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**Court of Appeals No. 73269-2-I**

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

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DONALD BERG and KAREN BERG,

Appellants,

v.

CITY OF KENT,

Respondent.

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**APPELLANTS' REPLY IN SUPPORT OF OPENING BRIEF**

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***I. REPLY IN SUPPORT OF APPELLANT'S OPENING BRIEF***

The City of Kent offers a number of arguments in response to the Berg's brief that places its misconduct directly at issue, which deprived the Bergs of a full and fair hearing. However, the City failed to address the crux of the issues raised on appeal in any meaningful way. Its brief is replete with self-serving and conclusory assertions and lacks both citation to evidence in the record and persuasive legal authority. Significantly, the City provides no explanation for the fact that identical code enforcement actions had been resolved before the Bergs' purchase of Shady Park, which permitted the outdoor storage to continue in its entirety.

Given the new evidence that the Bergs have secured to show that the City's witnesses testified falsely, and given the constitutional property rights at stake, this Court should reverse the hearing examiner's decision and/or remand this matter for a full and fair hearing, to include Brian Swanberg's testimony, with sufficiently detailed findings of fact and conclusions of law to permit appropriate review.

***II. THE TRIAL COURT DENIED THE BERGS CR 60 MOTION ON UNTENABLE GROUNDS***

In its Response Brief, at page 47, the City contends that retired Code Enforcement Officer's Brian Swanberg's testimony "adds nothing

new to the administrative record.” Nothing could be further from the truth. Not only does Mr. Swanberg explicitly confirm that the City knew “the entire Shady Park property was used for commercial outdoor storage,” but he discloses the complete falsity of the planning department witnesses’ testimony in asserting that they did not know the reason that identical complaints had been closed without action. CP 901.

The City of Kent has never refuted the allegation that its witnesses from the Planning Department falsely testified, as a conspiracy, that Mr. Swanberg made the decisions to close the complaints regarding the outdoor storage, when in fact it was the Planning Department that made the decisions. The City meekly responds by characterizing his testimony as insignificant, when in fact, it could not be any more significant to this case.

In his declaration, Mr. Swanberg clarifies that he was following the planning department’s direction to close the complaints regarding the outdoor storage. CP 899-900. This is also confirmed in a February 22, 2008 computer entry, in which Mr. Swanberg records that planning department’s Demetrius Winston had been working on a complaint regarding landscaping and outdoor storage. CABR 564-65. Mr. Swanberg then noted that Shady Park’s outdoor storage was “grandfathered” at the time of annexation, and the zoning complaint was

subsequently closed. CABR 564-65.

Mr. Swanberg did not have the authority to make determinations of zoning issues, as that was the planning department's responsibility. CP 900; VRP 6/13/13 at pg. 30 of 35. Mr. Gilbert even testified that the code enforcement officer would not even have authority to determine whether or not there was an enforceable action on the site. VRP 6/13/13 at pg. 30 of 32. The City's records unambiguously reflect that issues regarding Shady Park's outdoor storage were closed as resolved, without the imposition of limitations on the scope of outdoor storage, yet the planning department's Mr. Gilbert indicated that only the code enforcement officer would have "the whole story". VRP 6/13/13 at pg. 33 of 35. And because Mr. Gilbert was not the code enforcement officer, he could not explain the inconsistency of having prior identical violations to have been resolved without the City having taken any action to limit the scope storage, and then documenting the fact that outdoor storage was grandfathered. VRP 6/13/13 at pg. 31 of 32. The City's planning department witnesses claimed ignorance and deferred to Mr. Swanberg, the person that was notably absent from the hearing. Mr. Swanberg's testimony is critical in that it reveals the opposite is true: the planning department witnesses were not at all ignorant; this was simply a ploy to improve the City's legal position. CP 901.

Significantly, the City of Kent has never contested the Bergs' allegation that they were entitled to procedural rules governing the administrative proceeding, yet that those rules were never disclosed to them. With or without an attorney, a party is entitled to be apprised of the applicable rules. Mr. Glenn, a non-attorney, had to rely upon the assistance of the hearing examiner to subpoena a witness. Notably, the hearing examiner and the City Attorney were more than willing to assist in securing Dennis Higgins' testimony, but when it came to Mr. Swanberg, similar offers were not extended. VRP 7/26/13 at pgs. 15-16.

Nor has the City of Kent ever refuted the allegation that the City Attorney deliberately misrepresented the truth regarding Mr. Swanberg's location, in order to obstruct him from being subpoenaed. The City of Kent's silence on this particular point is stunning.

The Bergs satisfied their burden to show misconduct on the part of the City of Kent in preventing their ability to fully and fairly present their case and to ensure that justice has been done. Thus, it was an abuse of discretion not to grant the Bergs' CR 60 motion in order to permit consideration of this new evidence, especially given the fact that the City of Kent offered no reasonable explanation to refute these allegations.

The trial court incorrectly recalled that "the City witnesses didn't know how these things had been resolved." VRP 8/28/15, pg. 42. But the

City witnesses testified that it was Mr. Swanberg who unilaterally made the decision to close the prior identical complaints, but that closing them did not mean they had been resolved. CP 1172. We know now that this was not truthful. Although Mr. Swanberg closed the complaints in the City's software, as indicated by his initials, the direction to do so was given to him by the Planning Department's employees. CP 767-768; 899-901.

The trial court erred in concluding that "Mr. Swanberg's declaration contains the same [evidence and argument] that was presented at the LUPA hearing, and the trial court erred in finding that Mr. Swanberg's declaration "doesn't say why it was closed." (VRP 8/28/15, pg. 42). In fact, Mr. Swanberg testified in his declaration, "The planning department then advised me not to take any further action on the complaint and to enter 'informed by planning resolved' in the computer system." CP 768. Mr. Swanberg also testified, "I was advised by the planning department that this issue could be closed because the use of outdoor storage on Shady Park was 'grandfathered'." CP 768. The basis was that "the City's planning department recognized that the commercial operations on Shady Park, including the outdoor storage yard, all had commenced prior to annexation by the City of Kent." CP 901. Mr. Swanberg explained the reason that these complaints were closed, and his

testimony reveals that the planning department witnesses testified falsely to the contrary.

The trial court also erred in finding that Mr. Swanberg did not explain the reason the complaints were closed. As set forth above, he provided a clear explanation that he followed the direction of the Planning Department. Mr. Swanberg was instructed to close the complaints, he did not do so unilaterally as the City witnesses testified.

A trial court abuses its discretion when its evidentiary ruling is based on untenable grounds or reasons.” State v. Quaale, 177 Wn. App. 603, 610, 312 P.3d 726, 730 (2013), affd, 182 Wash. 2d 191, 340 P.3d 213 (2014) (citation omitted). In this case, the Bergs have proven an intentional fraud on the court. Thus, the trial court’s denial of the Berg’s CR 60 motion is based on untenable grounds and should be reversed to permit consideration of Mr. Swanberg’s crucial testimony and to ensure that justice will be done.

***III. THE BURDEN OF PROVING AN ILLEGAL  
EXPANSION FALLS SQUARELY ON THE CITY OF  
KENT***

For the very first time, in this *second* judicial review of the administrative land use hearing, the City of Kent asserts that the Bergs had a legal burden of proof to show that outdoor storage was a legal nonconforming use. However, that position is inconsistent with the City’s

documentary evidence, as well as the proceeding at the administrative hearing, and even the City's briefing at the superior court level.

First, the Notice of Violation includes a "History and Facts Relied Upon" which specifically provides "The City determined that, at the time of annexation, the convenience store, auto repair and related **outdoor storage** operating on the property were **legally established uses while under the jurisdiction of King County.**" (CABR 8, emphasis added). The notice further stated, "The City informed Mr. Berg that, after research, it had determined that the outdoor storage on his property was legally established on the site prior to annexation in January 1996 and the established degree of the storage was as depicted in the aerial photos taken in 1996 and 1999." CABR 9–10.

Second, the City presented its case in chief first, because it bore the burden of proof. In her opening statement, the City Attorney framed the two issues for the hearing examiner, both of which centered on the time period after 1996, in which zoning was initially passed by the City of Kent. CP 56. Upon conclusion of the City's case, the Bergs moved for a directed verdict, asserting the City of Kent had failed to sustain its burden of proof. CP 229-238. The City Attorney acknowledged that they bore the burden of proof on two occasions: "What the City has to prove, and the City submits it did, in fact, prove...." CP 231. "I would submit, based

on all of the evidence that the City has presented to the Court, specifically the written exhibit and documentation contained in Exhibit Number One clearly established, by a preponderance of the evidence viewed at this type of a motion in a light most favorable to the City that although the Defendant did enjoy a legal nonconforming use on a small portion of his property, there was a larger portion of the property that was in no way not utilize [sic] for any of those uses.” CP 234.

Significantly, the City’s brief on appeal at CP 432, filed before the King County Superior Court, was completely inconsistent with the position it is now taking:

**Petitioner operates a grocery store on his Property, which is permitted outright in the mixed-use zone in which it is located. Petitioner also operates an auto repair business on the Property, along with a small amount of property which is used to store vehicles attendant to the auto shop. The City has determined that the auto shop, and a small amount of outdoor storage related to the auto shop, are lawful nonconforming uses of the Property.**

The City of Kent should be judicially estopped from asserting that the Bergs had any burden of proving that their outdoor storage yard enjoyed the status of a legal nonconforming use.

Judicial estoppel is an equitable doctrine that precludes a party from asserting one position in a court proceeding and later seeking an advantage by taking a clearly inconsistent position. The doctrine seeks to preserve respect for judicial proceedings, and to avoid inconsistency, duplicity, and waste of time.

Arkison v. Ethan Allen, Inc., 160 Wn.2d 535, 538, 160 P.3d 13, 15 (2007)

(internal quotations and citations omitted). Never before has the City's position been that Shady Park's outdoor storage was not a legally nonconforming use prior to, or even after, the City's annexation in 1996. The issue has always been framed in terms of expansion of a legal nonconforming use.

Furthermore, the Bergs were never provided notice of any allegation, charge, or violation that called into question the status of outdoor storage as a legal nonconforming use. Notice and opportunity to be heard are the basic tenants of due process. The Bergs property interests are at stake, which mandates that their due process rights be protected. Berst v. Snohomish County, 114 Wn. App. 245, 255, 57 P.3d 273, 278 (2002). The essential elements of procedural due process are notice and opportunity to be heard. In re Hendrickson, 12 Wn.2d 600, 606, 123 P.2d 322 (1942). A litigant who is denied notice and opportunity to be heard is denied procedural due process of law in violation of Art. I, §3 of the Washington Constitution. Ware v. Phillips, 77 Wn.2d 879, 884, 468 P.2d 444 (1970) (*quoting State ex rel. Adams v. Superior Court of State, Pierce County*, 36 Wn.2d 868, 872, 220 P.2d 1081 (1950)).

Had the City elected to contest the status of the outdoor storage yard as a legal nonconforming use before 1996, it was obligated to provide such notice to the Bergs. Due process does not permit untimely notice nor

new post-hearing charges.

Nevertheless, the evidence in the record is that that automobile repair shop has been operating since the 1930s. CP 103-104. This was long before any zoning had been legally enacted by King County, which first occurred in 1958. CABR 195-200. Notably, the City of Kent acknowledged in a letter to Mr. Spencer dated September 11, 2002, that “outdoor RV and boat storage, self service mini-warehouse storage, impounded vehicle storage, or vehicle dismantling and salvage” would be legal non-conforming uses, as long as they had been established prior to the annexation. CABR 27. The outdoor storage and self-service mini-warehouse storage had been established before the annexation; thus, the City of Kent conceded that and only charged the Bergs with an illegal expansion of that legal non-conforming use.

The Bergs are entitled to relief pursuant to RCW 36.70C.130(1)(b), as the improper shifting of the burden of proof is an error of law that requires the matter be remanded to be corrected.

***IV. THE CITY CANNOT INDEPENDENTLY DETERMINE  
IN 2011 WHAT PORTION OF LAND HAD BEEN  
DEVOTED TO OUTDOOR STORAGE PRIOR TO 1996***

Despite the City of Kent’s argument to the contrary, there is no evidence in the record to support the contention that any expansion of outdoor storage occurred, especially considering the express language of

the Kent City Code.

The Kent City Code specifically defines the term: “**Use**. Use means an activity for which **land** or premises or a building thereon is **designed, arranged, or intended**, or for which it is **occupied or maintained**, let or leased.” KCC 15.02.532 (emphasis added). Thus, only the *landowner* can determine for what purpose land is “designed, arranged, or intended” and for what purpose it is “occupied or maintained.”

Given this definition, the only relevant testimony regarding how the acreage behind the grocery store and auto repair shop comes from the Beanblossoms and the Spencers, who were both owners of Shady Park prior to annexation by the City of Kent. Jean Beanblossom owned the Shady Park between 1972 and 1974 and testified that she and her husband utilized the back two acres for outdoor storage. CP 294. Ms. Beanblossom also testified that she assisted the subsequent property owner, David Spencer, as to the process for setting up a formal outdoor storage business. CP 295-296. Susan Spencer independently confirmed that during their ownership between 1975 and 2006, the entire portion of land behind the grocery store and automobile repair shop had been devoted to an outdoor storage yard. CABR 299.

The City’s Response Brief, at pages 6-7, relies extensively upon

the minutes of a public hearing in which several zoning alternatives were proposed and discussed before the City of Kent. The meeting minutes consist of a summary of the general discussion and do not include a transcript. The public comments are not sworn statements. This is double hearsay. There is no way to determine precisely what Mr. Spencer suggested, much less the reason he made such a suggestion at that time, nor even whether he did mention the outdoor storage yard in some respect. The City's assertion that Mr. Spencer was only using a portion of Shady Park for commercial uses is directly contradicted by the documents in the history of Shady Park, including those submitted by his architect to the City, CABR 215-218; 258, and the written testimony of his spouse, Susan Spencer, CABR 296-300.

During the administrative hearing, the City openly conceded that it had no facts upon which to base its contention of illegal expansion and that it was relying solely upon assumptions about the history of the property. CP 640. These assumptions were evident during a 2011 meeting in which the City drafted an orange lined shape on a photograph of Shady Park dated 1999. CABR 16. The area within the orange lined shape comprised of 34,270 square feet of space. CABR 16. This is when the City decided what amount of land could continue to be used for outdoor storage. There was absolutely no rationale behind the designation; "We

just said that's the storage area." CP 648. Nor was there any evidence to support that arbitrary position. CP 1047.

The City of Kent lacked the knowledge to determine anything about the history of Shady Park, so it admittedly resorted to speculation. The rule is well established that the existence of a fact or facts cannot rest in guess, speculation, or conjecture." Home Ins. Co. of New York v Northern Pac. Ry. Co., 18 Wn.2d 798, 140 P.2d 507 (1943).

Because the entire undeveloped parcel was devoted to and used as an outdoor storage yard, which the City of Kent could not rebut, there can be no illegal expansion of that non-conforming use. The Kent City Code confirms this proposition:

Expansion of nonconforming uses. No existing building, structure, or **land devoted to a nonconforming use** shall be expanded, enlarged, extended, reconstructed, intensified, or structurally altered unless the use thereof is changed to a use permitted in the district in which such building, structure, or land is located except as follows: When authorized by conditional use permit, a nonconforming use may be expanded, enlarged, extended, reconstructed, intensified, or structurally altered.

KCC 15.08.100.C.2 (emphasis added). See also KCC 15.02.001.D.

Municipal ordinances and state statutes are interpreted using the same rules of statutory construction. Eugster v. City of Spokane, 118 Wn. App. 383, 405-06; 76 P.3d 741 (2003). Courts "assume the municipality meant exactly what it said when it enacted the ordinance." Id. at 406. As

all of the undeveloped land within the parcel had been devoted to outdoor storage since the early 1970s, it is illogical to assert that there could be, much less that that has been, any expansion of outdoor storage. The City's Planner, Sharon Clamp, disregarded these nuances of the Kent City Code and interpreted the way storage had to be used much too narrowly. Ms. Clamp suggests that in order for land to be used for storage, something must actively be stored on the land at all times. CP 131-132. The City's Response Brief, at page 43, relies upon similar interpretations of the way that storage must be visibly evident at all times, which is completely inconsistent with the express language of the applicable code. However, this contradicts the law in Washington, which permits a legal non-conforming uses to grow in volume or intensity. Kitsap County v. Kitsap Rifle and Revolver Club, 184 Wn. App. 252, 268, 337 P.3d 328 (2014), amended on denial of reconsideration (Feb. 10, 2015), review denied, 183 Wn.2d 1008, 352 P.3d 187 (2015) (internal quotations and citations omitted). "Intensification is permissible, however, where the nature and character of the use is unchanged and substantially the same facilities are used. The test is whether the intensified use is different in kind from the nonconforming use in existence when the zoning ordinance was adopted." Id. quoting Keller v. City of Bellingham, 92 Wn.2d 726, 731, 600 P.2d 1276 (1979).

Recognizing the deficiency in its presentation of the case, the City now contends, at pages 42-43 of its Response Brief, that there has been a “change of use” with respect to storage associated with the automobile repair business, and storage associated with a separate outdoor storage yard. However, the City presented no such evidence during the hearing. There is nothing in the record pertaining to any way in which the use of Shady Park for outdoor storage has changed, other than in terms of volume. Nor is there any evidence to support a finding of an illegal expansion pursuant to KCC 15.02.533. Significantly, the City’s witness unambiguously conceded that there was not no difference in the change in character between storage of automobiles attendant to the automobile repair business, from the present use as an outdoor storage yard. CP 1146.

Absent either an expansion or change of use, a conditional use permit is not required under the code. This is a nothing but a red herring.

During the administrative hearing, the City of Kent did not sustain its burden to show that the area used and/or devoted to an outdoor storage yard was expanded after annexation in 1996, nor could it ever sustain that burden because that information is not within their purview. The Bergs are entitled to relief pursuant to RCW 36.70C.130(1)(b) and (d), as any decision made on the basis that the City could determine the use of the undeveloped property is an error of law; only the landowner can determine

such use. The Bergs are also entitled to relief pursuant to RCW 36.70C.130(1)(c), as any decision that there was an illegal expansion of the outdoor storage yard is not supported by substantial evidence given the lack of evidence presented by the City.

***V. CITY OF KENT CANNOT CITE ANY EVIDENTIARY BASIS IN THE RECORD OR LEGAL AUTHORITY TO REFUTE THAT IT WAS ERROR TO FAULT THE BERGS FOR FAILING TO SETTLE THIS DISPUTE***

Section B(7) of the Bergs' Opening Brief was devoted to the Hearing Examiner's error in interpreting law by basing a decision on the Bergs' failure to reach a settlement agreement with the City of Kent.

In response, the City of Kent merely provided its own interpretation of what the Hearing Examiner meant by Finding of Fact No. 4. However, the City did not provide any citations to the record to support its bald assertions, nor legal authority, as required by RAP 8(b). Thus, the City of Kent has conceded that the Hearing Examiner erred in this regard.

To enforce the rule, this court does not review issues not argued, briefed, or supported with citation to authority. We do not consider conclusory arguments. Passing treatment of an issue or lack of reasoned argument is insufficient to merit appellate review.

Christian v. Tohmeh, 191 Wn. App. 709, 728, 366 P.3d 16 (2015)

(internal citations omitted).

The Bergs are entitled to relief pursuant to RCW 36.70C.130(1)(b); this is an erroneous interpretation of the law.

***VI. THE HEARING EXAMINER FAILED TO PROVIDE SUFFICIENT FINDINGS OF FACT AND CONCLUSIONS OF LAW TO PERMIT APPELLATE REVIEW***

The Hearing Examiner did not incorporate the Notice of Violation and/or Correction Notice as part of his decision in his second Finding of Fact. Finding of Fact No. 2 simply recounted the procedural history of how the Bergs were notified of the violation. It was the Notice of Violation that incorporated the Correction Notice. In setting forth the history, the Hearing Examiner was not incorporating any facts set forth in these notices into his decision. Thus, the City's premise that there were 55 pages of documents that had been incorporated is without merit. Furthermore, such a practice would be in violation of KCC 2.32.130, which requires a hearing examiner to "make and enter written findings from the record and conclusions therefrom which support such decision."

The City of Kent encourages the appellate court to "look to the entire record" in order to determine the sufficiency of the evidence. But in this case, unlike In re LaBelle, 107 Wn.2d 196, 219, 728 P.2d 138 (1986), the hearing examiner never "orally recited the evidentiary facts it relied upon in making its decision" in order to permit this reviewing court the opportunity to conclude the factual bases for the ultimate conclusions, without speculation.

Even if this reviewing court were able to consider the hearing examiner's oral statements, it would lead to a conclusion that the Bergs prevailed on the ultimate issue. The Hearing Examiner acknowledged that an aerial photograph was insufficient to determine the actual capacity of real estate that was used for storage on more than one day. CP 603-604. The Hearing Examiner rejected the City of Kent's preposterous assertion that it could not determine from its own records the basis for having resolved the identical complaint years before. CP 550-554. The Hearing Examiner ridiculed the City of Kent for attempting to offer mere assumptions as facts. CP 635-641. The Hearing Examiner even exclaimed in exasperation that even after all of the time spent in the hearing, notably after the City of Kent had rested, that there was still no "evidence, other than of that photo, to provide a context of the prior use, the extent of the prior use." CP 591. This unequivocally indicates that the City of Kent failed to sustain its burden when presenting its case in chief.

The Bergs cite Weyerhauser v. Pierce County, 124 Wn.2d 26, 873 P.2d 498 (1994) in support of their contention that findings and conclusions must be sufficient, and that incorporating one parties' charging document is not sufficient. Weyerhauser relies upon State ex rel. Bohon v. Department of Public Service, 6 Wn.2d 676, 693-94, 108 P.2d 663 (1940), which provides:

Although it is not objectionable, and in some instances may be very helpful, to have the ‘opinion’ of the department state the contentions of the parties, the existing conditions, and a summary of the evidence, nevertheless, the facts as actually found should be clearly and definitely stated so that no uncertainty thereon shall exist. That is the function, however, of the department, not of this court.

Weyerhauser, supra, also relies upon State ex rel. Duvall v. City Council of City of Seattle, 64 Wn.2d 598, 602, 392 P.2d 1003 (1964), which provides:

These assertions are no more than conclusions. The purported findings do not state any facts to support the conclusion of public convenience and necessity to justify the adoption of the city's proposal rather than the counterproposals. They do not include the ultimate facts essential in findings to support a conclusion, as required by the statute...

Finally, the Bergs rely upon recent opinion in this Court, McMilian v. King County, 161 Wn. App. 581, 585, 255 P.3d 739 (2011), which was also a LUPA appeal that was pursued by the Bergs’ counsel, and resulted in a remand to the hearing examiner for entry of a single finding of fact.

The Hearing Examiner’s findings of fact are so deficient that a mountain of uncertainty exists as to the facts as actually found. Thus, a remand is necessary to rectify that deficiency.

#### ***VII. BERGS’ DUE PROCESS RIGHTS ARE AT STAKE***

The City asserts that the Bergs have no due process rights because they have not shown that the non-conforming use was ever legally established. Response Brief at pg. 45. That cannot be the case, however,

because that factual issue was conceded by the City of Kent.

[N]onconforming uses are permitted to continue. Our Supreme Court has explained the reason for allowing such uses: An ordinance requiring an immediate cessation of a nonconforming use may be held to be unconstitutional because it brings about a deprivation of property rights out of proportion to the public benefit obtained.

Id. at 592 (internal quotation and citations omitted).

Therefore, the City of Kent cannot deprive the Bergs of their property rights to continue operation of the outdoor storage yard in a manner without violating the Bergs' constitutional rights. "Acts violative of the [due process] clause may be declared void by the courts..." Systems Amusement, Inc. v. State, 7 Wn. App. 516, 518, 500 P.2d 1253 (1972). The inconsistent positions by the City of Kent, maliciously aligned to deprive the Bergs of their property rights, justifies a decision by this Court that a violation of due process has occurred and entitles the Bergs to relief. RCW 36.70C.130(1)(f).

### ***VIII. CONCLUSION***

The highest and best use of the subject parcel is to serve as an outdoor storage yard for the residential neighborhood, which has been the case for far more than eighty-five years. This use long predated both the King County zoning laws, and the City of Kent zoning laws.

The City conceded that the outdoor storage was a legal nonconforming use and charged the Bergs with an illegal expansion, for

which it bore the burden of proof. In presenting its case, it relied upon one aerial photograph that was taken in 1999 to show a change in the degree of outdoor storage at Shady Park. However, that merely proved that the outdoor storage had increased in volume and intensification, which is permissible. The City presented no evidence to show that the undeveloped property behind the grocery store and the automobile repair shop had not always been entirely devoted to outdoor storage. Such a showing is required by the express language of its code.

There is no way to ascertain what the hearing examiner determined. The findings of fact and conclusions of law are simply absent from his decision. The fact that the parties submit different interpretations of his decision only supports the Bergs' contention that a remand is necessary. Should the hearing examiner not be available for such purpose, a new trial should be granted pursuant to In re Welfare of Woods, 20 Wn. App. 515, 517, 581 P.2d 587 (1978).

At this point in time, the status of Shady Park's outdoor storage, and the scope and manner in which the Bergs are entitled to use their own property is entirely in question. Did the hearing examiner truly find that the Bergs violated the King County Code, and if so, which provisions did he find had been violated? Were the Bergs ever charged with violation of those provisions, to satisfy due process? Until there are sufficient findings

of fact and conclusions of law, these questions cannot be answered.

Additionally, a new trial should be granted to permit the testimony of Brian Swanberg, the City's former employee, to remedy the fraud perpetuated in this quasi-judicial proceeding. The Bergs have proven, beyond a reasonable doubt, that the City committed misconduct in preventing a full and fair trial by failing to provide them with access to basic procedural rules, by obstructing the Bergs' ability to subpoena him to testify, and by falsely testifying that he was the only individual who could explain the reason that the 2012 violation was any different from any of the prior violations, which were all closed because the outdoor storage had not changed in any way. The City did not even attempt to present any reasonable explanation for its actions in offering false testimony.

The Bergs are entitled to relief from the land use decision that wrongfully deprives them of their property rights.

Respectfully submitted this 6<sup>th</sup> day of June, 2016.

LAW OFFICE OF JEAN JORGENSEN, PS

By  \_\_\_\_\_  
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DECLARATION OF SERVICE

I declare that on this date I have caused to be delivered via email and U.S. regular mail, postage pre-paid, one true copy of REPLY IN SUPPORT OF APPELLANT'S OPENING BRIEF, to the following counsel:

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

Dated this 13 day of June, 2016.

  
\_\_\_\_\_  
Jamie Brazier, Legal Assistant

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