

No. 70553-9-1

COURT OF APPEALS, DIVISION I  
STATE OF WASHINGTON

RACE TRACK, LLC, a Washington limited liability company; PACIFIC  
GRAND PRIX, LLC, a Washington limited liability company; and  
PACIFIC RIM PROFORMANCE, INC., d/b/a PROFORMANCE  
RACING SCHOOL, a Washington corporation,

Appellants,

v.

KING COUNTY, a political subdivision of Washington State,

Respondent.

REPLY BRIEF OF APPELLANTS

Stephen P. VanDerhoef, WSBA No. 20088  
Charles E. Newton, WSBA No. 36635  
E-Mail: svanderhoef@cairncross.com  
E-Mail: cnewton@cairncross.com  
CAIRNCROSS & HEMPELMANN, P.S.

524 Second Avenue, Suite 500  
Seattle, WA 98104-2323  
Telephone: (206) 587-0700  
Facsimile: (206) 587-2308  
Attorneys for Appellants

FILED  
COURT OF APPEALS DIV 1  
STATE OF WASHINGTON  
2014 JAN 13 PM 3:37



**TABLE OF CONTENTS**

I. INTRODUCTION ..... 1

II. STATEMENT OF THE CASE..... 1

III. ARGUMENT ..... 2

    A. King County asks the Court to retroactively amend the CUP..... 2

    B. The Court should reverse the Examiner’s Decision because use of the track by ProFormance complies with Condition 1(a). ..... 3

    C. The County’s arguments against the application of Equitable Estoppel and Laches all fail..... 5

        1. RCW 7.48.190 ..... 5

        2. *City of Mercer Island v. Steinmann* ..... 7

        3. *Lauer v. Pierce County* ..... 9

    D. The County’s Response fails to negate any of the elements of Equitable Estoppel..... 11

        1. Reasonable Reliance and Inconsistent Statements..... 12

        2. Impairment of Governmental Functions..... 14

    E. The elements of Equitable Estoppel are met here. .... 15

    F. Under *Burien Bark Supply v. King County*, the County is prohibited from arbitrarily changing its interpretation of the CUP Conditions based upon Constitutional principles. .... 16

|     |   |    |
|-----|---|----|
| G.  | The Court should reverse under RCW 36.70C.130(1)(c) because the Examiner’s conclusion that the activities on Mondays, Tuesdays and weekend “quiet” days are not quiet and non-impacting is not supported by substantial evidence when viewed in light of the entire record before the Court. .... | 19 |
| H.  | Given the unique facts of this case, the Court should be guided by extra-jurisdictional cases. ....   | 20 |
| I.  | Appellants never requested a change in uses allowed on the relocated “kart” track and the County’s decision to restrict uses is not supported by the CUP. ....  | 21 |
| J.  | The RCW 4.84.370 Attorneys’ Fee Provision does Not Apply to this Appeal. ....   | 23 |
| IV. | CONCLUSION .....  | 25 |

## TABLE OF AUTHORITIES

### Washington Cases

|  |            |
|--|------------|
| <i>Burien Bark Supply v. King County</i> , 106 Wn.2d 868, 725 P.2d 994<br>(1986).....                                      | 16, 18, 19 |
| <i>Chelan County v. Nykreim</i> , 146 Wn.2d 904, 52 P.3d 1 (2002) .....  | 3          |
| <i>City of Mercer Island v. Steinmann</i> , 9 Wn. App. 479, 513 P.2d 80<br>(1973) .....                                    | 7, 8, 9    |
| <i>Lauer v. Pierce County</i> , 173 Wn.2d 242, 267 P.3d 988 (2011).....  | 9, 10      |
| <i>Magnolia Neighborhood Planning Council v. City of Seattle</i> , 155<br>Wn. App. 305, 323, 230 P.3d 190, 199 (2010)..... | 24         |
| <i>Mower v. King County</i> , 130 Wn. App. 707 (2005).....   | 24         |
| <i>Silverstreak, Inc. v. Dept. of Labor and Indus.</i> , 159 Wn.2d 868,<br>154 P.3d 891 (2007) .....                       | passim     |
| <i>Tugwell v. Kittitas Cnty.</i> , 90 Wn. App. 1, 15, 951 P.2d 272, 279<br>(1997) .....                                    | 24         |

### Other Cases

|  |           |
|--|-----------|
| <i>Hancock v. Hueter</i> , 118 Mich. App. 811 (1982) .....                                 | 6, 20, 21 |
| <i>Wieck v. District of Columbia Bd. of Zoning Adjustment</i> , 383 A.2d<br>7 (1978) ..... | 20, 21    |

### Statutes

|                            |        |
|----------------------------|--------|
| RCW 36.70C.130(1)(c).....  | 19     |
| RCW 36.70C.130(1)(d) ..... | 5      |
| RCW 36.70C.130(1)(f).....  | 19     |
| RCW 4.84.370.....          | 24, 25 |

|                       |        |
|-----------------------|--------|
| RCW 4.84.370(1).....  | 23, 24 |
| RCW 4.84.370(2) ..... | 24     |
| RCW 7.48 .....        | 7      |
| RCW 7.48.120 .....    | 6      |
| RCW 7.48.160 .....    | 6      |
| RCW 7.48.190 .....    | 5, 6   |

## I. INTRODUCTION

This case is about fundamental fairness and justice. The Court must decide whether King County may make repeated, consistent, supported, written interpretations confirming allowed activities under the CUP and then, without any changed conditions, summarily reverse its prior interpretations to the prejudice of Appellants who reasonably have relied on those confirmations over a 21-year period. For the reasons described in Appellants' Opening Brief and as more fully explained below, the County cannot do so.

## II. STATEMENT OF THE CASE

A full recitation of the facts of this matter is included in Appellants' Opening Brief. Here, Appellants provide short responses to two factual allegations made in the County's Response.

In several places in its Response, the County states that CUP Condition 1(a) "requir[es] the track to be closed and quiet on Mondays and Tuesdays."<sup>1</sup> This is incorrect. CUP Condition 1(a) requires the track to be closed only as to certain, specified activities, and the activities that are expressly allowed are not quiet. CUP Condition 1(a) states:

[Pacific Raceways] ***will be closed to all race testing and racing*** on Monday and Tuesday year round provided that these days may be used for racing when a rained out event could not be scheduled for the following weekend, or when a holiday which has a major event associated within it falls on a Monday or Tuesday. ***Race testing is not meant to exclude police and emergency vehicle testing and***

---

<sup>1</sup> King County's Response to Appellants' Opening Brief ("Response") at 2, 3, and 33.

*training, or other non-race related testing functions that are quiet, non-impacting.*<sup>2</sup>

Thus, the plain terms of Condition 1(a) do not require the track to be closed in its entirety, as stated by the County. The Superior Court affirmed this fact when it concluded that the CUP language “clearly reflects that the track, in fact, did not need to be closed to all uses on Mondays and Tuesdays.”<sup>3</sup> The County’s claims to the contrary are simply incorrect.

The County also makes repeated irrelevant statements about Race Track’s profits from gravel extraction activities.<sup>4</sup> The County’s comments appear to be aimed at convincing the Court that the economic impacts to Appellants from the County’s sudden reversal of its long-standing CUP interpretations are not too severe. Aside from being irrelevant to the issues on appeal, any mining profits inuring to Race Track have no bearing on the severe economic impacts to the other Appellants ProFormance and Grand Prix. The Court should disregard the County’s invitation to consider information that is irrelevant to the issues on appeal and that also obscures the true economic impacts to Appellants.

### **III. ARGUMENT**

#### **A. King County asks the Court to retroactively amend the CUP.**

The County asserts that Appellants would need to go through the CUP amendment process to change the terms of the CUP.<sup>5</sup> The County’s assertion requires the Court to ignore the fact that it is the County, and not

---

<sup>2</sup> AR: SC 00020.

<sup>3</sup> CP at 37:5-6.

<sup>4</sup> Response at 14, 36, and 47.

<sup>5</sup> Response at 3 (stating changes to CUP require a CUP amendment).

Appellants, that has unilaterally modified the 1984 CUP Conditions by attempting to change the meaning of the CUP Conditions after 21 years of contrary interpretations. Contrary to the County's assertion, Appellants are not asking the Court to change the terms of the CUP Conditions. Rather, Appellants are asking the Court to prevent the County from summarily changing the meaning of the CUP Conditions after 21 years, and imposing a de facto amendment to the CUP itself. In Washington, counties and applicants who fail to file a timely appeal of an issued permit are equally bound by the terms of the permit.<sup>6</sup> The Court should find no persuasive value in the County's characterization of Appellants' arguments as an attempt to change the CUP. The opposite is true. Appellants simply ask that the Court uphold the long-standing meaning of the CUP under unchanged language.

**B. The Court should reverse the Examiner's Decision because use of the track by ProFormance complies with Condition 1(a).**

ProFormance operates a driving school. The Notice and Order states that compliance with the CUP requires ceasing all "performance driving school operations."<sup>7</sup> But the CUP does not prohibit driving schools from operating on Mondays, Tuesdays and weekend quiet days. Even the County admits that its prior interpretations of the CUP Conditions allowed instructional driving schools on Mondays, Tuesdays, and weekend quiet

---

<sup>6</sup> See, e.g., *Chelan County v. Nykreim*, 146 Wn.2d 904, 52 P.3d 1 (2002) (holding that county was barred from revoking its approval of a boundary line adjustment when the county failed to file a timely appeal of the county's approval).

<sup>7</sup> AR: SC 00402.

days.<sup>8</sup> The County adds, however, that its prior CUP interpretations always required the allowed activities to be non-impacting, which the County has defined as being within ambient noise levels.<sup>9</sup> Therefore, the County argues it was justified in issuing the Notice and Order prohibiting driving schools because the ProFormance School has peak noise events that are above ambient noise levels and therefore it is not “non-impacting” as required under the CUP and County’s prior interpretations.

First, the County has consistently defined “non-impacting” to include the use of street-legal, muffled vehicles—not just within ambient levels. Second, beyond all the reasons outlined above and in Appellants’ Opening Brief, the County’s argument also fails for the simple reason that the County’s Notice and Order is completely overreaching. Rather than requiring Appellants to cease activities that are not within ambient noise levels, it requires Appellants to “Cease all...performance driving school operations...”<sup>10</sup> If the County truly is concerned about the impact to the neighbors, then it has an obligation to fashion a remedy that addresses that impact without banning outright Appellants’ long-standing businesses, which previously has always been allowed under the same CUP terms.

The Superior Court agreed that the Examiner erred on this point. The court was left with a definite and firm conviction that the Examiner had made a mistake with regard to the conclusion that the phrase

---

<sup>8</sup> Response at 6 (quoting the 1989 letter from CUP coordinator Gordon Thomson, which stated, “a driver’s training school...using muffled cars may take place...”).

<sup>9</sup> Response at 5 (quoting an internal memo from CUP drafter Irv Berteig: “If sound from SIR would add to ambient levels, it would be impacting and therefore not permitted.”).

<sup>10</sup> AR: SC 00402.

“non-race related testing” in CUP Condition 1(a) could not be read to authorize driving training for persons who are not police or emergency vehicle drivers on Mondays and Tuesdays.<sup>11</sup> Similarly, in this appeal, the Court should reverse the Hearing Examiner under RCW 36.70C.130(1)(d) because use of the track by ProFormance complies with or, at minimum, has complied in the past and can continue to comply with CUP Condition 1(a). Unlike the Superior Court’s decision to rewrite the CUP Condition, however, this Court should remand this matter to the King County Hearing Examiner for determination of what specific parameters, i.e., audible sound limits, amount to within “ambient noise levels” at the track, so that clear standards can be enforced by the County, complied with by Appellants, and enjoyed by the neighbors.

**C. The County’s arguments against the application of Equitable Estoppel and Laches all fail.**

The County’s arguments against the application of equitable estoppel and laches are unsupported by the cases it cites and the facts of this matter. Appellants respond to each of the County’s arguments below.

**1. RCW 7.48.190**

The County makes the novel argument that the Court cannot apply estoppel or laches in this case because the County’s determination that a condition of a CUP is being violated somehow self-immunizes the County’s action.<sup>12</sup> The County’s argument requires the Court to accept the County’s following strained logic. RCW 7.48.190 states that “[n]o lapse of

---

<sup>11</sup> CP at 35:3-16.

<sup>12</sup> Response at 39.

time can legalize a public nuisance, amounting to an actual obstruction of public right,” and because under the King County Code a violation of a conditional use permit is deemed a civil code violation, and because civil code violations are declared by King County Code to be public nuisances, therefore the County’s decision that Appellants are violating the CUP (despite the County’s express determinations to the contrary for 21 years) results in a de facto nuisance and means that the Court cannot apply estoppel or laches in this case. Chillingly, under the County’s logic, merely by issuing a Notice of Violation (even one that disregards the history or language of a permit) the County can never be held accountable.

But RCW 7.48.190 does not apply to the County’s decision to assert a violation of the CUP here. For purposes of RCW 7.48.190, the term “nuisance” is defined by statute, not by the King County Code. RCW 7.48.120 states: “Nuisance consists in unlawfully doing an act, or omitting to perform a duty...” Here, the lawfulness of Appellants’ acts under the CUP is the central question to be answered in this case. King County’s circular reasoning (i.e., the act is unlawful because King County has determined it to be unlawful) cannot operate to immunize the County from the application of estoppel or laches.<sup>13</sup>

Further, RCW 7.48.160 could not more clearly prevent the County’s current attempt to exempt itself from the obvious application of

---

<sup>13</sup> Notably, this same argument was made and rejected by the court in *Hancock v. Hueter*, 118 Mich. App. 811, 814 (1982) (upholding trial court finding that “the ordinance itself indicates that a mere violation itself is a nuisance, but that doesn't make it a nuisance”) *see discussion infra*.

equity. That section states “Nothing which is done or maintained under the express authority of a statute, can be deemed a nuisance.” The policy behind that provision is that an act expressly authorized by the government cannot later be deemed a nuisance. That is precisely what the County is doing in this case—having authorized certain uses under the terms of the CUP for 21-years and then suddenly deeming those same uses a nuisance. Chapter 7.48 RCW does not prohibit the Court from applying equitable estoppel or laches in this case.

## **2. *City of Mercer Island v. Steinmann***

The County cites *City of Mercer Island v. Steinmann*<sup>14</sup> in support of its argument that low level officials<sup>15</sup> cannot waive public rights.<sup>16</sup> Appellants already distinguished this case in their Opening Brief and the County has failed to address those arguments. Nonetheless, Appellants again explain here why the *Steinmann* rationale does not apply.

In *Steinmann*, a homeowner living in a single-family zone applied for a building permit for construction of an addition primarily above an existing garage for a “game room,” “hobby area,” and “photo dark room.” The permit was granted and the city inspected the addition several times during construction. As modified, the home included three separate living

---

<sup>14</sup> 9 Wn. App. 479, 513 P.2d 80 (1973).

<sup>15</sup> While not central to the County’s argument, it is noted that King County’s Administrator for the CUP is not a low level official. He or she is a successor of the original Administrator who was directly charged by the original drafter of the CUP, Irv Berteig, with the duty of assuring compliance with the terms of the CUP. Further, the King County Director of DDES, John Starbard, who confirmed the CUP allows activities his employees later deemed to be prohibited by the Notice and Order, certainly cannot be considered a low level of official.

<sup>16</sup> Response at 36-37.

areas, including the remodeled space above the garage. The homeowner then began renting out the various living areas in violation of the plain language of the zoning code authorizing only single-family residences. After the city sought to enforce the zoning code's single-family dwelling limitation, the homeowner appealed. But the court refused to accept the homeowner's argument that equitable estoppel barred the city from enforcing the zoning code after granting the building permit and inspecting the construction. The court explained the basis for its decision:

A municipality may not be held equitably estopped by the original malfeasant or malfeasant act of its officers or agents in having issued a permit ***contrary to the plain mandate of a zoning provision....***<sup>17</sup> The ***plaintiff landowner is presumed to have known of the invalidity of the exception and to have acted at his peril.***<sup>18</sup>

As explained in Appellants' Opening Brief, the critical difference between the *Steinmann* case and this matter is that there is no plain mandate under the CUP that prohibits driving schools on Mondays, Tuesdays and weekend quiet days. In fact, the opposite is true. The County, the only source for interpreting the CUP Conditions, interpreted them repeatedly and for decades as authorizing such uses. The County's interpretations were not "malfeasant acts" but were reasonable interpretations of the CUP language by the only authoritative source that Appellants could ask to interpret the CUP. Appellants cannot be held to

---

<sup>17</sup> 9 Wn. App. at 482 (quoting from *S. B. Garage Corp. v. Murdock*, 185 Misc. 55, 55 N.Y.S.2d 456, 460 (1945) (emphasis added).

<sup>18</sup> *Id.* (quoting from *V. F. Zahodiakin Eng'r Corp. v. Zoning Bd. of Adjustment of City of Summit*, 8 N.J. 386, 86 A.2d 127, 132 (1952)) (emphasis added).

have known that their actions were prohibited when the County consistently and repeatedly approved them. The County conducted itself nothing like the city in *Steinmann*, and thus *Steinmann* does not apply.

### 3. *Lauer v. Pierce County*

The County cites *Lauer v. Pierce County* for the proposition that equitable estoppel will not be applied where the representations relied upon are matters of law.<sup>19</sup> The County suggests that equitable estoppel cannot apply to hold the County to its prior consistent interpretations because interpretation of a CUP condition is a matter of law to which equitable estoppel should not apply. The *Lauer* case does not prevent the application of equitable estoppel in this matter and, in fact, the far more factually similar case of *Silverstreak, Inc. v. Dept. of Labor and Indus.*,<sup>20</sup> demands the application of equitable estoppel here.

*Lauer* involved the question of whether a land use applicant's development rights had vested to regulations in effect in 2004. In 2007, the County supported the applicant's argument that its application for a variance from stream buffer requirements was vested to the 2004 buffer regulations, which had been substantially enlarged in 2005. After the variance was approved, the applicant's neighbors appealed. The applicant argued that equitable estoppel prevented the neighbors from appealing the variance approval. However, the Court held that equitable estoppel did not bar the neighbors' appeal because the neighbors made no statements

---

<sup>19</sup> 173 Wn.2d 242, 267 P.3d 988 (2011).

<sup>20</sup> 159 Wn.2d 868, 154 P.3d 891 (2007).

upon which the applicant relied and the neighbors could not be bound by the County's representations that the variance approval was vested to the 2004 regulations because the County's statements were about a question of law—i.e., whether the applicant had a vested right to have its application reviewed under the 2004 regulations—and that question was the central legal issue in the appeal. In other words, the Court would be the final decision maker with regard to the question of vested rights, and the County's statements and conclusions with regard to that question of law could not operate to prevent an appeal, which would have the effect of preventing a final determination. Here, Appellants are not trying to prevent a third party from appealing a question of law about which the County has previously made representations. Rather, Appellants are arguing that the County is bound by its own representations.

This case is unlike *Lauer*, where estoppel was argued to preclude a third-party appellant from bringing claims, and far more similar to *Silverstreak, Inc. v. Dept. of Labor and Indus.*<sup>21</sup> In *Silverstreak*, the Court was faced with the question of whether an agency charged with the duty of interpreting and applying regulations that it promulgated was equitably estopped from suddenly reversing its position with respect to an ambiguous regulatory provision. The Court explained that it generally will defer to an agency's interpretations of its own properly promulgated regulations, however, when the agency suddenly reverses its interpretation

---

<sup>21</sup> 159 Wn.2d 868, 154 P.3d 891 (2007).

resulting in injury to a party who reasonably relied on the Agency's prior interpretation, then equitable estoppel applies in order to prevent manifest injustice.<sup>22</sup> Importantly, the Court also concluded that if the agency were allowed to apply its new interpretation to the appellants in that case, the Court would be forced to find the regulatory provision unconstitutionally vague because it would effectively authorize the "agency to make arbitrary discretionary decisions."<sup>23</sup> In other words, a regulatory body cannot draft a regulation and then apply it in opposite ways with respect to the same regulated activity. Here, the County is the author and interpreter of the CUP. Consequently, *Silverstreak* applies and the Court should reverse the Examiner's Decision based upon the doctrines of equitable estoppel and/or vagueness.

**D. The County's Response fails to negate any of the elements of Equitable Estoppel.**

As set forth in Appellants' Opening Brief, the doctrine of equitable estoppel is applicable in situations where:

1. The government agency made a statement, made an admission, or committed an act that is inconsistent with its current position;
2. A party reasonably relied on agency's statement, admission, or act;
3. The relying party would be injured if the agency was permitted to change its position;
4. Estoppel is necessary to prevent a "manifest injustice;" and

---

<sup>22</sup> *Id.* at 884-91.

<sup>23</sup> *Id.* at 890.

5. Estoppel will not impair governmental functions<sup>24</sup>

In this case, the County challenges the existence of the first, second, and fifth factors.

**1. Reasonable Reliance and Inconsistent Statements**

The County first argues that Appellants did not reasonably rely on the County's prior, consistent interpretations and also that the Notice and Order is not inconsistent with such prior interpretations. The County's argument succeeds only if historical facts the County has never disputed are ignored. The County does not dispute that prior to deciding whether to operate ProFormance, Don Kitch, received and reviewed the 1989 letter from King County CUP Administrator Gordon Thomson, which approved a driver training school using muffled vehicles.<sup>25</sup> The County also does not dispute that Mr. Kitch consistently attended the CUP annual neighborhood meetings, which until 2010 did not alert him to any issue with ProFormance's activities being out of compliance with the CUP.<sup>26</sup>

Instead of arguing that ProFormance did not rely on the County's interpretations, the County ignores that fact and provides the following completely unsupported conclusion: "King County's Notice and Order is consistent with [the] 1989 correspondence" that Kitch relied upon and "Kitch's operations cannot have been developed in reasonable reliance on

---

<sup>24</sup> *Silverstreak, Inc. v. Dep't of Labor & Indus.*, 159 Wn.2d 868, 887 (2007) (citing *Kramarevsky v. Dep't of Soc. & Health Servs.*, 122 Wn.2d 738, 743 (1993)).

<sup>25</sup> Response at 41 ("When deciding whether to operate at SIR Kitch reviewed the 1989 letter to Rockstad from CUP coordinator Gordon Thomson.")

<sup>26</sup> Response at 8 ("Kitch often attended CUP-required meetings with track neighbors. Frequently 'no one was there.' Kitch never heard noise complaints.").

the Thomson letter.”<sup>27</sup> This conclusion is refuted easily by simply reading the 1989 correspondence. Among other authorizations, the letter states “a driver’s training school for approximately 20 students using muffled cars may take place.”<sup>28</sup> But the Notice and Order requires ProFormance to “Cease all...performance driving school operations.”<sup>29</sup> The County’s Notice and Order could not be more inconsistent with the 1989 correspondence that Mr. Kitch relied upon. Mr. Kitch relied on the County’s prior consistent statements authorizing his school on Mondays, Tuesdays, and weekend quiet days, and the County’s Notice and Order now purports to totally prohibit its operation on those days.

While Mr. Kitch’s reliance is sufficient to support reversal of the Examiner’s Decision based upon equitable estoppel, the County also challenges Petitioner Race Track’s reliance through its president, Jason Fiorito. Mr. Fiorito’s reliance was set forth in detail in Appellants’ Opening Brief and largely remains unrebutted by the County.<sup>30</sup> The County admits but attempts to diminish the importance of the undisputed fact that Matthew Caskey, the CUP Administrator, stated to Mr. Fiorito that “muffled, street-legal vehicles” are allowed on Mondays, Tuesdays and weekend quiet days.<sup>31</sup> The testimony and documentary evidence in the record show that Mr. Fiorito, after his review of the terms of the CUP,

---

<sup>27</sup> Response at 42.

<sup>28</sup> AR: SC 00084.

<sup>29</sup> AR: SC 00402.

<sup>30</sup> Opening Brief of Appellants at 7-9.

<sup>31</sup> Response at 43-44.

confirmation of allowed uses under the CUP from the prior track manager, and confirmation from the CUP Administrator, subsequently borrowed substantial amounts of money to upgrade the track in reliance on the continuing income stream from ProFormance's use of the track on Mondays, Tuesdays, and weekend quiet days.<sup>32</sup> While Mr. Kitch's reliance alone is enough to support reversal, Mr. Fiorito also has established on behalf of Race Track his reliance on the County's prior interpretations.

## **2. Impairment of Governmental Functions**

The County's Response makes only a brief argument regarding impairment of governmental functions. The County attempts to distinguish *Silverstreak* by arguing that in that case only the parties to the disputed contract were impacted by the issue<sup>33</sup> whereas here neighbors would be impacted if under the doctrine of equitable estoppel the Court prevents the County from enforcing its new interpretation of the CUP.<sup>34</sup> What the County fails to mention is that it is the County that has chosen to overreach with its Notice and Order (i.e., "Cease all...performance driving school operations") rather than enforcing the County's consistent prior interpretations allowing activities within ambient noise levels.

Application of equitable estoppel will not impair governmental functions. The County will be free to enforce the CUP consistent with its interpretations of the CUP Conditions over the past two decades. Further,

---

<sup>32</sup> Opening Brief of Appellants at 8-9.

<sup>33</sup> Response at 38.

<sup>34</sup> Response at 38.

activities on Mondays, Tuesdays and weekend quiet days are required to abide by the same noise standards as other property owners, so the County's ability to enforce noise violations will be unaffected by the application of equitable estoppel.

**E. The elements of Equitable Estoppel are met here.**

This case presents facts far more egregious than those justifying estoppel in *Silverstreak*. Here, even the Hearing Examiner found:

Pacific Raceway's officials and King County DDES employees, including management, have agreed over the [prior 21] years that the use of the track on Mondays and Tuesdays for emergency vehicle testing and training, driver training, car clubs, and similar events that operate street legal (licensed) vehicles in a non-racing venue, have generally met CUP requirements for those events on Mondays and Tuesdays and on quiet weekend days to be "quiet and non-impacting."<sup>35</sup>

The elements of equitable estoppel are met:

(1) The government agency made a statement, made an admission, or committed an act that is inconsistent with its current position, i.e., issuance of a notice and order contrary to the County's 21-years of consistent interpretations allowing driving schools for street-legal, muffled vehicles on "quiet days" and Mondays and Tuesdays; (2) A party reasonably relied on the agency's statement, admission, or act, i.e., Appellants Race Track made substantial investments in its facility knowing that it had revenues from Mondays, Tuesdays and weekend quiet days to support those investments, Petitioner ProFormance decided to

---

<sup>35</sup> AR: SC 02541.

establish a business, and Petitioner Grand Prix borrowed \$2.5 million to relocate a multi-purpose track, all in reliance on the County's 21-year interpretation of the CUP Conditions; (3) The relying parties will be injured if the agency was permitted to change its position, i.e., the hundreds of thousands (if not millions) of dollars in lost revenues needed to service debts Appellants have incurred in reliance on the validity of the County's 21-year interpretation of the CUP Conditions; (4) Estoppel is necessary to prevent a "manifest injustice," i.e., substantial damages resulting from the County's capricious reversal of its consistent 21-year interpretation of the CUP Conditions; and (5) Estoppel will not impair governmental functions, i.e., the County's functions will not be affected by the County continuing to enforce the CUP in the same, consistent manner as it has for the last 21 years. Additionally, activities on Mondays and Tuesdays and weekend quiet days are required to abide by the same noise standards as other property owners, so the County's ability to enforce noise violations would be unaffected by application of equitable estoppel.

**F. Under *Burien Bark Supply v. King County*, the County is prohibited from arbitrarily changing its interpretation of the CUP Conditions based upon Constitutional principles.**

King County's Response fails to distinguish the remarkably similar case of *Burien Bark Supply v. King County*,<sup>36</sup> in which the Court found that King County could not reinterpret its zoning code to prohibit the same activity the County twice previously had interpreted the code to allow. The

---

<sup>36</sup> 106 Wn.2d 868, 725 P.2d 994 (1986).

County provides no authority to support its argument that the vagueness doctrine should not apply to permit conditions and makes no attempt to explain how permit conditions and zoning regulations are fundamentally different.<sup>37</sup> Uses allowed under the CUP at issue here are functionally identical to the uses allowed under a zoning regulation, and Constitutional protections against ad hoc discretionary interpretations of both must apply.

The County next focuses on a single word in the CUP Conditions, “quiet,” and argues that Appellants’ Constitutional rights are not violated. But the County’s Notice and Order does not state that instructional driving schools are to comply with the “quiet and non-impacting” terms in CUP Condition 1(a), nor does the County attempt to define “quiet and non-impacting,” which it has defined previously as within ambient noise levels. Instead, and rather than requiring Appellants to cease activities that are not within ambient noise levels, the County’s Notice and Order requires Appellants to “Cease all...performance driving school operations...”<sup>38</sup> But that requirement goes well beyond the terms of the CUP and is an outright reversal of what the County has allowed under the CUP for 21 years.

The County highlights the word “quiet” as a way to put forth an after-the-fact justification for the County’s new interpretation. In essence, the County argues that its new interpretation could rationally be supported by the terms of the CUP Conditions, and therefore it is not vague and

---

<sup>37</sup> Response at 33-34.

<sup>38</sup> AR: SC 00402.

Appellants' Constitutional rights are not violated. But just as in *Burien Bark*, where the phrase "limited degree" could be interpreted to allow Burien Bark Supply to operate its bark sorter, here the phrase "non-race related testing functions that are quiet, non-impacting" could be (and have been) interpreted to allow driving schools and street-legal (muffled) vehicles. Also similar to *Burien Bark*, King County's Notice and Order prohibits the same activity it previously authorized. In *Silverstreak*, where the agency involved had summarily reversed its prior interpretation of an ambiguous regulation to the detriment of the appellants, the Supreme Court explained that if the Court had not found that equitable estoppel applied, then the Court would be forced to find the regulation unconstitutionally vague because it would effectively authorize the "agency to make arbitrary discretionary decisions."<sup>39</sup>

The County's persistent attempts to elevate Pacific Raceways neighbors' concerns over those of Appellants also is belied by the facts of *Burien Bark*. There, the County's reinterpretation of the zoning code was triggered by persistent complaints by Burien Bark's neighbors.<sup>40</sup> Nonetheless, the Court upheld the trial court's decision that the code was unconstitutionally vague as applied to Burien Bark Supply because it left "to the discretion of county officials the substance of determining what activities are prohibited."<sup>41</sup> Because the County retains its ability to

---

<sup>39</sup> *Silverstreak*, 159 Wn.2d at 890.

<sup>40</sup> *Burien Bark*, 106 Wn.2d at 869-70.

<sup>41</sup> *Id.* at 871.

enforce its other regulations to protect the public interest, the Court did not allow the effect on the neighbors to trump the requirements of the law.

The County's conduct in this case (reversal after 21 years of contrary interpretations) is far more egregious than those in *Burien Bark* (reversal after two interpretations over the prior two-year span). Under these facts, *Burien Bark* is directly on point and, because the CUP Conditions are unconstitutionally vague as applied to Appellants, the Court should reverse the Hearing Examiner's decision and rule that pursuant to RCW 36.70C.130(1)(f) King County cannot now reinterpret the CUP Conditions to prohibit what they previously had always allowed.

**G. The Court should reverse under RCW 36.70C.130(1)(c) because the Examiner's conclusion that the activities on Mondays, Tuesdays and weekend "quiet" days are not quiet and non-impacting is not supported by substantial evidence when viewed in light of the entire record before the Court.**

Nearly a full third of the County's Response is dedicated to describing the testimony of some of Pacific Raceways' neighbors who complain of noise generated from Pacific Raceways.<sup>42</sup> Appellants' Opening Brief thoroughly explained the evidentiary problems with the neighbors' testimony. The County's laborious description of certain neighbors' testimony does not refute those issues, nor does it establish the existence of a CUP violation just as neighbor complaints did not authorize reinterpretation of the vague zoning ordinance in *Burien Bark*. The Court should reverse the Examiner's Decision under RCW 36.70C.130(1)(c)

---

<sup>42</sup> Response at 15-25.

because it is not supported by evidence that is substantial in light of the whole record before the Court.

**H. Given the unique facts of this case, the Court should be guided by extra-jurisdictional cases.**

The County fails to distinguish *Wieck v. District of Columbia Bd. of Zoning Adjustment*,<sup>43</sup> and *Hancock v. Hueter*.<sup>44</sup> The County argues that those cases should not apply because they do not involve impacts on members of the public and because the County here was more diligent in enforcing the land use restrictions.<sup>45</sup> To the contrary, the *Wieck* court specifically recognized that there is an “important general public interest in the integrity and enforcement of zoning regulations”<sup>46</sup> but that interest was “not sufficient to outweigh the inequity of substantial prejudice to petitioner.”<sup>47</sup> The court then held that the zoning official’s failure to enforce the zoning violation for six and one-half years was an “extraordinary and compelling circumstance” justifying the application of laches preventing the enforcement of the applicable zoning regulation.<sup>48</sup>

While the *Hancock* court did not address the impacts to the public in deciding to apply laches, similar to the *Wieck* court, it did evaluate the equities between the enforcement authority and the private property owner and held that it would be inequitable to enforce the zoning ordinance after the city delayed in bringing any enforcement action for approximately

---

<sup>43</sup> 383 A.2d 7 (1978).

<sup>44</sup> 118 Mich. App. 811 (1982).

<sup>45</sup> Response at 45-47.

<sup>46</sup> 383 A.2d at 10.

<sup>47</sup> *Id.* at 12.

<sup>48</sup> *Id.* at 12.

eight years.<sup>49</sup> Here, the County is asking the Court to affirm the County's decision to ignore the inequities to Appellants (and ignore the testimony of the neighbors who agree with the County's 21 years of confirmation that the track activities comply with the CUP) and focus solely on the impacts to those neighbors who have complained about those activities. The Court should decline the County's invitation to do so. Instead, the Court should be guided by the decisions in *Wieck* and *Hancock*, and find that, on balance, the equities weigh heavily in favor of Appellants.

**I. Appellants never requested a change in uses allowed on the relocated "kart" track and the County's decision to restrict uses is not supported by the CUP.**

The County's only argument in support of its decision to prohibit the use of the "track by vehicles other than karts, including but not limited to motorcycles and street legal automobiles"<sup>50</sup> is that because the MDNS<sup>51</sup> for the permit authorizing the track relocation listed "shift kart race events, driver training and track rental" as the proposed uses for the relocated track, Appellants should have understood that the uses on the track would be limited to karts.<sup>52</sup> But motorized vehicles other than karts have used the kart track for decades.<sup>53</sup> When Appellants began the process of relocating the track, Appellants' attorney corresponded with King County to confirm the uses on the relocated track.<sup>54</sup> Because the track primarily was used by

---

<sup>49</sup> 118 Mich. App. at 818.

<sup>50</sup> AR: SC 00236.

<sup>51</sup> Mitigated Determination of Non-Significance under the State Environmental Policy Act, ("SEPA"), which conditions were incorporated into the issued grading permit.

<sup>52</sup> Response at 9-12.

<sup>53</sup> CP at 368:14 – 371:1.

<sup>54</sup> AR: SC 00097 – 00099; 00119 – 00121.

karts and was configured in a manner commonly referred to in the industry as a “kart track,” it was popularly known as the “kart track.”<sup>55</sup> Appellants referred to the track by its popular name in correspondence with King County. But nothing in that correspondence was ever meant to restrict the uses allowed under the 1984 CUP. That correspondence also specifically explained that there would be no change in use of the kart track once it was relocated.<sup>56</sup>

The County’s Notice and Order states that uses other than karts violate CUP Condition 15 “requiring all improvements and uses to be conducted in accordance with the pre-March 31, 1984 plot plan.”<sup>57</sup> But the referenced plot plan does not identify what uses were expressly allowed on the kart track portion of the main road course.<sup>58</sup> The track at issue was located in the eastern portion of the property near the area labeled “Drag Strip Pit Area.”<sup>59</sup> Nowhere does the plot plan restrict uses in that area or elsewhere to kart use.

According to King County DDES Director John Starbard’s email of January 4, 2011, the County and Appellants were correct to believe that preexisting uses would continue to be allowed at the relocated track.<sup>60</sup> Mr. Starbard’s email in response to a neighboring property owner (making the same argument that the County is now trying to make) stated, “a wide

---

<sup>55</sup> CP at 772:10 – 775:16.

<sup>56</sup> AR: SC 00097 – 00099; 00119 – 00121.

<sup>57</sup> AR: SC 00402.

<sup>58</sup> AR: SC 00240.

<sup>59</sup> *Id.*

<sup>60</sup> AR: SC 00211 – 0013.

range of uses is allowed on the shift kart track....The ‘track rental’ provision is quiet [sic] broad.”<sup>61</sup> Strangely, the County reversed that position only 17 days later when, in conjunction with its broader reversal concerning the meaning of the CUP and allowed uses on Mondays, Tuesdays and weekend quiet days, it issued the Notice and Order prohibiting all uses except kart use.<sup>62</sup>

The Court should reverse the Examiner’s Decision to uphold the County’s strict limitation of the track to karts for the same reasons explained above with respect to CUP Conditions 1(a) and 1(b). The County’s Notice and Order prohibits the same activities that had occurred on the track for years, and the Court should rule that the County is barred from such a reversal under the same doctrines of equitable estoppel, laches, and/or constitutional principles of due process and fundamental fairness outlined in Appellants’ Opening Brief and discussed above.

**J. The RCW 4.84.370 Attorneys’ Fee Provision does Not Apply to this Appeal.**

RCW 4.84.370(1) provides for an award of attorneys’ fees and costs to the prevailing party on appeal on “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.” This matter is not an appeal of a decision to issue, condition, or deny a

---

<sup>61</sup> *Id.* at SC 00211.

<sup>62</sup> AR: SC 00402.

development permit. This matter is an appeal from the decision in an enforcement action based on the County's new interpretation regarding an already issued permit—the CUP. The plain language of the statute does not allow for an award of attorneys' fees under these circumstances.<sup>63</sup>

Further, even if RCW 4.84.370 applied, the City was not the substantially prevailing party below. The Superior Court reversed the Examiner's decision on a key issue. The court found that the Examiner erred in concluding that a driving school was not allowed under the terms of the CUP. Thus, Appellants were the prevailing party on that key issue. RCW 4.84.370(2) also provides that “the county, city, or town whose decision is on appeal is considered a prevailing party *if its decision is upheld at superior court and on appeal.*” (emphasis added). Again, the County's decision was not upheld at superior court; it was partially reversed.<sup>64</sup> Under the plain terms of the statute, the County is not entitled to fees.<sup>65</sup>

---

<sup>63</sup> See *Tugwell v. Kittitas Cnty.*, 90 Wn. App. 1, 15, 951 P.2d 272, 279 (1997) (denying fee award under RCW 4.84.370 where the case involved a rezoning and no development permit was issued, conditioned or denied).

<sup>64</sup> *Magnolia Neighborhood Planning Council v. City of Seattle*, 155 Wn. App. 305, 323, 230 P.3d 190, 199 (2010) (holding that “because Magnolia is not the prevailing party on all of the issues on appeal, it is not entitled to fees [under RCW 4.84.370]”).

<sup>65</sup> Contrast this case with *Mower v. King County*, 130 Wn. App. 707 (2005), in which the appellant, Mower, illegally dumped fill material in a sensitive area, refused to seek the proper permits, and the County issued a code violation notice. Mower made appeals to the King County Hearing Examiner, Superior Court, and Court of Appeals. All appeals were denied. Without analyzing whether the County's notice of violation equated to the issuance, conditioning, or denial of a development permit under RCW 4.84.370(1), the Court of Appeals granted King County's request for fees under RCW 4.84.370(2), stating: “Under the plain language of the statute, King County is the prevailing party in this case where its decision is upheld at the superior court and on appeal as happened here.” Here, King County's decision was not upheld at Superior Court. The Superior

#### IV. CONCLUSION

For 21 years, King County expressly authorized activities that it has now suddenly decided to prohibit under unchanged regulatory language and unchanged conditions. The terms of the CUP do not prohibit the operation of instructional driving schools, which the County repeatedly has stated are allowed. Yet the County's Notice and Order requires Appellants to "Cease all...performance driving school operations..."<sup>66</sup> Similarly, the kart track has been used by vehicles other than shift karts for decades. Yet the County's Notice and Order requires Appellants to "Cease all non-shift kart use" of the kart track.<sup>67</sup>

For the reasons outlined above, including Appellants continued compliance with the CUP Conditions, application of the principles of equitable estoppel and laches, and Constitutional principles of due process and fundamental fairness, the Court should reverse the Examiner's Decision and require the County to continue to authorize the activities that the County authorized for over 21 years. In the alternative, the Court should remand this matter to the Hearing Examiner for a determination of what specific parameters, i.e., audible sound limits, amount to within "ambient noise levels" at the track, so that clear standards can be enforced by the County, complied with by Appellants, and enjoyed by the neighbors.

---

Court partially reversed the Examiner's Decision. RCW 4.84.370 does not provide for an award of attorneys' fees in this situation.

<sup>66</sup> AR: SC 00402.

<sup>67</sup> AR: SC 00402.

DATED this 13th day of January, 2014.

Cairncross & Hempelmann, P.S.

A handwritten signature in black ink, appearing to read 'C. VanDerhoef', written over a horizontal line.

Stephen P. VanDerhoef, WSBA No. 20088

Charles E. Newton, WSBA No. 36635

Attorney for Appellants

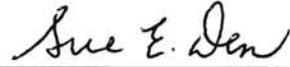
**Certificate of Service**

I, Sue E. Den, certify under penalty of perjury of the laws of the State of Washington that on January 13, 2014, I caused a copy of the document to which this is attached to be served on the following individual(s) via email and Hand Delivery:

**Attorneys for Respondent King County:**

Cristy Craig, WSBA No. 27451  
Senior Deputy Prosecuting Attorney  
DANIEL T. SATTERBERG  
King County Prosecuting Attorney  
CIVIL DIVISION  
W400 King County Courthouse  
516 Third Avenue  
Seattle, WA 98104  
[cristy.craig@kingcounty.gov](mailto:cristy.craig@kingcounty.gov)  
[Natalie.Duran@kingcounty.gov](mailto:Natalie.Duran@kingcounty.gov)  
[Diana.cherberg@kingcounty.gov](mailto:Diana.cherberg@kingcounty.gov)  
[Monica.erickson@kingcounty.gov](mailto:Monica.erickson@kingcounty.gov)

DATED this 13<sup>th</sup> day of January, 2014, at Seattle, Washington.



\_\_\_\_\_  
Sue E. Den, Legal Assistant