm. B. Dickson Co. v. County of Pierce*, 65 Wn. App. 614, 618, 829 P.2d 217 (1992).

The trial court's credibility determinations and its resolution of the truth from conflicting evidence will not be disturbed on appeal. *Garofalo*, 169 Wash. at 705, 13 P.2d 497 (credibility); *Du Pont v. Dep't of Labor & Indus.*, 46 Wash.App. 471, 479, 730 P.2d 1345 (1986) (resolving truth from conflicting evidence).

Because the fact-finder determined that the subject parcel had long been utilized as a storage yard for auto parts over a series of successive ownerships, McMilian satisfied his burden to show that a sufficient quantum of evidence exists to support his premise of the pre-zoning law use of the subject parcel as a storage yard. This is a challenge to the application of the law to the facts under RCW 36.70C.130(1)(d) because McMilian would have prevailed under the factual determination, but for the error of law committed by the Hearing Examiner requiring ownership in order to establish a legal nonconforming use. Thus, McMilian satisfied the burden of proving the first element.

2. The Use of the Subject Parcel as a Storage Yard was Lawful Prior to King County's New Zoning Laws

The only reference to a “lawful use” by the Hearing Examiner is as follows,

It belies common sense to conclude that a person who operates a land use on property not owned by that person,

without permission to operate such use, and without adverse possession, has established a lawfully operated use and a property right which must then be accorded disfavored nonconforming use status.

(CP 22). There is no dispute that prior to King County Implementing New Zoning Laws in 1958, the subject parcel was not subject to any zoning ordinance. Instead, King County confuses the meaning of “legal” when associated with the phrase “nonconforming use” and focuses on the status of the occupier rather than on the use of the property. King County contends that the use of the subject parcel was not lawful because of its assertion that Mr. Horan was a trespasser, and use of real property by a trespasser is not “legal”. (This issue has been exhaustively briefed above, for the sake of judicial efficiency, it is incorporated herein by reference.)

King County’s citation to *First Pioneer Trading Co., Inc. v. Pierce County*, 146 Wn. App. 606, 191 P.3d 928 (2008) is factually distinguishable from the facts in this case. In *First Pioneer*, no lawful nonconforming use was found because the property owner failed to establish “the existence of a legal, preexisting use.” *Id.* at 617. The property owner in that case submitted no proof that the property had ever been used to conduct a business. *Id.* In this case, McMilian demonstrated evidence of an extensive history of the business operation, and in particular, the storage yard. Despite King County’s assertion to the

contrary, McMilian presented photographic evidence of an office and shed associated with the storage yard, unlike the landowner in *First Pioneer*.

King County's citation to *Cizek v. Concerned Citizens of Eagle River Valley, Inc.*, 49 P.3d 228 (2002) is also factually distinguishable. The Alaska Supreme Court did not hold that the status of a trespasser in that case defeated the claim of a lawful, nonconforming use, but merely considered the *frequency* of use by the unauthorized pilots on the airstrip and found that use was not continuous. "Regardless of what legal theories Concerned Citizens advanced to meet its burden, the dispositive legal issue always involved the question of whether there was sufficient legal use of the airstrip to continue the nonconformity-not just whether McElhany and Evans were trespassers." *Id.* at 235. In our case, the subject parcel was used consistently as a storage yard for decades, as was evidenced by the 24 million pounds of tires and the antique auto parts remaining on the property. The possible status of a trespasser is irrelevant, even under this case cited by Appellant King County.

Two cases cited by King County held that insufficient evidence existed to support a nonconforming use. In *Minquadale Civic Association v. Kline*, 42 Del.Ch. 378, 385, 212 A.2d 811 (1965), the nonconforming use was not defeated because of the status of a trespasser, but because a) the operation of the business "had ceased for a period of almost two years

before the adoption of the Zoning Code”; b) only “casual or occasional use of property” had been established; and because there would be an *expansion* of a non-conforming use to an adjoining parcel. Likewise, in *Mallet v. Loux*, the nonconforming use was not defeated solely because of the status of a trespasser: “If boats were stored, the users were at best trespassers, the use intermittent, and the time of such use indefinite. A nonconforming use may not be erected on so insubstantial a foundation.” *Id.* at 413. Neither *Minquadale* nor *Mallet* support any black-and-white rule that a nonconforming use is automatically defeated by a trespasser.

This is also a challenge to the application of the law to the facts under RCW 36.70C.130(1)(d) because McMilian would have prevailed under the factual determination, but for the error of law committed by the Hearing Examiner prohibiting a trespasser to maintain a legal nonconforming use. Thus, McMilian satisfied the burden of proving the second element.

3. Use of Subject Parcel for Storage was Never Abandoned or Discontinued

McMilian presented substantial evidence of the continued use of the subject parcel as a storage yard since the 1930s, through numerous live witnesses, affidavits, and documentary evidence. The fact that he removed overgrown vegetation in early 2005 in order to gain better access

to the automobile parts in the storage yard, and then removed 24 million pounds of tires and antique cars between 2006 and 2008 from the subject parcel, leads to no other logical conclusion.

Significantly, however, King County bears the burden of showing abandoned or discontinued use.

Once the applicant establishes that such a legal nonconforming use existed before enactment of a contrary zoning ordinance, the burden of proof shifts to the municipality to show that the applicant abandoned or discontinued the use after the ordinance's enactment. *Van Sant*, 69 Wash.App. at 648, 849 P.2d 1276 (citing 8A E. McQuillin, Municipal Corporations § 25.191 (3d ed.1986)).

First Pioneer at 614. This Court of Appeals held, in *Van Sant* at 648:

This burden of proof is not an easy one.

The abandonment of a nonconforming use ordinarily depends upon a concurrence of two factors: (a) An intention to abandon; and (b) an overt act, or failure to act, which carries the implication that the owner does not claim or retain any interest in the right to the nonconforming use.

The Hearing Examiner stopped his legal analysis as to whether a legal nonconforming use was established by McMilian once he concluded that a trespasser could not maintain the required legal use. The Hearing examiner determined:

... the secondary issues as to whether a nonconforming use was abandoned and/or discontinued, on the other side of the coin, whether it may be intensified from that asserted to have previously existed, are moot and need not be decided here for the disposition of the appeal.

(CP 22). Since the Hearing Examiner failed to enter any finding that the nonconforming use was abandoned or discontinued for more than one year, this reviewing court cannot defer to any finding of fact.

In such situations, instead of remanding a matter to the trial court for a factual finding, an appellate court may independently review evidence consisting of written documents and make the required findings. *See Lobdell v. Sugar 'N Spice, Inc.*, 33 Wash.App. 881, 887, 658 P.2d 1267, review denied, 99 Wash.2d 1016 (1983).

Bryant v. Joseph Tree, Inc., 119 Wn.2d 210, 222, 829 P.2d 1099 (1992).

King County relies solely upon the testimony of the new neighbors, who could not see the automobile parts that were buried and strewn throughout the storage yard before 2005 because of the extensive vegetation, in support of the proposition that McMilian abandoned the subject parcel between 2003 and 2005. Yet, King County ignores the fact that the subject parcel continued to store millions of pounds of debris throughout that period. Just as in the court found no abandonment of a storage yard in *State ex. rel. Lige & Wm. B. Dickson Co. v. County of Pierce*, supra, the record in our case is similarly replete with assertions from McMilian, as well as documentation of substantial aged material removed from the storage yard between 2006 and 2008, to find that the storage yard was not abandoned for a year or more. Even a lease of part of the property used as a storage yard would not interrupt the use of the

property as a whole. *Id.* Simply because the neighbors did not personally observe the full extent of the use of the property does not mean the storage yard was abandoned.

D. MCMILIAN WAS NOT CITED FOR ILLEGAL INTENSIFICATION AND THE ISSUE IS NOT PROPERLY BEFORE THIS COURT, THE HEARING EXAMINER REACHED NO LEGAL CONCLUSION ON THE ISSUE OF INTENSIFICATION, AND ANY INCREASE IN STORAGE IS LEGALLY PERMISSIBLE.

McMilian was not cited for intensifying a nonconforming use. The only violation relating to nonconforming use is as follows:

- a. Operation of an auto wrecking business from a residential site in violation of Section 21A.30.080 of the King County Code;

Despite King County's assertion to the contrary, the Hearing Examiner reached no legal conclusion on the question of intensification:

... the secondary issues as to whether a nonconforming use was abandoned and/or discontinued, on the other side of the coin, whether it may be intensified from that asserted to have previously existed, are moot and need not be decided here for the disposition of the appeal.

McMilian has continually objected to King County's attempts to raise additional issues, including expansion of a nonconforming use. The King County Superior Court agreed that the additional issues were not properly before the reviewing court.

King County could have cited McMilian for illegally expanding

and/or intensifying its use, but it did not. Permitting King County to raise this issue on appeal would violate McMilian's due process rights.

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. 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.

Post v. City of Tacoma, 167 Wn.2d 300, 217 P.3d 1179 (2009) quoting *Mathews v. Eldridge*, 424 U.S. 319, 333, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976).

McMilian did not appeal a citation for intensifying a nonconforming use; King County's revised Bill of Particulars did not include any allegation of intensifying a nonconforming use; and significantly, King County admits in its briefing "that nothing in its Notice and Order alleged illegal intensification..." (CP 589). Regardless, intensification of a nonconforming use is permissible.

Intensification is permissible, however, where the nature and character of the use is unchanged and substantially the same facilities are used. The test is whether the intensified

use is “different in kind” from the nonconforming use in existence when the zoning ordinance was adopted.

Keller v. City of Bellingham, 92 Wn.2d 726, 731, 600 P.2d 1276 (1979).

The subject parcel was a storage yard for automobile parts before 1958, and it is still a storage yard for automobile parts today. Whether vehicle hulks and large car parts were moved to the subject parcel by a logging vehicle or a forklift is of no consequence when determining the land’s use. Whether the vehicle hulks are crushed by logging vehicles with four-foot high tires or a car crusher (on the adjoining parcel) is of no consequence when determining the land’s use. Whether cars sat there for one week or one year unmoved is of no consequence. There are no time limits on storage once that use is established. McMilian’s use is no “different in kind” than that of their predecessors. He simply runs a more efficient and higher volume business than did his predecessor.

Notably, King County Code 21A.32 addresses the scope of expansion that is permitted, but does not place any restrictions, limitation, or prohibition on intensification. King County cannot now attempt to revise its own Code. *See State ex rel. Smilanich v. McCollum*, 62 Wn.2d 602, 607-08, 384 P.2d 358 (1963) (despite the general rule favoring phasing out of nonconforming uses, a nonconforming asphalt plant may be enlarged where there was nothing in the zoning code prohibiting such

enlargements); *Bartz v. Board of Adjustment*, 80 Wn.2d 209, 216-17, 492 P.2d 1374 (1972) (board of adjustment properly exercised its discretion in granting defendant's application for an expansion of a nonconforming auto wrecking yard where there was no prohibition in the ordinance against such expansion).

Even if it was not a due process violation to raise this new issue on appeal, an issue that has no basis of fact or law in the underlying Notice of Violation or Bill of Particulars, the type of storage yard activities occurring on the subject parcel do not constitute an illegal intensification. Nothing in the King County Code prohibits intensification. Just as the Superior Court found that these issues were not properly before the Court, this Appellate Court should find the same.

E. LAND USE DECISION VIOLATES
MCMILIAN'S CONSTITUTIONAL RIGHTS

McMilian's federal and state constitutional due process rights are squarely at issue. Washington law offers more protection of real property rights in order to place "greater emphasis on certainty and predictability in land use regulations." *Abbey Road Group, LLC v. City of Bonney Lake*, 167 Wn.2d 242, 251, 218 P.3d 180 (2009). These concepts are "rooted in notions of fundamental fairness ... [and recognize that property] rights can represent a valuable and protectable property interest." *Id.* at 250.

Although the focus of the Washington Supreme Court in *Abbey* was the

vesting of development rights, the legal principles involved are identical when considering the property interest of McMilian in continuing to operate an ongoing business despite a change in local zoning ordinances.

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

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

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

West Main at 50.

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

McMilian's fundamental property right to operate a nonconforming business in favor of furthering their zoning agenda and appeasing a miniscule group of citizens who are upset about the visibility of a wrecking yard from their new residential neighborhood.

F. KING COUNTY HELD MCMILIAN'S PERMIT HOSTAGE AND TOOK THE POSITION THAT THE STORAGE YARD WAS NOT A LEGAL NONCONFORMING USE

Upon demand from King County, McMilian hired an engineer, paid the fee, and applied for the clearing and grading permit that King County demanded. However, then King County refused to complete the processing of the application because of the unresolved issue regarding nonconforming use. Now, King County seeks to penalize McMilian for failing to obtain a permit, which issuance is within its sole control. In essence, King County has held the permit hostage in an attempt to gain leverage. Such action by a municipality is unlawful. *Mission Springs, Inc. v. City of Spokane*, 134 Wn.2d 947, 952, 954 P.2d 250 (1998).

King County presented no evidence to support any calculation of the area cleared of vegetation. Its evidence is merely an aerial view of removal of the alder canopy.

Additionally, the King County Code permits an exception for routine maintenance, KCC 21.21A.045(13), but does not describe whether removal of young alders, which grow like weeds, might constitute routine

maintenance, at least for a wrecking yard. King County presented the testimony of Robert Manns, its Site Development Specialist. Mr. Manns testified that an exception exists for normal and routine maintenance activities. (CP 778 – 779). Mr. Manns, however, could provide no testimony as to what constitutes normal and routine maintenance with respect to an automobile wrecking yard. King County's other witness on this issue, Mr. Tijerina, also testified that he was unfamiliar with a specific exception from permitting for normal and routine maintenance, and that he had no understanding of what constituted normal and routine maintenance in this context. (CP 910). Mr. McMilian, however, testified that enabling safe access throughout the subject parcel storage yard constituted normal and routine maintenance of an automobile wrecking yard storage area. (CP 947-948; CP 956).

The Hearing Examiner failed to make any finding of fact regarding the routine maintenance exception. Given the complete lack of evidence presented by King County, McMilian's evidence is sufficient to find that no clearing permit was necessary due to the routine maintenance exception. This Court should find that a mistake has been committed by the application of law to the facts presented.

V. REQUEST FOR ATTORNEYS' FEES

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

RCW 4.74.370 provides, in pertinent part:

(1) Notwithstanding any other provisions of this chapter, reasonable attorneys' fees and costs shall be awarded to the prevailing party or substantially prevailing party on appeal before the court of appeals or the supreme court of a decision by a county, city, or town to issue, condition, or deny a development permit involving a site-specific rezone, zoning, plat, conditional use, variance, shoreline permit, building permit, site plan, or similar land use approval or decision. The court shall award and determine the amount of reasonable attorneys' fees and costs under this section if:

(a) The prevailing party on appeal was the prevailing or substantially prevailing party before the county, city, or town, or in a decision involving a substantial development permit under chapter 90.58 RCW, the prevailing party on appeal was the prevailing party or the substantially prevailing party before the shoreline[s] hearings board; and

(b) The prevailing party on appeal was the prevailing party or substantially prevailing party in all prior judicial proceedings.

Although McMilian was not *technically* the prevailing party before the Hearing Examiner, not because of the factual determinations but

because of committed errors of law, he should still be able to recover attorneys' fees under RCW 4.84.370. McMilian prevailed at the Superior Court, and should also prevail at the Court of Appeals.

This is a case in which the Constitutionality of RCW 4.84.370 should be addressed. King County retained a Hearing Examiner that is not a lawyer and who lacked the ability to properly research the law. McMilian, who had retained counsel as representation at the quasi-judicial hearing, then appealed to the Superior Court and prevailed on those issues of law. Now, King County appealed to this Court of Appeals on the same issues of law. Significantly, because of the decision of the Hearing Examiner, King County would have no exposure to paying McMilian's attorneys' fees – ever. In sharp contrast, McMilian would have exposure to pay King County its attorneys' fees should he have failed to prevail before the Superior Court and then elected to proceed before this Court. King County is forcing McMilian to incur substantial fees in this matter and will continue to do so because of the favorable treatment provided by the statute.

The Washington Supreme Court's Justice Sanders briefed this issue in his dissenting opinion in *Habitat Watch v. Skagit County*, 155 Wn.2d 397, 424-431, 120 P.3d 56 (2005).

The statute creates two classes with respect to the payment of attorney fees: private litigants, who pay attorney fees if they oppose the local government decision and lose again at the superior court and Court of Appeals, and local governments, who never pay attorney fees under the statute.

...

Given the statutory interpretation required by the language of the attorney fees and LUPA's definition of a land use decision, the classification under the statute is clear. The government can never be required to pay attorney fees, unlike parties that challenge local government land use decisions.

...

This is simply a naked preference for local governments over private litigants opposing local government land use decisions. A statute the rationale of which is simply to favor the government is not rational.

Justice Sanders then quoted another Washington Supreme Court case in support of his analysis that RCW 4.84.370 is unconstitutional:

Absent that justification, there is no basis, substantial or even rational, on which their discrimination between governmental plaintiffs and others can be supported. They thus cannot stand under the equal protection clause of the Fourteenth Amendment or Const. art. 1, § 12.

Hunter v. North Mason High School, 85 Wash.2d 810, 817-19, 539 P.2d 845 (1975).

As applied to the facts in this case, not permitting McMilian the same opportunity to recover attorneys' fees by repeatedly prevailing at the judicial is a violation of equal protection. McMilian should prevail, and will comply with RAP 18.1. This Court should award fees on appeal to Respondent McMilian.

VI. CONCLUSION

The law clearly establishes that ownership of real property is not relevant to the establishment and maintenance of a legal nonconforming use. This is the crucial legal question in this case. The Hearing Examiner erred in reaching his legal conclusions when he began to analyze whether the predecessor in interest, Mr. Horan, was a trespasser, whether Mr. Horan could assert a viable claim for adverse possession, and whether Mr. Horan's relationship with the owners was hostile and full of animosity.

McMilian has sustained his burden of showing that he is entitled to relief because the land use decision suffers from errors of law, errors in applying the law to the facts, the facts are not supported by substantial evidence, and because the land use decision violates McMilian's constitutional rights.

McMilian satisfied his burden under the applicable LUPA standards for relief. Just as the King County Superior Court held, the Hearing examiner's decision should be reversed.

Respectfully submitted this 23rd day of August, 2010.

SINGLETON & JORGENSEN, INC. PS

By 

Jean Jorgensen
WSBA No. 34964
Attorneys for Respondent Leo McMilian

CERTIFICATE OF SERVICE

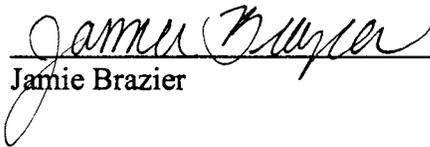
Jamie Brazier declares: I am a citizen of the United States and of the State of Washington; that I am over the age of 18 years and competent to be a witness in this cause. That on August 23, 2010, I delivered one copy of the RESPONDENT'S OPENING BRIEF, to the address(es) listed below by messenger service or by regular U.S. mail to:

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

Sherry McMilian
PO Box 508
Maple Valley, WA 98038
(by regular U.S. mail)

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

Executed at Renton, Washington, on: August 23, 2010.



Jamie Brazier