

No. 70553-9-I

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.

OPENING BRIEF OF APPELLANTS

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I. INTRODUCTION

The primary question before the Court is whether King County may, for 21 years, issue multiple supported and reasonable written and oral interpretations of an ambiguous permit condition to expressly allow an activity and then suddenly reverse its interpretation to the detriment of the Appellants who have reasonably relied on the County's prior, consistent interpretations. At issue are King County's interpretations of two permits governing activities at Pacific Raceways. Appellants, the owner of Pacific Raceways and its lessees,¹ ask the Court to reverse the King County Hearing Examiner's decision² upholding the County's recent, unprecedented interpretation of the applicable permits. The Court should reverse the Examiner based on the standards of the Land Use Petition Act, Ch. 36.70C RCW ("LUPA") and equitable and constitutional principles, which the Hearing Examiner had no jurisdiction to consider.

II. ASSIGNMENTS OF ERROR

The Examiner erred when he denied Appellants' appeals of King County Notice and Order dated January 21, 2011. The issues pertaining to the Assignments of Error are:

1. Whether equitable estoppel prevents King County from suddenly rendering an interpretation of an ambiguous permit condition that is contrary to the interpretation the County has consistently made in writing

¹ Race Track, LLC ("Race Track") owns the Pacific Raceways property and Pacific Grand Prix, LLC ("Grand Prix") and Pacific Rim ProFormance Racing School, Inc. ("ProFormance") are lessees.

² The Hearing Examiner's Report and Decision dated March 21, 2012 is located in the Clerk's Papers at pp. 135 – 153.

and orally for over 21 years, when Appellants have relied on the County's consistent interpretation and manifest injustice will occur if the County's new interpretation is enforced.

2. Whether the doctrine of laches prevents the County from enforcing the CUP so as to prevent activities that have been authorized for decades under the same CUP provisions.

3. Whether the County's new interpretation of the CUP Conditions violates constitutional principles of Due Process and fundamental fairness.

4. Whether the Examiner's Decision is supported by evidence that is substantial when viewed in light of the whole record before the court.

5. Whether the King County Superior Court erred when it modified the terms of King County's Notice and Order of Violation to authorize instructional driving schools but without defining whether the terms "quiet and non-impacting" equate to within ambient noise levels.

III. STATEMENT OF THE CASE

Race Track, LLC ("Race Track") owns the property at 31001 44th Avenue SE in Kent, Washington popularly known as Pacific Raceways³, a well-known motorsports facility that has been operating at its current location since July 4, 1960.⁴ Pacific Raceways is a family-owned business originally constructed by Dan Fiorito, Sr. His grandson, Jason Dan Fiorito, now serves as president of Pacific Raceways, a wholly owned subsidiary of Race Track.⁵

³ Originally named Pacific Raceways, the property later became known as Seattle International Raceways ("SIR"), but in 2002 the name reverted to Pacific Raceways.

⁴ CP at 340:11-18. (Notes designated as "CP" refer to the Clerk's Papers.)

⁵ CP at 339-340.

Race Track leases its facilities to Appellants Pacific Grand Prix, LLC (“PGP”) and Pacific Rim ProFormance, Inc. (“ProFormance”).⁶ The activities at Pacific Raceways are authorized pursuant to a conditional use permit.

A. The same Conditional Use Permit governing activities at Pacific Raceways has been in place since 1984.

Conditional Use Permit No. A-71-1-81 (the “CUP”), which governs activities at Pacific Raceways, was reinstated in its current form by King County Zoning Adjuster Irv Berteig effective May 4, 1984.⁷ CUP Conditions 1(a) (addressing activities on Mondays and Tuesdays) and 1(b) (addressing activities on certain weekend “quiet” days) are the CUP provisions at issue in this case:

The hours of tract [sic] operation shall be limited to 9:00 a.m. to 5:30 p.m., for both testing and racing with the following exceptions:

a. SIR⁸ 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 training, or other non-race related testing functions that are quiet, non-impacting.⁹

b. SIR shall provide a minimum of one quiet weekend day (Saturday or Sunday) per month during the May through September racing season. SIR shall notify Building and Land Development in writing of the five designated quiet

⁶ CP at 411:11-17 and 422:15-20; CP at 763:12-25.

⁷ AR: SC 00050-00074; SC00531; SC 00692; SC 00898 – 00900. (Notes designated “AR” refer to the administrative record and numbers assigned in the Superior Court).

⁸ Pacific Raceways was previously called “Seattle International Raceway” or “SIR.”

⁹ AR: SC 00020.

days prior to May 1st each year. SIR should notify interested community representatives in the interest of community relations.¹⁰

B. Between 1989 and 2010, King County officials consistently interpreted the CUP as allowing instructional driving schools and car clubs using muffled vehicles to use the track on Mondays, Tuesdays and weekend quiet days.

For over 20 years, King County has interpreted these CUP Conditions to allow instructional driving schools and car clubs using muffled vehicles to use the track on Mondays, Tuesdays, and weekend quiet days. The following list summarizes King County’s affirmative written statements that those activities are allowed under the CUP:

1989	CUP Administrator for King County Gordon Thomson’s letter to General Manager for the track, Jim Rockstad ¹¹	“filming may take place at SIR with no public address system, no spectators, cars with mufflers, and limit of approximately 30 people” “a driver’s training school for approximately 20 students using muffled cars may take place” “quiet day mean[s] non-spectator, non-impacting (muffled vehicles), no noise above ambient, and no traffic impacts” ¹²
1991	CUP Administrator for King County Greg Borba	“The type of activities which have been previously approved by Irv Berteig and/or Gordon Thomson, namely filming or video taping, instructional driving schools and track maintenance work are all acceptable ‘quiet day’ activities provided they are non-spectator events, use non-impacting (muffled) vehicles, create no noise above ambient levels, and create no traffic impacts outside the track.” ¹³
1992	CUP Administrator for King County	“The conclusion drawn from the noise tests is that the noise levels emanating from SIR

¹⁰ *Id.*

¹¹ Thompson copied Irv Berteig, the CUP’s author, on his 1989 letter.

¹² AR: SC 00084.

¹³ AR: SC 00091.

	Greg Borba noise studies	activities on scheduled quiet days [are] within ambient noise levels of the surrounding residential neighborhoods. Although the driver school vehicles can be heard, the noise level is within 'normal' noise levels for the neighborhood." ¹⁴
2005	CUP Administrator for King County Matthew Caskey	"track is closed for 'racing' on Mondays & Tuesdays, but the track operator may use this time for vehicle training." ¹⁵
2005	CUP Administrator for King County Matthew Caskey	"Track is closed to 'racing' events. Training or driving courses involving 'street legal' cars are allowed as long as the activity is 'quiet and non-impacting.'" ¹⁶
2006	CUP Administrator for King County Matthew Caskey	"Pacific Raceways Officials and King County DDES management have mutually agreed over the years that the use of the track on Mondays and Tuesday for emergency vehicle testing and car clubs, that both operate street legal (licensed) vehicles in a non-racing venue, have generally met CUP requirements for those events on Mondays and Tuesdays to be "quiet and non-impacting". The Department has expressed similar views about the same venues held on quiet weekend days." ¹⁷
2010	Director of King County DDES	"the Raceway was closed to racing on Mondays and Tuesdays. Instructional training allowed." ¹⁸
2010	DDES Staff Summary	"Pacific Raceways Officials and King County DDES management have mutually agreed over the years that the use of the track on Mondays and Tuesday for emergency vehicle testing and car clubs, that both operate street legal (licensed) vehicles in a non-racing venue, have generally met CUP requirements for those events on Mondays and Tuesdays to be 'quiet

¹⁴ AR: SC 00093 – 94.

¹⁵ AR: SC 00126.

¹⁶ AR: SC 00129.

¹⁷ AR: SC 00181 – 00182.

¹⁸ AR: SC 00190.

		and non-impacting'. The Department has expressed similar views about the same venues held on quiet weekend days." ¹⁹
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C. Appellants relied on the County's consistent interpretation that the CUP Conditions allow driving schools and muffled-vehicles on Mondays, Tuesdays and weekend quiet days.

Mr. Kitch began establishing ProFormance driving school in 1992.²⁰ He reviewed the CUP and questioned then track manager, Jim Rockstad, specifically requesting confirmation in writing from the County as to when driving school activity was allowed.²¹ Mr. Rockstad gave Mr. Kitch a copy of Gordon Thomson's 1989 letter confirming that driving schools were allowed on quiet weekend days and, because quiet weekend days were more restrictive than Mondays and Tuesdays,²² on Mondays and Tuesdays as well.²³ Mr. Kitch was not concerned about the prohibition against "race related" activities because none of his driver training classes would involve racing.²⁴ As Mr. Thomson's letter required, he intended to use muffled vehicles driven onto the track by his students or part of a fleet of street legal, fully muffled vehicles he would potentially provide to his students.²⁵ He had no intention of allowing his students to engage in, nor has he ever allowed them to engage in, racing.²⁶

¹⁹ AR: SC 00191 – 00192.

²⁰ CP at 412:20-23.

²¹ *Id.*

²² AR: SC 00539 – 00540.

²³ *Id.*

²⁴ CP at 416:9 – 17.

²⁵ *Id.*

²⁶ CP at 427:14 – 429:20.

Mr. Kitch established and built his driving school programs to comply with what the CUP allowed and what the County had confirmed and continued to confirm was allowed on Mondays and Tuesdays.²⁷ Mr. Kitch attended annual community meetings and rarely heard concerns from neighbors about his driving school activities on Mondays and Tuesdays.²⁸ When any such concerns came up, the County CUP Administrators always confirmed that instructional driving schools using street legal, muffled vehicles could operate on Mondays and Tuesdays.²⁹

Mr. Fiorito, the President of Race Track, testified that he confirmed what uses were allowed on the track prior to taking over management of the track in 2002. Confirmation was imperative not only to verify the track's basic operations but also its revenue sources before committing to taking the track over, and more importantly, determining how much to invest (and borrow) to bring the substantially neglected track up to safety standards.

Mr. Fiorito talked with the track manager, Bill Deoneseous, to confirm what was allowed, including on Mondays, Tuesdays and quiet weekend days.³⁰ He reviewed the CUP, including the conditions that governed uses on Mondays, Tuesdays and quiet weekend days.³¹ He observed Don Kitch's school operating on Mondays and Tuesdays and car clubs operating on Mondays and Tuesdays and quiet weekend days using street legal, fully muffled vehicles.³² He confirmed with Mr. Deoneseous

²⁷ CP at 418:16 – 422:14.

²⁸ *Id.*

²⁹ *Id.*

³⁰ CP at 351:7 – 352:19.

³¹ CP at 342:16 – 346:6.

³² CP at 361:23 – 362:15.

and Mr. Kitch that Mr. Kitch had been operating his driving school at the track since 1994, and that Skip Barber operated his school since at least 1990.³³ He observed police Emergency Vehicle Operator Training³⁴ and Pursuit Immobilization Technique³⁵ training on the track.

Mr. Fiorito attended the 2001 community meeting, run by Matt Caskey, the CUP Administrator at the time.³⁶ Mr. Caskey confirmed that street legal and muffled vehicles could operate on Mondays and Tuesdays and on quiet weekend days.³⁷ Mr. Caskey confirmed that this had been the County's historic position and this included car clubs and private instructional schools as well as police and emergency vehicle training.³⁸

After confirming that these activities were allowed and would produce significant income on Mondays and Tuesdays and quiet weekend days, Mr. Fiorito assumed management of track operations in 2002 and borrowed money to improve the track. In reliance upon the text of the CUP and the County's consistent interpretation of that language, he determined that the track would produce revenue to support operations and pay back improvement loans.³⁹ Mr. Fiorito confirmed that upwards of 30% of his road course rental revenues (and ability to pay operating expenses and track improvement debt) was generated on Mondays and Tuesdays and quiet weekend days.⁴⁰ He would not have invested in the track if, in 2001, the

³³ CP at 351:7 – 352:19.

³⁴ CP at 357:13 – 358:17.

³⁵ CP at 1199:20 – 25.

³⁶ CP at 342:15 – 24.

³⁷ CP at 348:2 – 350:3.

³⁸ *Id.*

³⁹ CP at 341:19 – 342:11; 366:2 – 368:13

⁴⁰ CP at 404:22 – 408:14; 1784:25 – 1786:4.

County had banned instructional driving schools from operating on Mondays and Tuesdays.⁴¹

D. In 2010 and 2011, after the appointment of a new Director, King County DDES suddenly reversed its prior, consistent interpretations of the activities allowed on Mondays, Tuesdays and weekend quiet days, and Appellants appealed.

On June 30, 2010, three months after John Starbard became Director of King County Department of Development and Environmental Services (“DDES”), DDES sent Appellants a letter entitled “King County Code Violation Code Enforcement Case #E1000334,” which contradicted the 1984 CUP and every prior County confirmation of the CUP. It stated:

An inspection of the subject property and review of King County records confirms the following violations of the King County Code exist on the subject property.

Noncompliance with the conditions of King County Conditional Use (CUP) Permit A-71-0-81.... Specifically,...1B. SIR (currently Pacific Raceways) has not been closed to all race testing and racing on Monday and Tuesday year-round as required by the CUP (1a. operating conditions)...To correct these violation(s): * * * 1B. Cease all race testing and racing on Monday and Tuesday year round by July 12, 2010.⁴²

Though the June 30, 2010 letter did not expressly ban instructional driving schools and car clubs “that operate street legal (licensed) vehicles in a non-racing venue,” Mr. Fiorito of Race Track, LLC nonetheless responded apprehensively:

Quiet, non-impacting has been interpreted and enforced by King County as meaning street legal muffled vehicles. These have been the only vehicles that occupy the track on Mondays and

⁴¹ CP at 368:9 – 25.

⁴² AR: SC 00193 – 00194.

Tuesdays for at least the nearly 30 years since the adoption of the CUP. These days are and will continue to be a significant portion of our business. They are also the mainstay of the ProFormance Driving School, the primary renter of those days. To arbitrarily change the interpretation and enforcement of the rules now would significantly negatively effect [sic] Pacific Raceways' business, and effectively destroy the business of ProFormance. The same interpretation and enforcement of the meaning of quiet weekend days has been employed by the County, and the same negative impact to the financial condition of the track would ensue if that was redefined.⁴³

In response, on July 13, 2010, King County sent another violation letter. That letter stated that in order to correct the violation Appellants had to “[c]ease all race testing and racing, including but not limited to Kart racing and non-emergency vehicle testing or training, on Monday and Tuesday year round by July 29, 2010.”⁴⁴ In response, Appellants ceased all kart racing on Mondays and Tuesdays, which Appellants determined was not allowed under the terms of the CUP which applied to the 2006 grading permit that allowed the track to be relocated.⁴⁵ However, because car clubs that operate street-legal (licensed) vehicles in a non-racing venue are not prohibited by the terms of the CUP, but rather have, in fact, consistently been allowed under CUP Condition 1(b), and because ceasing those activities would cause Appellants irreparable harm, Appellants continued to use the track for ProFormance racing school.⁴⁶

On January 21, 2011, King County served Appellants with a document titled “Notice of King County Code Violation: Civil Penalty

⁴³ AR: SC 00195 – 00196.

⁴⁴ AR: SC 00198 – 00199.

⁴⁵ CP at 386:16 – 23.

⁴⁶ CP at 400:13 – 22:2.

Order: Abatement Order: Duty to Notify” (“Notice and Order”).⁴⁷ The County’s Notice and Order instructed Appellants to: “Cease all racing and performance driving school operations and any other race-related functions, including any and all racing, lapping, or similar uses of private vehicles on required quiet days by **February 21, 2011.**”⁴⁸

Both in his deposition and during his testimony before the Hearing Examiner, Mr. Sandin’s only explanation for rejecting at least 21 years of consistent County interpretations regarding the CUP was the circular reasoning that the County has now determined that under the 1984 CUP instructional driving schools and car clubs using muffled vehicles have been banned.⁴⁹ Mr. Starbard’s nonsensical rationale is that the language “other non-race related testing functions” in Condition 1(a) was meant to prevent police and other emergency vehicles from racing each other.⁵⁰

Appellants appealed the January 21, 2011 Notice and Order to the King County Hearing Examiner. The Examiner made the following factual determination:

31. Pacific Raceway’s officials and King County DDES employees, including management, have agreed over the 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’.⁵¹

⁴⁷ AR: SC 00235 – 00237.

⁴⁸ *Id.*

⁴⁹ AR: SC 01480 – 01481; CP at 1171:9 – 1173:25.

⁵⁰ AR: SC 01446 – 01147.

⁵¹ AR: SC 02541.

The Examiner's Decision recognized that "[t]he Hearing Examiner does not have jurisdiction to consider the issue of equitable estoppel."⁵²

The Examiner's Decision denied Appellants' appeal and adopted verbatim DDES's unsupported and novel CUP interpretation first announced in DDES's January 2011 letter, stating that in order to bring the property into compliance Appellants were required to:

Cease all racing and performance driving school operations and any other race related functions, including any and all racing, lapping, or similar uses of private vehicles on required quiet days by February 21, 2011. Required quiet days are Mondays, Tuesdays and designated week-end quiet days.⁵³

Appellants appealed the Examiner's Decision to superior court under the Land Use Petition Act.

After affirming the bulk of the Examiner's Decision, the superior court reversed the portion of the Examiner's Decision that concluded that the "non-race related testing" language in CUP Condition No. 1 prohibited driving training for persons who are not police or emergency vehicle drivers on Mondays and Tuesdays. The superior court then impermissibly rewrote Paragraph A of the Notice and Order. On appeal, this Court sits in the same position as the superior court and reviews the Examiner's Decision, not the decision of the superior court. *Cingular Wireless, LLC v. Thurston County*, 131 Wn. App. 756, 767, 129 P.3d 300 (2006).

⁵² *Id.*

⁵³ AR: SC 02543.

E. In January of 2006, King County granted Appellants' application to relocate a racing track on the property; in January of 2011 King County confirmed that a wide range of uses is allowed on the track; then, 17 days later as part of its broader attempt to severely restrict Pacific Raceways' operations, King County issued a Notice of Violation stating that use of the track by any vehicles other than karts is prohibited.

For several years, the eastern portion of the Pacific Raceways property included a racing surface commonly referred to as the kart track (the "Kart Track"). The Kart Track was located in an area labeled on the 1984 Plot Plan as "Drag Strip Pit Area."⁵⁴ By 2003, the Kart Track's surface was in need of replacement and Appellants Race Track, LLC ("Race Track") and Pacific Grand Prix, LLC ("PGP") began discussions with King County DDES concerning the process for relocating the Kart Track from the eastern portion to the western portion of the property.⁵⁵ Because relocation of the Kart Track was not a change in use or modification of the CUP Conditions, which otherwise would require an amendment to the CUP, the County agreed that the request would be reviewed and acted upon as a grading permit application.⁵⁶

Race Track and PGP, the operator of the relocated Kart Track, applied for the grading permit under Project Number L05CG064 (the "Grading Permit"). On December 15, 2005, King County issued a Mitigated Determination of Non-Significance ("MDNS"), which approved the following track operations:

⁵⁴ AR: SC 00240.

⁵⁵ CP at 1178:25 – 1179:5; 1496:12 – 20.

⁵⁶ AR: SC 00098.

Three types of uses are proposed for the relocated track: shift kart race events, *driver training and track rental*. The Track Operations Summary submitted with the proposal indicates that race events “will likely occur between the months of April and October at the rate of one per month over a 4 day period of Thursday through Sunday between the hours of 8:00 AM and 5:00 PM.” *Driver training consists of an “Arrive and Drive” program for up to 20 participants and is proposed for operation on Wednesday through Friday from 9:00 AM to 3:00 PM except when race events are scheduled. Track rental is available to members of the general public who supply their own vehicles, drivers and equipment.* Track rentals are proposed to occur on allowable weekdays between 9:00 AM and 6 PM except when race events are scheduled.⁵⁷

The Grading Permit incorporated the conditions of the MDNS.⁵⁸

Although the relocated racing surface continued to be referred to by its shorthand title of the “kart track,” nothing in the MDNS or the Grading Permit limited the use of the racing surface to go-carts.

The terms “kart” and “kart tracks” are industry terms of art used to describe a particular type of track, not a particular type of vehicle.⁵⁹ Just as the Pacific Raceways “Drag Strip” was not limited to “drag strip” use (it in fact also is used as the front straightaway of the “Road Race Course” as designated on the Plot Plan), the Kart Track was not limited to “kart” use. No restrictions on the use of the relocated track were ever discussed in the relocation and Grading Permit process. It was only over the course of 17 days in January 2011 that DDES’s Director attempted to justify a ban of non-karts on the relocated race track as part of an already unsupported Notice and Order of Violation concerning Monday, Tuesday and quiet

⁵⁷ AR: SC 00136.

⁵⁸ AR: SC 00149 – 00150.

⁵⁹ CP at 772:10 – 775:16.

weekend days. The County's MDNS, consistent with all documentation and descriptions from the Appellants before the MDNS was issued, expressly allowed driver training and rental of the Kart Track to members of the public using their own vehicles.⁶⁰

From 2006 into 2011, only three weeks before the County issued the Notice and Order challenged herein, the County believed and publicly stated in great detail, that the use of the kart track was not limited to any particular type of vehicle.⁶¹ In fact, with respect to PGP, the only violation alleged by the County in the July 13, 2010 Violation Letter was that PGP was operating on quiet days contrary to its permit.⁶² PGP immediately ceased operations on Mondays and Tuesdays as a result.⁶³

On January 3, 2011, John Starbard, the Director of DDES, received an email from Linda Worden, a track neighbor.⁶⁴ Ms. Worden's email noted that a form of motorcycle racing ("supermoto") was scheduled to begin again on the Kart Track and she asked, among other things, for the permit that allowed use of the Kart Track by vehicles other than go-karts.⁶⁵ Mr. Starbard read the MDNS and discussed the issue with senior DDES staff "who were here at the time the SEPA document [the MDNS] was written."⁶⁶

Then, on January 4, 2011, Mr. Starbard wrote back to Ms. Worden, copying the entire King County Council and all of the DDES staff members

⁶⁰ AR: SC 00136.

⁶¹ AR: SC 00211.

⁶² AR: SC 00198.

⁶³ CP at 780:3 – 23.

⁶⁴ AR: SC 00212.

⁶⁵ AR: SC 00211.

⁶⁶ *Id.*

that were involved in examining the alleged violations of the CUP.⁶⁷ Mr. Starbard confirmed, consistent with the Grading Permit and all DDES analysis and conduct since 2006, that “[i]t appears that such an event can take place on the shift kart track on days other than quiet days, and within established hours of operation” and “it appears to me that the supermoto event is allowable.”⁶⁸ He confirmed that because the supermoto event was “not occurring on a ‘quiet day,’ it appears to be open to the general public, and presumably a fee or ‘rental’ will be charged,” it was allowed according to the Kart Track’s approved operations.⁶⁹ Mr. Starbard concluded:

“Vehicle” is not a defined term in the SEPA document. The dictionary defines vehicle as, “a device or structure for transporting persons or things.” The clearing and grading permit, dated March 1, 2006, refers back to the SEPA Mitigated Determination of Nonsignificance (page 6 of 9). It refers to “shift kart operations” and “shift kart activities,” but does not define them in the permit. ***Given that the permit cites the SEPA document, and the SEPA document does address proposed operations and uses, I would say the clearing and grading permit leads to the same conclusion as above.***

It appears, then, that a wide range of uses is allowed on the shift kart track, within hours of operation, and provided they are not on quiet days. The “track rental” provision is quiet [sic] broad. Though you did not ask about it, even the phrase “except when race events are scheduled” is unclear.⁷⁰

Seventeen days later, on January 21, 2011, King County issued the Notice and Order discussed above. In that Notice and Order, without subsequent justification in any County document, King County stated that

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.* (emphasis added).

Appellants were violating CUP Conditions and are required to cease the following activity:

Use of shift kart track by vehicles other than shift karts, including but not limited to motorcycles and street legal automobiles in violation of permit condition 15 requiring all improvements and uses to be conducted in accordance with the pre-march 31, 1984 plot plan.⁷¹

The January 21, 2011 Notice and Order did not attempt to reconcile DDES's new interpretation in the Notice and Order with the interpretation made by Mr. Starbard himself only 17 days earlier on January 4, 2011.

Appellants appealed the Notice and Order to the King County Hearing Examiner.⁷² The Examiner denied Appellants' appeal, adopted DDES's late January 2011 analysis rather than its Director's own carefully researched and detailed decision, and required Appellants to "[c]ease all non-kart use of the kart track by February 21, 2011."⁷³ Appellants appealed the Examiner's Decision to superior court, where the court upheld the Examiner's Decision. On appeal, this Court reviews the Examiner's Decision, not the decision of the superior court. *Cingular Wireless, LLC v. Thurston County*, 131 Wn. App. 756, 767, 129. P.3d 300 (2006).

F. The County's new interpretations of the CUP and Kart Track MDNS and Grading Permit will destroy each Petitioner's business.

The County's new interpretation of allowed activities on Mondays and Tuesdays and quiet weekend days substantially harms and undermines

⁷¹ AR: SC 00236.

⁷² AR: SC 00405; 00411; 00416.

⁷³ AR: SC 02534.

the viability of Race Track's business. Mr. Fiorito described his very real concern that his sources of revenue, previously approved by the County and upon which he depends to pay track improvement debt, would be deeply cut and he would be unable to pay operating costs including debt service.⁷⁴ His business already operates at a loss and the loss of hundreds of thousands of dollars of road course revenue from Mondays and Tuesdays and kart track lease payments will only increase those current losses.⁷⁵

Mr. Kitch confirmed that his school, and the 17 years he has invested in it, cannot survive if the County is successful in now banning him from the track on Mondays and Tuesdays.⁷⁶ Customers simply cannot or will not pay the amount necessary to allow Mr. Kitch to pay the higher Wednesday through Sunday rates.⁷⁷ Mr. Kitch was shocked by the County's new interpretation which seeks to ban his school entirely.⁷⁸

Mr. Zalud confirmed that he has invested over \$2.5 million in the kart track based upon the County's confirmation that he could use the relocated track for the cars and motorcycles that were previously allowed uses on the track before it was lawfully relocated.⁷⁹ Without the revenue provided by cars and motorcycles, he will also be unable to pay off debt he incurred to build the track the County confirmed he could build.⁸⁰

⁷⁴ CP at 404:22 – 408:14; 1784:25 – 1786:4.

⁷⁵ *Id.*

⁷⁶ CP at 460:10 – 25.

⁷⁷ CP at 417:5 – 418:10.

⁷⁸ CP at 460:10 – 25.

⁷⁹ CP at 790:25 – 791:8.

⁸⁰ CP at 791:9 – 792:13.

Mr. Fiorito confirmed that he cannot allow Mr. Kitch's school and Mr. Zalud's customers to use the road course from Wednesday through Sunday because neither Mr. Kitch nor Mr. Zalud can afford to run their businesses while paying the higher rental rates that the unrestricted Wednesday through Sunday time slots command.⁸¹ Given his existing business losses, Mr. Fiorito cannot afford to cut his rental rates for Wednesday through Sunday time slots to accommodate the realities of Mr. Kitch's and Mr. Zalud's business.⁸² The County's new interpretations have a debilitating, if not destructive, effect on Appellants' businesses.

IV. ARGUMENT

A. Standard of Review

This matter is governed by the Land Use Petition Act, Ch. 36.70C RCW ("LUPA"). Under LUPA, the Court may grant relief if it determines one of the standards set forth in RCW 36.70C.130(1)(a) - (f) has been met. Appellants challenge the Examiner's Decision under the following standards of RCW 36.70C.130(1), which allow the Court to grant relief if:

1. 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;
2. The land use decision is not supported by evidence that is substantial when viewed in light of the whole record before the court;
3. The land use decision is a clearly erroneous application of the law to the facts; [or]

⁸¹ CP at 404:22 – 408:14; 1784:25 – 1786:4.

⁸² *Id.*

4. The land use decision violates the constitutional rights of the party seeking relief.

The standards in subsections (b) and (f) present questions of law subject to de novo review. *Whatcom County Fire Dist. No. 21 v. Whatcom County*, 171 Wn.2d 421, 426-27, 256 P.3d 295 (2011). Interpretation of statutes and ordinances is a question of law reviewed de novo. *Id.* Under the substantial evidence standard in subsection (c), there must be a sufficient quantum of evidence in the record to persuade a reasonable person that the declared premise is true. *Wenatchee Sportsmen Ass'n v. Chelan County*, 141 Wn.2d 169, 176, 4 P.3d 123 (2000). A finding is clearly erroneous under subsection (d) when, although there is evidence to support it, the reviewing court on the record is left with the definite and firm conviction that a mistake has been committed. *Chinn v. City of Spokane*, 157 Wn. App. 294, 298, 236 P.3d 245, 247 (2010).

Under RCW 36.70C.120 and .130, the superior court acts in an appellate capacity and, on appeal to the court of appeals, the court of appeals stands in the shoes of the superior court and similarly reviews the decision of the local jurisdiction (not the decision of the superior court) based on the record before the local jurisdiction. *Van Sant v. City of Everett*, 69 Wn. App. 641, 651, 849 P.2d 1276 (1993).

Case law governing zoning ordinances is instructive when interpreting conditional use permits.⁸³ Challenges regarding the interpretation of a zoning

⁸³ Zoning ordinances and conditional use permits have similar functions. For example, zoning ordinances authorize the uses and regulate the activities on various properties. Conditional use permits authorize a particular use on a particular property subject to certain conditions of use.

ordinance are reviewed under the error of law standard. *Van Sant*, 69 Wn. App. at 647. Zoning codes are usually interpreted in accordance with the general rules governing statutory construction. *City of Seattle v. Green*, 51 Wn.2d 871, 322 P.2d 842 (1958); *City of Spokane v. Douglass*, 115 Wn.2d 171, 795 P.2d 693 (1990). Zoning ordinances must be construed in a manner that will give effect to the intent behind the provision. *Hama Hama Co. v. Shorelines Hearings Bd.*, 85 Wn.2d 441, 536 P.2d 157 (1975); *City of University Place v. McGuire*, 102 Wn. App. 658, 9 P.3d 918 (2000), rev'd, 144 Wn.2d 640, 30 P.3d 453 (2001).

Courts recognize certain rules when construing land use ordinances. First, zoning ordinances that prevent owners from using their property are strictly construed. *Keller v. City of Bellingham*, 92 Wn.2d 726, 600 P.2d 1276 (1979). Similarly, if an ordinance does not contain a restriction on a particular use of land, no such restriction may arise by inference. *Hobert v. Marque*, 5 Wn. App. 222, 486 P.2d 1140 (1971). Generally, the local land use agency's interpretation of the ordinance is given substantial weight by the court in interpreting the ordinance. *Citizens for a Safe Neighborhood v. City of Seattle*, 67 Wn. App. 436, 836 P.2d 235 (1992); *Eastlake Community Council v. City of Seattle*, 64 Wn. App. 273, 823 P.2d 1132 (1992).

B. The Court should reverse the Examiner's Decision under RCW 36.70C.130(1)(b) because use of the track by ProFormance complies with CUP Condition 1(a).

Condition 1(a) provides that on Mondays and Tuesdays the track is closed to race testing, but that "Race testing is not meant to exclude police

and emergency vehicle testing and training, or other non-race related testing functions that are quiet, non-impacting.”⁸⁴ For over 21 years, King County has interpreted “non-race related testing functions” to include ProFormance’s instructional driving school. The Examiner, however, concluded that “[t]here is no reasonable way that the [Condition 1(a)] language can be read as authorizing driver training for persons who are not police or emergency vehicle drivers...”⁸⁵ and more specifically, Condition 1(a) “does not authorize the operation of a driving school on Monday or Tuesday, or on weekend quiet days.”⁸⁶

The Court should interpret Condition 1(a) in a manner that will give effect to the intent behind the provision, and should be guided by the ordinary meaning of words. Here, the drafter of the CUP, Irv Berteig, and several subsequent CUP administrators confirmed that this provision specifically authorizes a driver training school, using muffled vehicles, that operate within normal, ambient noise levels for the neighborhood. It was not until 2010 that anyone at King County concluded that “non-race related testing functions” excludes a driver training school. By concluding that the CUP “does not create or harbor any ambiguity on [this] question” and that, under the language in CUP Condition 1(a), a driver training school is not allowed, the Examiner’s Decision made an erroneous interpretation of the law. The superior court found that the Examiner did err on this issue, but failed to

⁸⁴ SC 00020.

⁸⁵ SC 02542.

⁸⁶ SC 02542.

confirm that the words “quiet, non-impacting” means within ambient noise levels. The Court should reverse the Examiner’s Decision on this issue.

C. The Court should reverse the Examiner’s Decision under RCW 36.70C.130(1)(d) because the doctrine of equitable estoppel prevents the County from reversing its continuous, decades-long interpretations of the CUP Conditions.

The Court should reverse the Examiner’s Decision under RCW 36.70C.130(1)(d) because the Examiner did not have jurisdiction to apply the law of equitable estoppel, which precludes the County from reversing its consistent, 21-year interpretation of the CUP Conditions. Equitable estoppel applies to governmental agencies 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
5. Estoppel will not impair governmental functions.

Silverstreak, Inc. v. Dep’t of Labor & Indus., 159 Wn.2d 868, 887 (2007).

In *Silverstreak*, City Transfer of Kent, Inc. (“CTI”) won a contract to provide 800,000 cubic yards of fill material for a third runway embankment at Sea-Tac. CTI then contracted with suppliers (“Suppliers”) to supply and deliver the fill material. Suppliers relied on a 1992 Department of Labor & Industries (“Department”) policy memorandum on “Delivery of Materials” under WAC 296-127-018 to prepare their bid, which required Suppliers to

pay market wages rather than prevailing wages to the end-dump truck drivers. Roughly one year after completion of the project, the Department issued a notice of violation, which stated that Suppliers owed prevailing wages to the end-dump truck drivers.

Suppliers appealed the notice of violation. The Supreme Court upheld the Department's interpretation of WAC 296-127-018 that the end-dump truck drivers should be paid prevailing wages. Despite that ruling, however, the Court applied equitable estoppel and held that Suppliers were not required to pay prevailing wages because the Department was estopped from claims contrary to the position taken in its 1992 policy memorandum.

Here, the facts are much more egregious than in *Silverstreak*. The Hearing Examiner specifically found that "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.'"⁸⁷ The County's January 21, 2011 Notice and Order is a reversal of its consistent, 21-year interpretation of the CUP Conditions that the Hearing Examiner confirmed. Appellants have invested millions of dollars in reliance on the County's long-standing interpretation of the CUP that allowed limited, non-race related activities on Mondays, Tuesdays and

⁸⁷ AR: SC 02541.

weekend quiet days, the relocation of the multi-purpose kart track, and the establishment of a driving school business that could afford to lease the track only on less intensive and thus less expensive Mondays, Tuesdays and quiet weekend days. Now, if the Court upholds the inconsistent interpretation in the County's Notice and Order, Appellants will incur hundreds of thousands (if not millions) of dollars in damages.⁸⁸

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., 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 establish a business, and Petitioner PGP borrowed \$2.5 million to relocated 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

⁸⁸ See citations contained at footnotes 93 – 101.

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 the application of equitable estoppel.

The leading case preventing equitable estoppel against a government agency is *Mercer Island v. Steinmann*, 9 Wn. App. 479, 513 P.2d 80 (1973). In *Steinmann*, the Court of Appeals held that the City of Mercer Island was not estopped from enjoining the use of a residence as an apartment in violation of the Mercer Island Code even though the city had granted a permit for certain building improvements and had inspected the property during construction. Because the apartment use clearly was prohibited under the zoning code and the applicant sought a building permit without indicating that the improved property would be used as apartments, the Court of Appeals held that estoppel would not apply.

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 County expressly stated that such uses were allowed. Consequently, Appellants cannot be held to have known that their actions were prohibited. Further, unlike the *Steinmann* case, there was no way for Appellants to determine whether operating a driving school was prohibited under the CUP other than

to ask that question of the CUP Administrator. For 21-years the County's CUP Administrator confirmed publicly and in writing that the CUP does allow such schools.

The County should be estopped from reinterpreting the CUP after 21 years of consistent interpretations. The County resolved any ambiguity in the CUP when in 1989 and 1991 it issued interpretations with the oversight of the CUP's author, and continued to confirm the meaning of the CUP in 1998 and through the 2000s, only to suddenly reverse itself in 2010. Appellants reasonably relied on the County's unwavering interpretations of the CUP's meaning and have made substantial investments in their businesses in reliance on those interpretations. Appellants ask the Court to reverse the Hearing Examiner and estop the County from re-defining the CUP Conditions, effectively making an unlawful amendment to the CUP,⁸⁹ after decades of clear and consistent interpretations to the contrary.

D. The Court should reverse the Examiner's Decision under RCW 36.70C.130(1)(d) because the doctrine of laches prevents the County from changing its continuous, decades-long interpretations of the CUP Conditions.

Laches is "implied waiver arising from knowledge of existing conditions and acquiescence in them." Laches applies if three conditions exist: (1) knowledge or reasonable opportunity to discover on the part of a potential plaintiff that he has a cause of action against a defendant; (2) an

⁸⁹ Appellants note that the County cannot rewrite the terms of the CUP decades after CUP issuance, since the County failed to file a timely appeal of the CUP, and so the CUP language is binding on the County just as it is binding on Appellants. *See e.g., Chelan County v. Nykreim*, 146 Wn.2d 904, 52 P.3d 1 (2002).

unreasonable delay by the plaintiff in commencing that cause of action; (3) damage to defendant resulting from the unreasonable delay. *Citizens for Responsible Gov't v. Kitsap County*, 52 Wn. App. 236, 240, 758 P.2d 1009, 1011 (1988). Unlike equitable estoppel, laches does not require a finding that a party reversed prior statements. Instead, laches applies based upon a lapse of time and failure to assert a right. While the application of laches against government entities generally is disfavored, under certain factual circumstances, the application of laches is appropriate. Given the unique facts of this case, there is no law on point in Washington, but cases from other jurisdictions offer authority and rationale for laches in this context.

For example, in *Wieck v. District of Columbia Bd. of Zoning Adjustment*, 383 A.2d 7 (1978), a permit was issued in June of 1967 for a shed. A month later, a permit was issued authorizing the installation of a new fireplace, partitions for a bathroom, and electrical work. Before and during the work, the city inspected the property. In July of 1968, several months after completion, the district zoning administrator sent a letter ordering the improvements to be removed. The city took no action for three years, at which time a nearly identical letter was sent. In May of 1974, a new owner purchased the property and in December of 1974, the chief of the zoning inspector branch sent a letter ordering the new owner to dismantle the structure and return it to its allowed use as a shed.

On appeal, the court held that the doctrine of laches barred the enforcement of the applicable zoning regulation against the owner. The court noted “a claim of laches in the zoning context is not judicially favored and is rarely applied except in the clearest and most compelling

circumstances.” *Id.* at 11. Nonetheless, the court found that the between the initial letter in July of 1968 and the third order sent in December of 1974 was inexcusable and the harm to the owner outweighed the district’s interest in enforcing zoning regulations. *Id.* at 12. Thus, the Court held:

Under these extraordinary and compelling circumstances, and with actual notice by the government being present for such a long period, we reverse . . . and hold that the District is barred from enforcing the applicable zoning regulation against petitioner due to laches. In zoning, as in other areas of law, the government can be in the wrong. In zoning, the equities can be so compelling as to favor the individual property owner.

Id. at 12-13.

Similarly, in *Hancock v. Hueter*, 118 Mich. App. 811 (1982), laches precluded the city from enjoining the use of a house as a three-family residential building. The court found that the owner had paid garbage collection fees to the city since 1972, which constituted notice of the existence of the three dwelling units. The city manager was informed of the existence of the three units prior to 1979 and inspected the house in 1979. Yet, the city did not file a complaint for an injunction until August of 1980. Based on those facts and the prejudice the owner would suffer from the injunction, the court held that the application of laches was appropriate.

Here, the facts are far more egregious than in *Wieck* or *Hancock*. King County not only failed to enforce the alleged violations under the CUP, but the County expressly stated for 21 years that such activities were not violations.⁹⁰ The wholesale reversal by the County works a substantial injustice upon Appellants who have built their businesses around the

⁹⁰ AR: SC 02541.

County's undisputed historical position. Under these facts, the elements of laches are met. First, the County not only knew of the alleged CUP violations, the County expressly found that such activities were allowed. Second, the County unreasonably delayed in enforcing the alleged violations for over 21 years, and again found during that time period that there were no such violations. Finally, Appellants will be substantially prejudiced by the County's sudden enforcement of terms in the CUP that it now claims are unambiguous but that never supported an enforcement action in the past. The Court should rule that laches precludes the County from asserting a new interpretation of the CUP and enforcing it for the first time after a delay of over 21 years of acquiescence and affirmative statements to the contrary.

E. The Court should reverse the Examiner's Decision under RCW 36.70C.130(1)(f) because it violates constitutional principles of due process and fundamental fairness.

The King County Hearing Examiner can exercise only those powers delegated to it by the County Council. The King County Code expressly recognizes the limitations of the Examiner's jurisdiction and authority.⁹¹ As a consequence, the Examiner's Decision did not address or rule on constitutional questions. This Court, however, does have jurisdiction to rule on constitutional questions.

Because a person of common intelligence cannot determine which activities are allowed or prohibited by the terms of the CUP (as shown by the County's own conflicting interpretations), the CUP Conditions are unconstitutionally vague as applied to Appellants, and the Court should

⁹¹ KCC 20.24.020; *See also* KCC 20.24.110.

reverse the Examiner's Decision pursuant to RCW 36.70C.130(1)(f). The Supreme Court of Washington's decision in *Burien Bark Supply v. King County*, 106 Wn.2d 868, 725 P.2d 994 (1986), should control the outcome here.

In *Burien Bark*, King County Code enforcement personnel inspected the operations of Burien Bark Supply ("Burien Bark") in 1980 and 1981 in response to complaints from neighbors about excessive dust resulting from the business's bark sorting process. The County twice concluded that Burien Bark had not violated its zoning restrictions. Neighbors complained again in November 1982 and the County reversed course, notifying Burien Bark that its operation violated the general commercial ("C-G") zoning classification. The County later issued Burien Bark a notice and order to correct the violations. The notice and order required Burien Bark to cease sorting and selling beauty bark, which was a significant portion of its business.

Burien Bark appealed the notice and order. The matter ultimately reached the Supreme Court. After discussing the void for vagueness doctrine, the Court held that the ordinance was unconstitutionally vague.

The trial court held that the prohibition of processing beyond a "limited degree" in KCC 21.30.010 is so vague that the County cannot constitutionally prohibit Burien Bark Supply from using its sorter. We agree. The code does not explain how a procedure is to be deemed "limited." We cannot tell, for example, whether one should consider the number of steps in the process; the percentage of business time devoted to the process; the extent to which the process is necessary for the overall business; or the physical size of the process. *The code unconstitutionally leaves to the discretion of county officials the substance of determining what activities are prohibited... A citizen should not be subjected to ad hoc interpretations of the law by county officials.*

Burien Bark, 106 Wn.2d at 872 (emphasis added). Because the Supreme Court affirmed the matter on constitutional grounds, it did not reach the issue of equitable estoppel.

Here, Appellants are being subjected to ad hoc interpretations of the law by County officials. On Mondays and Tuesdays, CUP Condition 1(a) allows “police and emergency vehicle testing and training, [and] ***other non-race related testing functions that are quiet, non-impacting.***”⁹² Like *Burien Bark*, King County issued interpretations of the applicable language before reversing course and issuing a contrary interpretation. In *Burien Bark*, the County issued two interpretations over the years 1980 and 1981 before reversing its interpretation in 1982. Here, the County issued multiple interpretations over a 21-year time period prior to suddenly reversing that interpretation in 2010. Because the language in the CUP was at least equally vague and the County’s actions are even more egregious than in *Burien Bark*, the Court should reverse the Examiner’s Decision and rule that the County must abide by its historical interpretation of the CUP Conditions.

The Constitutional void for vagueness doctrine outlined in *Burien Bark* is based on concerns of due process and fundamental fairness. Due process and fundamental fairness require clear discretionary standards that provide an applicant or permittee with fair warning of how the governing authority will exercise its discretion. Scholars and judges have identified some of the many policy reasons for requiring clear discretionary standards:

Discretionary development review too often involves the *ad hocery* that Richard Babcock has described as ‘trial by

⁹² AR: SC 00068.

neighborism.’ Babcock, *The Zoning Game* 14 (1966). On this point, the Michigan court once noted: ‘Without definite standards an ordinance becomes an open door to favoritism and discrimination, a ready tool for the suppression...through the granting of authority to one and the withholding from another.... A zoning ordinance cannot permit administrative officers or boards to pick and choose the recipients of their favors.’ *Osius v. City of St. Clair Shores*, 344 Mich. 693, 75 N.W.2d. 25, 28, 58 A.L.R.2d 1079 (1956).

Rathkopf, *The Law of Zoning and Planning* § 11:4 (2010). The policies supporting the need for clear discretionary standards are readily apparent in this appeal. Without notice, and contrary to the County’s long-standing, carefully considered interpretation, the County attempted to open the door to favoritism and discrimination in 2010, and Appellants find themselves blindsided by *ad hoc* County decisions resulting from “trial by neighborism.” At a minimum, due process requires some standards against which to judge the limits of the County’s discretion. Constitutional principles of due process and fundamental fairness prevent the County from suddenly asserting the CUP Conditions are ambiguous after decades of clear interpretations and then issuing a contrary interpretation.⁹³ That type of unfettered, *ad hoc* discretion leads to abuse, as it has here, and is precisely why Constitutional principles prohibit it. The Court should reverse the Examiner’s Decision and rule that the County must abide by its unwavering historical interpretation of the CUP Conditions.

⁹³ See e.g., *Silverstreak, Inc. v. Washington State Dept. of Labor & Indus.*, 159 Wn. 2d 868, 890, 154 P.3d 891 (2007)

F. The Court should reverse the Examiner’s Decision under RCW 36.70C.130(1)(b), (d), and (f) because vehicles other than karts complies with conditions of the CUP.

Motorized vehicles other than karts have used the kart track for decades.⁹⁴ When Appellants began the process of relocating the track, Appellants’ attorney corresponded with King County to confirm uses on the relocated track.⁹⁵ Because the track primarily was used by 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.”⁹⁶ Appellants referred to the track by its popular name in correspondence with King County, but nothing in that correspondence was ever meant to suddenly 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.⁹⁷ Appellants explained:

We do not believe that the request to move the go cart track for use by shift carts is a change in use or a modification of the conditions. First, there is no request to modify any of the conditions attached to conditional use permit A-71-0-81. Second, the proposed relocation is not a “change of use”. It is a relocation of a use from one part of the property to another part of the property. The use, which is motor vehicle racing, will remain the same.⁹⁸

⁹⁴ CP at 368:14 – 371:1.

⁹⁵ AR: SC 00097 – 00099; 00119 – 00121.

⁹⁶ CP at 772:10 – 775:16.

⁹⁷ AR: SC 00097 – 00099; 00119 – 00121.

⁹⁸ AR: SC 00098.

Indeed, the September 12, 2005 Track Operations Summary stated expressly that “proposed operations will adhere to the existing Conditional Use Permit until such time as those conditions change.”⁹⁹

The County’s Notice and Order seeks to prohibit the use of the “track by vehicles other than karts, including but not limited to motorcycles and street legal automobiles in violation of permit condition 15 requiring all improvements and uses to be conducted in accordance with the pre-March 31, 1984 plot plan.”¹⁰⁰ Unfortunately, the referenced plot plan does not identify what uses were expressly allowed on the kart track portion of the main road course.¹⁰¹ The track at issue was located in the eastern portion of the property near the area labeled “Drag Strip Pit Area.”¹⁰² Nowhere does the plot plan restrict uses in that area or elsewhere to kart use.

The requirement in CUP Rules and Procedures No. 15(3) that “[a]ll improvements and uses shall remain in compliance with the approved plot plan” is unclear.¹⁰³ Based on the historic use of the track and the fact that no change in the activities on the track was proposed, the County agreed that an amendment to the CUP or any other new use permit was not required and issued a grading permit without any restrictions on the use of the kart track and Appellants reasonably believed that those same activities could continue on the relocated track. According to King County DDES Director John Starbard’s email of January 4, 2011, the County and Appellants were

⁹⁹ AR: SC 02539.

¹⁰⁰ AR: SC 00236.

¹⁰¹ AR: SC 00240.

¹⁰² *Id.*

¹⁰³ AR: SC 00065.

correct.¹⁰⁴ Mr. Starbard's email in response to a neighboring property owner stated, "a wide range of uses is allowed on the shift kart track.... The 'track rental' provision is quiet [sic] broad."¹⁰⁵ 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.¹⁰⁶

The Court should reverse the Examiner's Decision upholding 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 uses of the track by vehicles other than karts have been the status quo for years. The County inspected the track after it was completed and witnessed non-kart use without ever raising an eyebrow. As late as January 2011, the County expressly found that a wide range of uses are allowed on the track. Relying on the continuing use of the track by non-karts, Appellants have invested substantially in the track relocation and improvements. Then, based upon a plot plan that does not provide any clear basis for reversing the status quo and ignoring its own detailed grading permit issuance and subsequent analysis, the County issued its Notice and Order prohibiting the same activities that had existed on the track for years. The Court should rule that the County is barred from such a reversal under the same doctrines of

¹⁰⁴ AR: SC 00211 – 0021.

¹⁰⁵ AR: SC 00211.

¹⁰⁶ AR: SC 00235 – 00237.

equitable estoppel, laches, and/or constitutional principles of due process and fundamental fairness outlined above.

G. The Court should reverse the Examiner’s Decision under RCW 36.70C.130(1)(c) because there is no evidence in the record to support the Examiner’s conclusion that in 1989 the County’s interpretation of the CUP “evolved” and activities allowed under the CUP “expanded.”

The Examiner’s Decision concludes: “Beginning in 1989, King County’s interpretation of [the CUP] evolved. Activities permitted at Pacific Raceways on Mondays and Tuesdays and weekend quiet days expanded.”¹⁰⁷ The Examiner’s conclusion infers that a prior, more restrictive interpretation of the CUP existed before 1989. But the record contains no such interpretations. To the contrary, prior to 2010, the CUP had been interpreted only to authorize the activities that King County summarily decided to ban in 2010. The Examiner erred by concluding that the CUP interpretation evolved and expanded and the Court should reverse the Examiner’s Decision on this point.

H. The Court should reverse the Examiner’s Decision under RCW 36.70C.130(1)(c) because the 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.

The Examiner’s Decision at Conclusion 10 states:

Even if one could interpret the CUP as authorizing a driving school on Mondays and Tuesdays, as King County did for a lengthy period of time, the training done by ProFormance Racing School has not been ‘quiet’ and ‘non-impacting,’ as those words are commonly understood. The noise heard at nearby residential

¹⁰⁷ AR: SC 02541.

properties has been substantial, and the residents on some of those properties have been impacted.”¹⁰⁸

This Conclusion is the underlying basis supporting the Examiner’s ultimate decision to deny Appellants’ appeal of the Notice and Order. But the basis for the Examiner’s Conclusion is testimony of only some local community members (the “County Neighbors”), which, upon examination, shows bias against Pacific Raceways generally and lacks credibility. In fact, the substantial testimony in the record supports the conclusion that Appellants’ activities are quiet and non-impacting within the meaning of the CUP Conditions, and pursuant to RCW 36.70C.130(1)(c), the Court should reverse the Examiner’s Decision.

1. The majority of the County Neighbors did not report CUP violations.

County officials charged with enforcing the CUP have interpreted Condition 1(a) to mean that certain activities are allowed at Pacific Raceways on Mondays and Tuesdays and on weekend quiet days provided that they do not add to the “ambient” noise levels surrounding the track.¹⁰⁹ While the County has never defined the meaning of “ambient” noise,¹¹⁰ the testimony from both Mr. Steffel and Mr. Jurdy was clear – in an outdoor noise environment, the “ambient” noise level is composed of all of the noise events occurring in that location over a particular period of time.¹¹¹ Appellants and King County’s experts both testified that a sound can be

¹⁰⁸ *Id.*

¹⁰⁹ AR: SC 00088 – 00089; 00090; 00091 – 00092.

¹¹⁰ CP at 1346:21 – 1347:15.; *See also* SC 02451, ¶ 32.

¹¹¹ CP at 575:13 – 576:3.

audible and still not add to the “ambient” noise level at the particular location where it is perceived.¹¹²

In contrast to this uncontested expert testimony, many of the County Neighbors testified that a CUP violation occurs when Pacific Raceways was audible on a Monday or Tuesday or a weekend quiet day, it was in violation of the CUP.¹¹³ Thus, the testimony from several County Neighbors – asserting that Pacific Raceways could be heard on a particular day – is not sufficient to prove a violation of the CUP, which requires the activity to be in excess of the ambient noise level at that location.

The County Neighbors’ complaints also are inconsistent. Officer Sawin testified about complaints she received from neighbors, but never verified,¹¹⁴ including a complaint on August 16, 2011.¹¹⁵ Mr. Fiorito confirmed that there was no activity occurring on the race track property that day; the track was unrented.¹¹⁶ Mr. Fiorito confirmed in rebuttal that there were no neighborhood complaints on several days when Mr. Kitch’s school and Goodyear tire testing were in full operation in 2011: July 24¹¹⁷ (a quiet weekend day) and September 6, 12, 26, and 27 (all Mondays or Tuesdays).¹¹⁸ Neighbor complaints on days when no activity occurred shows that neighborhood activities, including traffic on public right of ways, prompted the County Neighbors to complain. The absence of any

¹¹² CP at 1394:2 – 1395:13; 577:2 – 9.

¹¹³ CP at 1024:20 – 24 (Larry Worden); 1072:17 – 21 (Jean Williams); 1124:1-5 (Don Huling); 1526:22 – 1527:5 (Peter Tetlow); 1696:3 – 10 (Tracie Felton).

¹¹⁴ CP at 1671:12 – 1674:1.

¹¹⁵ CP at 1671:12 – 23.

¹¹⁶ CP at 1799:22 – 1780:6.

¹¹⁷ CP at 1796:24 – 1797:18.

¹¹⁸ CP at 1800:7 – 1801:16.

complaints on fully-operating instructional driving school and other non-race related testing days is evidence that these activities fit within even the County's new, nebulous, subjective definition of "quiet and non-impacting."

2. The County Neighbors' testimony identifies significant environmental noise sources surrounding the track.

Sparling's report presented three separate categories of environmental noise that occurred during their testing at the four sampling locations.¹¹⁹ In each of the sampling locations, noise events occurred in the environment that registered above 60 dBA and as high as 72 dBA.¹²⁰ According to Sparling, these events included: (1) aircraft, (2) local traffic, with traffic on Auburn Black Diamond Road being particularly noticeable at the Gaither and Felton Residences, (3) garbage trucks, and (4) yard work and maintenance occurring at neighboring properties.¹²¹

The County Neighbors' testimony corroborated that there are significant contributors to ambient noise in all areas surrounding the track. Mr. Gaither¹²² and Mr. Clark¹²³ testified that they could hear Auburn Black Diamond Road from their residences. Mr. Clark – who runs his extremely loud "rat rod" on Auburn Black Diamond Road¹²⁴ – testified that there was a loud diesel truck using a "jake brake" that drove by his house on Auburn Black Diamond road at 5:30 a.m., seven days a week.¹²⁵ Mr. Clark also testified that the diesel trains (which pass between his house and Pacific

¹¹⁹ AR: SC 00316 – 00318.

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² CP at 1630:3 – 16.

¹²³ CP at 1557: 5-8.

¹²⁴ CP at 1558:17 – 1559:14.

¹²⁵ CP at 1557:9 – 14.

Raceways two to three times a day) are louder than cars at Pacific Raceways on Mondays and Tuesdays.¹²⁶ Mr. Huling testified that noise from Lake Holm Road could be louder than Pacific Raceways on Mondays and Tuesdays.¹²⁷ Mr. Huling also confirmed the loud noise caused by garbage trucks, power washing, and roof maintenance that occurred near his residence during the time that the County conducted its noise sampling.¹²⁸

This testimony was consistent with Mr. Fiorito's testimony confirming the following obvious trends. First, since 1984, the neighborhood around the track, like of much of South King County, has become more populated. Second, like the track, the neighborhood is more active between May and September because the weather is better, days are longer, and more yard work is done which includes lawnmowers, line trimmers, chainsaws, pressure washers and other small engine noise.¹²⁹

All of these noise events, which the County Neighbors try to downplay in their testimony, are part of the ambient noise environment in the neighborhoods near Pacific Raceways. Despite the County's attempt to characterize the area surrounding the track as a rural environment where human and motorized noise is the exception, the County cannot deny the noise testing results or the testimony of its own witnesses which demonstrate that there are significant contributors to the ambient noise environment near the track that have nothing to do with Pacific Raceways.

¹²⁶ CP at 1565:3 – 16.

¹²⁷ CP at 1116:17 – 23.

¹²⁸ CP at 1117:7 – 20.

¹²⁹ CP at 603:25 – 604:18; 605:14 – 606:13.

3. Subjective “annoyance” with sound from Pacific Raceways does not equate to a violation of the CUP.

When testifying regarding the “perceptibility” of a particular sound, both Mr. Steffel and Mr. Jurdy testified that a noise, even when not louder than the ambient noise environment, will be more perceptible to a person who is “annoyed” by that particular sound than someone who is not bothered by it.¹³⁰ The County Neighbors’ subjective annoyance and bias against activity at Pacific Raceways was clearly demonstrated in their testimony. First, both Mr. Huling and Mr. Clark testified that they were more sensitive to noise than most people because of their experience with noise testing and as an auto mechanic, respectively.¹³¹ One of the most strident opponents of the track, Ms. Boehm, testified that between 2004 and March of 2010 she did not find noise from Pacific Raceways to be bothersome.¹³² It wasn’t until she became angry as a result of fireworks associated with a Wednesday night drag racing event that noise coming from Pacific Raceways became a source of annoyance for her.¹³³ Similarly, Mr. Wells, who worked from home since 2005, testified that the sound from Pacific Raceways didn’t bother him until his wife started complaining about it in 2009.¹³⁴ Mr. Huling testified that it was not the “volume” of the noise that bothered him on quiet days, but the “pattern” of the sound that he found bothersome.¹³⁵ The subjective pre-disposition against track noise that the County Neighbors

¹³⁰ CP at 557:3 – 17; 560:25 – 561:17.

¹³¹ CP at 1086:20 – 22; 1562:16 - 23 and 1571:8 - 15.

¹³² CP at 1295:17 – 1297:7.

¹³³ CP at 1263:1 – 18.

¹³⁴ CP at 1533:17 – 1534:2.

¹³⁵ CP at 1093:2 – 9.

demonstrated cannot form the basis for an objective violation of the CUP. Instead of conditioning CUP compliance on subjective standards, the County always has based CUP compliance on the objective standard of that which is within ambient noise levels. The Court should reverse the Examiner and not sanction this type of trial by neighborism.

4. Much of the testimony of the County Neighbors lacks credibility.

Setting aside the County Neighbors' bias, much of their testimony is inconsistent internally and when compared to other testimony presented during the hearing. For example, Ms. Boehm was the only County Neighbor who testified that it was "flat out quiet" before 2010 and then dramatically increased thereafter.¹³⁶ This is inconsistent with not only the testimony of the other County Neighbors, but also the testimony of Don Kitch, who indicated that his business has decreased in the last three years as a result of the economic downturn. Mr. Fiorito also confirmed that track use has dropped off precipitously since 2008.¹³⁷ Finally, although Ms. Boehm asserted that she sold her house as a result of track noise, she actually listed her home for sale in 2009, prior to the time that she decided that she was bothered by noise from Pacific Raceways.¹³⁸ Based on these inconsistencies, Ms. Boehm's testimony lacks credibility.

Sandra Gaither and Linda Worden testified that, in their opinion, a violation of the CUP occurs if the track is audible. However, both Ms. Gaither and Ms. Worden had previously acknowledged in writing that a

¹³⁶ CP at 1272:6 – 21 and 1275:11 – 23.

¹³⁷ CP at 1784:25 – 1786:13.

¹³⁸ CP at 1294:4 – 17.

violation of the CUP occurs only if it adds to the ambient noise level and not simply because the sound is audible.¹³⁹ Further, Ms. Gaither admitted her true intentions by testifying, completely independent from the discreet issues before the Hearing Examiner, that if she had her way, she would completely shut down Pacific Raceways.¹⁴⁰ Ms. Worden, who has been an opponent of the track since she sued SIR in the 1970s and 1980s, also expressed similar general biases against Pacific Raceways.¹⁴¹ The biases of both these witnesses calls into question the credibility of their testimony.

The testimony of the remaining County Neighbors also is too varied and inconsistent to credibly establish that Pacific Raceways has violated the CUP. With the exception of the Wordens, Ms. Gaither, and Mr. Guddat, none of the County Neighbors were aware that activities at Pacific Raceways were limited by the CUP prior to 2010.¹⁴² When viewed in light of testimony by Ms. Felton and Ms. Worden that a violation of the CUP occurs when Pacific Raceways is merely “audible”, even their “verification” does not prove that a violation of the CUP has occurred.

5. The majority of the County Neighbors demonstrated that they cannot discern the difference between the ProFormance School and police training.

The County Neighbors’ testimony regarding potential violations of the CUP is further called into question when viewed in light of the testimony that police training activity at Pacific Raceways, which the CUP

¹³⁹ See AR: SC 02412 and SC 02445.

¹⁴⁰ CP at 1599:7 – 12.

¹⁴¹ CP at 1552:8-16; 1562:4-12.

¹⁴² CP at 1069:15 -18 (Jean Williams); 1108:3 – 11 (Don Huling); 1269:7 – 14 (Leah Boehm); 1514:20 – 1515:13 (Peter Tetlow); 1538:24 – 1539:23 (Nicholas Wells).

clearly authorizes, creates the same type of noise about which the County Neighbors complain. As explained above, with the exception of Ms. Warden and Ms. Felton, none of the County Neighbors confirmed whether ProFormance School was the source of the noise they heard on Mondays and Tuesdays. Rather, the County Neighbors generally testified about hearing engine noise based on acceleration, squealing tires, and multiple car “passbys”. However, as demonstrated by the testimony of both Deputy Amber Kennedy of the King County Sheriff’s Department and Sergeant Brian Williams of the Auburn Police Department, all of the sounds that the County Neighbors describe could have been generated by police testing.¹⁴³ In the absence of verification by the County Neighbors that what they heard on Mondays and Tuesdays was not police training, their testimony cannot credibly prove a violation of the CUP.

As highlighted by Deputy Kennedy’s testimony, all of the types of sounds that the County Neighbors complained about (i.e., engine revving, tire squealing, and multiple car passbys) are produced by police testing at Pacific Raceways. Deputy Kennedy described: (1) “auto cross” testing in which the officers purposely cause their vehicles to spin out; (2) the “backing course” in which officers spin their vehicles into simulated garages multiple times; (3) the 40 mile per hour high speed lane change exercise which typically results in at least one wreck, or “rodeo” per 8 hour shift; (4) instructors doing “hot laps” around the track at speeds up to 100 miles per hour; and (5) drifting exercises in the pit area and parking lot.¹⁴⁴ Deputy

¹⁴³ See generally CP at 1202:19 – 1213:24 and 1232:3 – 16.

¹⁴⁴ CP at 1230:13 – 1246:19.

Kennedy testified that during the day and swing shifts, there were typically up to 16 cars on the track at a time.¹⁴⁵ The Sheriff's Department uses all types of vehicles to conduct the testing that Deputy Kennedy described, including seized vehicles such as Chevy Camaros, Chevy Tahoes, and Lexuses.¹⁴⁶ Thus, it would not be readily apparent to someone observing the track that these street legal vehicles were being driven by the police and not a student at the ProFormance driving school.

In addition to the testing described above, Sergeant Brian Williams of the Auburn Police Department also described the Pursuit Intervention Technique or "PIT" training that he conducts at the track. Sergeant Williams described the metal-on-metal impacts and the excessive tire squeal that occurs 72 – 96 times per 8 hour shift.¹⁴⁷ In addition to the PIT training, the Auburn Police Department conduct skills testing similar to that described in detail by Deputy Kennedy.¹⁴⁸

Mr. Kitch and Mr. Fiorito confirmed what Deputy Kennedy and Sgt. Williams stated: the loudest activity that occurs on the track on Mondays and Tuesdays is police training.¹⁴⁹ Mr. Kitch has taught "EVOC" and PIT courses for police agencies.¹⁵⁰ Nothing about Mr. Kitch's curriculum at ProFormance encourages tire spinning, 360 degree spins, 180 degree course reversals, pinning, blocking, squealing or collisions like the police EVOC

¹⁴⁵ CP at 1231:20 – 25.

¹⁴⁶ CP at 1227:14 – 1228:3.

¹⁴⁷ CP at 1213:19 – 23.

¹⁴⁸ CP at 1194:1 – 78:14.

¹⁴⁹ CP at 357:18 – 364:3; 448:3 – 453:10.

¹⁵⁰ CP at 448:3 – 453:10. "EVOC" stands for Emergency Vehicle Operations Course which is required for law enforcement officers. See CP at 1195: 24 – 1196:9.

and PIT training the County has exempted from its most recent enforcement efforts. Unlike students and car club members, the police must abuse their vehicles, even “totaling” some, to learn how to effectively chase and stop criminals on the road.¹⁵¹

Most importantly, Environ’s sound level measurements demonstrated that the police testing described above was significantly louder than sound generated by the ProFormance School. As discussed at length in Environ’s initial report, noise generated by police testing generated noise that was 25 dBA higher than ambient conditions based on interval readings.¹⁵² Environ concluded that, unlike ProFormance School activity, the increase in ambient noise created by police training would cause a noise “impact” as defined by most generally accepted guidelines pertaining to changes in sound levels.¹⁵³

I. The County Neighbors’ testimony is further undercut by the testimony from Pacific Raceways’ neighbors who are not biased against the track.

The testimony of the County Neighbors, who clearly demonstrated their subjective sensitivity to sound from Pacific Raceways, becomes even less probative of an alleged violation of the CUP when compared to the neighbor testimony presented by Appellants. Unlike the County Neighbors, Jennifer Nowland, Kelley Nowland, Pamela Neumann, and Diane Robertson (the “Appellant Neighbors”) are not overly sensitized to the sounds generated by Pacific Raceways and therefore provide a more objective perspective regarding activities taking place near the track.

¹⁵¹ See generally CP at 1202:19 – 1213:24 and 1232:3 – 16.

¹⁵² AR: SC 00345 – 00346.

¹⁵³ *Id.*

Jennifer and Kelley Nowland (the “Nowlands”) have lived within blocks of Pacific Raceways since 1994.¹⁵⁴ Kelley Nowland, who became interested in the issues surrounding Pacific Raceways when he found out that others in the community were “putting words in his mouth”, has worked the night shift as a Boeing machinist for the last eight years.¹⁵⁵ Despite the fact that he sleeps during the day, Mr. Nowland’s sleeping pattern has never been interrupted by weekday activity at the track.¹⁵⁶ Similarly, Mrs. Nowland worked at home for the eight months leading up to her testimony.¹⁵⁷ Mrs. Nowland does not even notice noise from the track during the weekdays.¹⁵⁸ With the exception of large drag racing events on unrestricted days, local traffic near the Nowland’s home is much louder and more distracting than anything taking place at Pacific Raceways.¹⁵⁹

Pamela Neumann is retired and spends significant amounts of time at home during the weekdays.¹⁶⁰ Like the Nowlands, she also started attending community meetings regarding Pacific Raceways when she received a letter regarding community opposition to the track.¹⁶¹ Ms. Neumann, who stated that she never found daytime activity at Pacific Raceways distracting, testified that Pacific Raceways “was part of the sound of summer.”¹⁶² Thus,

¹⁵⁴ CP at 918:21 – 920:12.

¹⁵⁵ CP at 947:7 – 16.

¹⁵⁶ CP at 943:11 – 945:2.

¹⁵⁷ CP at 926:19 – 927:4.

¹⁵⁸ CP at 927:5 – 13.

¹⁵⁹ CP at 925:11 – 926:18; 940:14 – 942:9.

¹⁶⁰ CP at 954:1 – 11.

¹⁶¹ CP at 957:22 – 959:12.

¹⁶² CP at 959:2 – 14.

Ms. Neumann's testimony further demonstrates the subjective nature of the County Neighbor's testimony.

Finally, Diane Robertson, who lives two doors down from Mr. Huling¹⁶³, has never heard Pacific Raceways during the weekdays, despite the fact that she is a nurse who worked nights for five years and slept during the day.¹⁶⁴ Similar to the other Appellant Neighbors, Ms. Robertson refused to sign a petition opposing the track because, as she testified, she didn't "...feel like it's noisy."¹⁶⁵ Ms. Robertson, who stated that she only hears the track during August, testified that vehicles "hot wheeling" in her neighborhood were significantly more noticeable than anything taking place at Pacific Raceways.¹⁶⁶

As a whole, the testimony of the Appellant Neighbors further highlights Mr. Steffel and Mr. Jurdy's testimony regarding the subjective nature of the human response to noise. Unlike the County Neighbors who are sensitized to sound from Pacific Raceways, the Appellant Neighbors only rarely notice sound coming from the track. In light of the Appellant Neighbor testimony and in the face of inconclusive expert noise testing, the subjective testimony of the County Neighbors who are predisposed to find sound from Pacific Raceways distracting cannot form the basis to prove a violation of the CUP.

As discussed, the CUP allows "non-race related testing functions that are quiet, non-impacting" on restricted days. For decades the County

¹⁶³ CP at 1085:17 – 1086:1.

¹⁶⁴ CP at 1094:5 – 1095:24.

¹⁶⁵ CP at 1081:9 – 1083:13.

¹⁶⁶ CP at 1092:4 – 1094:3.

has interpreted that phrase to allow instructional driving schools. After hearing the testimony and evidence discussed herein, the Examiner concluded that Appellants' activities on those days did not meet the quiet, non-impacting standard. In short, the Examiner elevated the subjective opinion of opponents of Pacific Raceways over the substantial evidence in the record showing that the opposite is true. Consequently, under RCW 36.70C.130(1)(c), the Court should reverse the Examiner's Decision.

V. CONCLUSION

There is a place for judicial deference to governmental agency decision makers, but there is a limit to that deference. When an agency establishes the meaning of a permit condition through written interpretations over two decades, the agency must be held to its word. And when the agency suddenly reverses its interpretation to the detriment of a party relying on the agency's representations, then the Court must prevent such injustice.

The unique facts of this case support the application of equitable estoppel, laches, Due Process, and fundamental fairness. Accordingly, Appellants ask the Court to reverse the Hearing Examiner's Decision and to remand this matter for dismissal or for entry of an order that conforms with equitable doctrines and constitutional limits on ad hoc determinations affecting the rights of private property owners.

DATED this 12th day of November, 2013.

Cairncross & Hempelmann, P.S.



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Certificate of Service

I, Andie C. Scoggins, certify under penalty of perjury of the laws of the State of Washington that on November 12, 2013, 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:

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