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**A. ASSIGNMENTS OF ERROR**

1. The trial court erred in entering a Final Judgment incorporating the Ruling On Petition For Judicial Review And Petitioners' Motion For Summary Judgment, dated August 12, 2005, and entered August 15, 2005, in making the determination that under the peculiar facts of the case, appellant Washougal MX's attempt to withdraw the conditional use permit application was ineffective.

2. The trial court erred in entering a Final Judgment incorporating the Ruling On Petition For Judicial Review And Petitioners' Motion For Summary Judgment, dated August 12, 2005, and entered August 15, 2005, in making the determination that appellant Washougal MX was estopped to withdraw the conditional use permit application

3. The trial court erred in entering a Final Judgment incorporating the Ruling On Petition For Judicial Review And Petitioners' Motion For Summary Judgment, dated August 12, 2005, and entered August 15, 2005, in making the determination that at some point in the processing of an application for a CUP, appellant Washougal MX became estopped from withdrawing the conditional use permit application because it caused the County and other interested parties to expend substantial

resources and time in reliance upon an expectation of resolution of the issues.

4. The trial court erred in entering a Final Judgment incorporating the Ruling On Petition For Judicial Review And Petitioners' Motion For Summary Judgment, dated August 12, 2005, and entered August 15, 2005, in making the determination that appellant Washougal MX's non-conforming use rights ceased upon approval of a conditional use permit (CUP) by the Board of County Commissioners of Clark County, and that those rights were converted to those permitted under the CUP.

5. The trial court erred in entering a Final Judgment incorporating the Ruling On Petition For Judicial Review And Petitioners' Motion For Summary Judgment, dated August 12, 2005, and entered August 15, 2005, in making the determination that the Board of County Commissioners of Clark County chose not to recognize the withdrawal of appellant Washougal MX's application for a conditional use permit.

6. The trial court erred in entering a Final Judgment incorporating the Ruling On Petition For Judicial Review And Petitioners' Motion For Summary Judgment, dated August 12, 2005, and entered August 15, 2005, in making the determination that appellant Washougal

MX was bound by the Hearing Examiner's determination if the CUP were upheld.

7. The trial court erred in entering a Final Judgment incorporating the Ruling On Petition For Judicial Review And Petitioners' Motion For Summary Judgment, dated August 12, 2005, and entered August 15, 2005, in making the determination that it would seriously undermine the integrity of the administrative process to allow a party to withdraw its conditional use permit application.

8. The trial court erred in entering a Ruling Denying Respondent's CR12(b) (6) Action, dated and entered May 11, 2004, in ruling that it would be grossly inequitable to allow appellant Washougal MX to simply walk away from the matter after knowing what the Hearings Officer and Board's decision was.

9. The trial court erred in entering a Ruling Denying Respondent's CR12(b) (6) Action, dated and entered May 11, 2004, by ruling that appellant Washougal MX was estopped from withdrawing the conditional use permit application.

10. The trial court erred in entering a Ruling On Motion For Reconsideration, dated June 9, 2004 and entered on June 10, 2005, in denying appellant Washougal MX reconsideration of the Ruling Denying Respondent's CR12(b) (6) Action, dated and entered May 11, 2004.

**B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. In making an application for a conditional use permit for the purpose of obtaining a non-required permit for the continued exercise of legally-established prior nonconforming use rights and in processing the application in a contested hearing process, has the permit applicant abandoned his prior nonconforming use rights if the permit decision refuses to authorize the activities for which the permit application was made? (Assignments of Error 1, 2, 3, 6, 7, 8, 9 & 10)

2. In making an application for a conditional use permit for the purpose of obtaining a non-required permit for the continued exercise of legally-established prior nonconforming use rights, does the permit applicant become estopped to withdraw the permit application on account of having engaged in a lengthily and contentious permitting process? (Assignments of Error 1, 2, 3, 6, 7, 8, 9 & 10)

3. In making an application for a conditional use permit for the purpose of obtaining a non-required permit for the continued exercise of legally-established prior nonconforming use rights, does the permit applicant become estopped to decline the permit approval on account of having engaged in a lengthily and contentious permitting process? (Assignments of Error 1, 2, 3, 6, 7, 8, 9 & 10)

4. When opponents to an application for a conditional use permit for the continued operation of a legally established prior nonconforming use fight the permit application, do they do so in reasonable reliance that the permit applicant will operate the uses under the permit even though the authorizations requested by the permit application are not approved? (Assignments of Error 1, 2, 3, 6, 7, 8, 9 & 10)

5. When opponents to an application for a conditional use permit for the continued operation of a legally established prior nonconforming use challenge a decision to approve the permit in court, have the opponents reasonably relied on the permit or the administrative process for the issuance of the permit? (Assignments of Error 1, 2, 3, 6, 7, 8, 9 & 10)

6. If a decision is rendered to approve a conditional use permit for which application was made to continue the exercise of legally-established prior nonconforming use rights, which decision does not authorize the preexisting activities for which the application for the permit was submitted, is the right to continue the preexisting activities merged and extinguished into only those use activities that are approved by the decision, such that the only use rights that the applicant has are to engage

in those uses authorized by the permit approval decision.? (Assignment of Error 4)

7. Is it a denial of substantive due process of law or a taking without just compensation if there is an abrupt loss of nonconforming use rights as a result of the imposition of conditions of approval under a hearing examiner's decision that approves an application for a conditional use permit that was processed only to permit the continuation of the legally-established prior nonconforming use? (Assignments of Error 1, 2, 3, 4, 6, 7, 8, 9 & 10)

8. When a appeals Board adopts a resolution formally upholding a Hearing Examiner's decision to approve a conditional use permit on advise of counsel in order to conclude the proceedings on the conditional use permit, does such action by the Board constitute a decision not to recognize a prior withdrawal of the permit application? (Assignment of Error 5)

## C. STATEMENT OF THE CASE<sup>1</sup>

This is an appeal by Washougal Motocross LLC and Moss and Associates (hereinafter “Washougal MX”) of Clark County Superior Court Judge Roger Bennett’s entry of final judgment on a LUPA petition and

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<sup>1</sup> The County’s Certified Appeal Board Record (the County record of the proceedings and documents on the conditional use permit application) are in a box identified as number 2 in the County Clerk’s Index of Exhibits. The documents in the box are from hearings before Larry Epstein, the Clark County Hearings Examiner, and from the closed-record appeal hearings before the Board of Clark County Commissioners that followed each of two decisions by the Examiner on the matter of the conditional use permit application. The Examiner conducted hearings beginning on May. 9, 2002 and rendered a 1<sup>st</sup> decision, which was appealed to the Board, which conducted a closed record appeal hearing beginning on August 20, 2002. From that appeal hearing, the Board then remanded the case back to the Examiner for further hearings before the Examiner. The Examiner’s second decision from hearings commencing on Sept. 9, 2003, was again appealed to the Board. Documents from the Examiner’s first set of hearings are numbered and tabbed consecutively, beginning with the number “1”. Some of the documents unique to each of the appeal hearings to the Board that followed the Examiner decision are tabbed and numbered consecutively, beginning “1A”, “2A”, etc. Other documents in the Board’s record from each of the appeal hearings are not identified except by title, date and author; these documents precede the tabbed documents. Unfortunately, the documents and tabs for the second set of hearings before the Examiner also are numbered consecutively beginning with the number “1”. The documents unique to the Commissioners’ appeal hearings in the appeal of the second decision are also numbered beginning “1A”, “2A”, etc., although again, some of the Board’s documents are only identifiable by title, date and author; again, these documents precede the tabbed documents. The Examiner’s exhibits (documents) are listed in two “Hearing Examiner Exhibits” lists for each set of hearings. Citation to the Examiner’s hearing exhibits will be by reference to the Examiner’s exhibit number, preceded by “A” for the exhibits for the hearings beginning on May 9, 2002 before the Examiner’s first decision, and preceded by “B” for the exhibits for the second set of hearings beginning on Sept. 9, 2003 for the second decision. The “A” and “B” will be followed by an “E”. So for example, exhibit 33 of the second set of hearings will be “BE-33”. Documents from the corresponding Board record will be identified in the same way, except “B” will be used instead of “E”; and except that if the documents have not been otherwise identified in the Board’s record by number or tab, the documents will be identified by title and date, preceded by “App-1” for the first appeal hearing or “App-2” for the second appeal hearing. When the documents are not on paper with numbered lines, the citation will usually contain reference to the part in which the referenced material can be found. “page 3, part A.1.a” is an example. The Examiner’s exhibit list for his hearings beginning on May. 9, 2002 are appendix A. The Examiner’s exhibit list for his hearings beginning on Sept. 9, 2003 are appendix B.

action for declaratory judgment, and related rulings. The final judgment (including a grant of summary judgment on the declaratory judgment action) was entered on October 13, 2005. (CP 13)

This case arises out of a conditional use permit application submitted to Clark County on behalf of Washougal MX for off-road vehicle racing, riding, and related activities.<sup>2</sup>

The site contains a motocross-racing track; areas for motorcycle trail riding and racing; and areas for associated camping and parking.<sup>3</sup> The purpose for making the application was to obtain conditional use permit approval for those activities that had been occurring under Washougal MX's legally established prior non-conforming use rights<sup>4</sup>. As stated in the County staff report and recommendation to the County Hearing Examiner:

“The proposed use of the site is currently a legal non-conforming use. When the off-road recreation facility was established on the site, it was a legal use. Subsequently, the area has been re-zoned to R-5, which allows racetracks as a conditional use. At the request of the County, Washougal MX is voluntarily applying for a conditional use permit. The applicant does not propose to alter the use, but to obtain a permit for the existing use. The existing conditions of the site are substantially the same as the proposed

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<sup>2</sup> App-1: Final Order, Dated July 22, 2002, Page 1, part A.1.a - A.1.b. A copy of this Final Order, Dated July 22, 2002 is also attached to CP 2 as Exhibit A. The permit application is AE-6.

<sup>3</sup> App-1: Final Order, Dated July 22, 2002, Page 1-2, A.1.b. Also appears at CP 2, Ex. A.

<sup>4</sup> App-1: Final Order, Dated July 22, 2002, Page 1, A.1.a. Also appears at CP 2, Ex. A. See also SEPA checklist in AE-6, enclosed Environmental Checklist, page 2, top.

developed conditions of the site. . . . Its approval will not physically alter the site nor its impacts on the County or the public.”<sup>5</sup>

The County’s Community Development Department

recommended approval of the request for the conditional use permit.<sup>6</sup>

County Hearing Examiner Larry Epstein conditionally approved the permit by his Final Order dated July 22, 2002.<sup>7</sup> The order was appealed to the Clark County Board of County Commissioners by respondents herein, Eugene Greer and Jim Taska, and by Washougal MX, appellant herein.<sup>8</sup> The Board entered a ruling that remanded the matter back to Epstein for further proceedings.<sup>9</sup>

During the hearings before Examiner Epstein, Greer and Taska opposed the proposal for the conditional use permit.<sup>10</sup> They argued that Washougal MX enjoyed limited nonconforming use rights;<sup>11</sup> that various

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<sup>5</sup> AE-23: Clark County Staff report and Recommendation for the Washougal MX CUP, April 24, 2002, Page 4, Paragraph 8

<sup>6</sup> AE-23: Clark County Staff report and Recommendation for the Washougal MX CUP, April 24, 2002, Page 15

<sup>7</sup> App-1: Final Order, Dated July 22, 2002, page 26. Also appears at CP 2, Ex. A.

<sup>8</sup> App-1: Greer Motocross Appeal, Eugene Greer, August 5, 2002, Moss and Associates, Inc. Appeal, Hayward & Sellers, August 6, 2002, filed on behalf of Washougal MX. Appeal of Taska, John S. Karpinski, August 2, 2002

<sup>9</sup> App-1: Resolution 2002-10-02.

<sup>10</sup> App-1: Final Order, Dated July 22, 2002, Page 6, Item 3.a. Also appears at CP 2, Ex A.

<sup>11</sup> App-1: Final Order, Dated July 22, 2002, Page 6, Item 3.a. Also appears at CP 2, Ex.A. App-2: Final Order On Remand, Dated Nov. 4, 2003, page 6, items i, & j.iv; page 8, item iii; page 11, item g. The Final Order On Remand also appears at CP 2, Ex. C.

limitations should be imposed on Washougal MX's existing activities,<sup>12</sup> that Washougal MX was required to comply with the State's administratively imposed sound regulations, Ch. 173-60 WAC [hereinafter "State sound standards"];<sup>13</sup> and that the majority of motorcycle activities on the Washougal MX track did not qualify for the WAC 173-60-050(3)(g) exemption for "sounds originating from motor vehicle racing events at existing authorized facilities" [hereinafter "existing authorized facilities exemption"].<sup>14</sup>

In the periods between hearings, sound studies were done by a consultant for Washougal MX.<sup>15</sup> The results of the studies showed that unless exempted as racing events at an existing authorized facility, the prior nonconforming racing and riding activities otherwise exceeded the sound standards of Ch. 173-60 WAC, the State sound standards.<sup>16</sup>

At the September 23, 2003 hearing before Examiner Epstein, counsel for Washougal MX stated that the applicant had proposed continuing the activities that had been prior nonconforming under a conditional use permit, but that if the applicant did not get the permit, or

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<sup>12</sup> App-1: Final Order, Dated July 22, 2002, Page 6, Item 3.a. Also appears at CP 2, Ex. A. App-2: Final Order On Remand, Dated Nov. 4, 2003, page 6, items i, & j.iv; page 7, item o, page 8, item iii; page 11, items e, f, & g. The Final Order On Remand also appears at CP 2, Ex. C.

<sup>13</sup> *Id.*

<sup>14</sup> App-2: Final Order On Remand, Dated Nov. 4, 2003, page 11, items f & g. The Final Order On Remand also appears at CP 2, Ex. C.

<sup>15</sup> App-2: Final Order On Remand, Dated Nov. 4, 2003, pages 5, 22. (Also CP 2, Ex C)

get it with conditions that were preferable to the exercise of the nonconforming use rights, the applicant could not accept the permit.<sup>17</sup> Counsel again advised the Examiner at the end of the same hearing that if conditions were imposed that significantly affected the existing operation of Washougal MX, Washougal MX had no incentive to operate under the conditions of the permit or to accept the permit.<sup>18</sup> Further, counsel for Washougal MX had sent a letter of May 7, 2002 to Mr. Richard S. Lowry, the County's attorney in the proceedings on the conditional use permit application, which stated, in part, as follows:

In applying for and proceeding with this conditional use permit, my client is not waiving any legally established, prior nonconforming use rights. Without any question, he intends to abide by the conditions of the permit. However, at this point we only know what conditions the staff will recommend. We do not know what the ultimate conditions will be that are imposed until after the Examiner rules and all appeal periods have expired. If a condition were imposed that he couldn't live with, he reserves the right to refuse to accept the permit and to continue with the operation of the facility under his pre-existing rights.<sup>19</sup>

After further hearings following the remand, Mr. Epstein issued a Final Order On Remand, dated November 4, 2003, which again approved the permit conditionally.<sup>20</sup> Epstein ruled that the prior sanctioned

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<sup>16</sup> App-2: Final Order On Remand, Dated Nov. 4, 2003, page 22. (Also CP 2, Ex C)

<sup>17</sup> CP 38, page 29, lines 15-24.

<sup>18</sup> *Id* at page 168, lines 19-23.

<sup>19</sup> CP 19, attached Declaration of Richard S. Lowry.

<sup>20</sup> App-2: Final Order On Remand, Dated Nov. 4, 2003.. (Also CP 2, Ex C)

nonconforming-racing activities and practices at Washougal MX were exempt from the state's sound standards as "racing events at an existing authorized facility".<sup>21</sup> However, he nevertheless reimposed those same sound standards with somewhat altered applicability as a condition of permit approval without the benefit of the WAC existing authorized facilities exemption.<sup>22</sup>

Another appeal to the Board by Greer, Taska and Washougal MX followed the issuance of Epstein's Final Order on Remand.<sup>23</sup> Washougal MX sought relief from Epstein's imposition of the State's sound standards (without benefit of the existing authorized facility exemption), arguing that the site's preexisting, nonconforming sanctioned racing activities and practices would be unable to comply.<sup>24</sup> In Washougal MX's written comments to the Board for its January 20, 2004 appeal hearing, Washougal stated that if the sound limits were upheld "the applicant will be forced to abandon the permit and continue operation as a legal nonconforming use."<sup>25</sup>

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<sup>21</sup> cp 34; App-2: Final Order On Remand, Dated Nov. 4, 2003, page 2-3, 8a.. (Also CP 2, Ex C)

<sup>22</sup> App-2: Final Order On Remand, Dated Nov. 4, 2003, page 38, C (Also CP 2, Ex C)

<sup>23</sup> App-2: Board of County Commissioners Resolution 2004-02-10, page 1, lines 19-25, page 2, lines 1-3; Jim Taska's Appeal Of The Hearings Examiners' Final Order On Remand, Nov. 18, 2003, Bradley W. Andersen; Applicant's And Landowners' Amended Appeal, James L. Sellers; Letter from Keith Hirokawa (notice of appeal on behalf of Greer), Nov. 17, 2003.

<sup>24</sup> BB-2A, page 2, lines 6-8.

<sup>25</sup> BB-2A, page 2, lines 11-13.

In a closed-record hearing on January 20, 2004, the Board arrived at a consensus to uphold the Examiner's decision.<sup>26</sup> On February 9, 2004, Washougal MX delivered a letter to the Board withdrawing the permit application and refusing acceptance of the conditional use permit if it were issued.<sup>27</sup> On February 10, 2004, the Board considered Washougal MX's withdrawal letter along with a proposed resolution that had been prepared for that meeting,<sup>28</sup> which formally upheld Epstein's decision approving the conditional use permit.<sup>29</sup> At the meeting the County attorney, Mr. Richard Lowry, told the Board that Washougal MX intended to continue operating under its nonconforming use rights.<sup>30</sup> Mr. Lowry advised the Board that a party could "abandon, reject, not take advantage of a permit that the county issues if they chose to do so".<sup>31</sup> He nevertheless advised the Board to adopt a resolution upholding Epstein's Final Order On Remand to conclude the proceedings on the permit application,<sup>32</sup> which the Board then adopted.<sup>33</sup>

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<sup>26</sup> App-2: Board of County Commissioners Resolution 2004-02-10, Pg 2, Lines 9-21.

<sup>27</sup> CP 33, Page 3, Lines 6-9; BB-1A.

<sup>28</sup> CP 34, page 5, lines 19-22; App-2: Board of County Commissioners Resolution 2004-02-10

<sup>29</sup> App-2: Board of County Commissioners Resolution 2004-02-10

<sup>30</sup> CP 34, page 3, lines 6-10 & 20-25; page 4, lines 1-2. See also page 2, lines 21-22.

<sup>31</sup> CP 34, page 4, lines 15-17.

<sup>32</sup> CP 34, page 3, lines 10-14.

<sup>33</sup> App-2: Board of County Commissioners Resolution No. 2004-2-10

Within 21 days of the Board's adoption of its resolution upholding Epstein's Final Order on Remand, Greer and Taska filed a LUPA petition and complaint for declaratory judgment.<sup>34</sup>

In their LUPA petition Greer and Taska requested that the trial court reverse the decisions of the Hearing Examiner and Board of Commissioners that approved the conditional use permit.<sup>35</sup> They also asked the trial court to declare the rights of the parties in the continued use of the Washougal MX site and its relationship to the conditional use permit.<sup>36</sup>

Washougal MX moved for dismissal of the petition under CR12(b)(6) for lack of standing based on RCW 36.70C.060.<sup>37</sup> Washougal MX's argument was that since the conditional use permit application had been withdrawn and the applicant had elected to operate under its non-conforming use rights, the petitioners were not aggrieved as is required by the statute for standing to seek LUPA review.<sup>38</sup> The motion was supported by the declaration of Trevor Hayward of Moss and Associates, the engineering firm that had represented the application.<sup>39</sup> Hayward's declaration stated that Epstein did not approve the uses requested by the

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<sup>34</sup> CP 1 & CP 2

<sup>35</sup> CP 2, page 3 line 7 through page 15, line 3; page 21 lines 1-11.

<sup>36</sup> CP 2, page 20, lines 9-23; page 21, lines 12-15.

<sup>37</sup> CP 3.

<sup>38</sup> *Id.*

conditional use permit application; and that the sound standards imposed by Epstein would prevent the continuation of the prior nonconforming racing activities at Washougal MX.<sup>40</sup> The Declaration of Rick Huffman to the same effect was also submitted in support.<sup>41</sup> The Declaration of James L. Sellers was also submitted, authenticating the February 9, 2004 to the Board withdrawing the conditional use permit application.<sup>42</sup>

Greer and Taska opposed the motion to dismiss on the basis that the law did not allow the withdrawal of a permit application; that Washougal MX had waited too long to withdraw its application<sup>43</sup>; that Washougal MX was barred from raising its withdrawal of its application because Washougal MX did not file its own LUPA action<sup>44</sup>; and that Greer and Task had standing because they were prejudiced by the County's decision to approve the permit.<sup>45</sup> Washougal MX responded that it had not abandoned its rights by processing the application for the permit.<sup>46</sup> Judge Bennett entered a Ruling Denying Respondent's CR12(b)(6) Action on May 11, 2004, which ruled that Washougal MX

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<sup>39</sup> CP 10.

<sup>40</sup> CP 10, page 3, lines 3-8.

<sup>41</sup> CP 9; page 2, lines 19 through page 3, line 9.

<sup>42</sup> CP 8. Copy of original of letter appears at BB-1A.

<sup>43</sup> CP 24, page 2, lines 11-12; page 8, line 7 through page 12, line 15.

<sup>44</sup> CP 24, page 6, line 8 through page 8, line 6.

<sup>45</sup> CP 24, page 12, line 16 through page 15, line 21.

<sup>46</sup> CP 20, page 5, line 22 through page 7, line 17.

was estopped from withdrawing the conditional permit application after “knowing what the hearings officer and Board’s decision is.”<sup>47</sup>

Washougal MX moved for reconsideration on the basis that the doctrine of estoppel did not apply in the absence of a change of position by Greer and Taska in reasonable reliance on something that Washougal MX had said or done<sup>48</sup>; and that if Washougal MX were not able to withdraw or decline the permit, Washougal MX would be stuck with an allowed use that would not permit the activities for which the permit was requested; and which was subject to limitations of the approved use that were constitutionally infirm.<sup>49</sup> In response, Greer and Taska added an argument that Washougal MX became a conforming use with the favorable decision on the conditional use permit because all of the previously nonconforming uses were of a type permitted as a conditional use under the County’s zoning code.<sup>50</sup>

Judge Bennett denied Washougal MX’s motion to reconsider by a Ruling on Motion for Reconsideration that was entered on June 10, 2004.<sup>51</sup>

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<sup>47</sup> CP 30.

<sup>48</sup> CP 17, line 1 through page 6, line 10.

<sup>49</sup> CP 17, line 18 through page 8, line 6.

<sup>50</sup> CP 35, page 6, lines 3-23.

<sup>51</sup> CP 31.

Thereafter, the LUPA petition was brought on for trial, and for hearing on Greer and Taska's contemporaneous motion for summary judgment, which asked that Washougal MX's nonconforming use rights be declared extinguished.<sup>52</sup> In opposing the summary judgment motion for the declaratory judgment action, Washougal MX relied on the LUPA record<sup>53</sup> and resubmitted the Declarations of Hayward and Huffman, and the May 7, 2002 letter from Washougal MX's counsel to Richard S. Lowry, which had stated that Washougal MX was reserving its nonconforming use rights.<sup>54</sup>

On August 15, 2005, Judge Bennett entered his Ruling On Petition For Judicial Review and Petitioners' Motion For Summary Judgment.<sup>55</sup> Judge Bennett upheld Epstein's decision of conditional approval of the permit application as sustained by the Board.<sup>56</sup> Judge Bennett further ruled that Washougal MX's attempt to withdraw its application had been ineffective; that Washougal MX was estopped from withdrawing its

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<sup>52</sup> CP 28; CP 25; CP 25, page 61, line 17 through page 64, line 14.

<sup>53</sup> CP 11 & CP 12.

<sup>54</sup> CP 10; CP 9; CP 19, attached Declaration of Richard S. Lowry.

<sup>55</sup> CP 13 (attachment). The parties have filed a SECOND STIPULATION OF COUNSEL DESIGNATING DOCUMENTS OR OTHER EVIDENCE IN ACCORDANCE WITH RAP 9.12 with the Court of Appeals in accordance with RAP 9.12. The stipulation designates the documents and evidence called to the trial court's attention for the summary judgment motion as those documents and evidence listed in the Clark County Superior Court's Exhibit Index (item 1) and the index of clerk's papers (CP 4), except for numbers 4, 13, and 21 of such index of clerk's papers.

<sup>56</sup> CP 13 (attachment).

application; that all non-conforming rights ceased upon approval of the conditional use permit by the Board of Commissioners on February 10, 2004; and that Washougal MX's nonconforming rights were converted to those permitted under the CUP.<sup>57</sup>

Only Washougal MX has appealed any of Judge Bennett's rulings.<sup>58</sup>

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<sup>57</sup> CP 13, attachment, page 7, line 6 through page 9, line 16.

<sup>58</sup> CP 21.

#### **D. ARGUMENT**

Both Judge Bennett and Examiner Epstein determined that racing and related activities at Washougal MX were legally established prior nonconforming uses that were exempt from the State’s sound standards, Ch. 173-60 WAC [hereinafter “State’s sound standards”], as “racing events at an existing authorized facility” that were exempt pursuant to WAC 173-60-050(3)(g) [hereinafter “existing authorized facility exemption”].<sup>59</sup> No party has challenged these determinations by appeal of Judge Bennett’s Final Judgment.

Because the Board of Commissioners sustained Epstein’s Final Order on Remand,<sup>60</sup> which imposed his own sound standards based on the standards established by Ch. 173-60 WAC,<sup>61</sup> Washougal MX withdrew its permit application and refused to accept issuance of the permit,<sup>62</sup> expecting to continue to operate under its nonconforming use rights.<sup>63</sup> Therefore the primary issue for this appeal is whether Washougal MX can

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<sup>59</sup> App-2: Final Order On Remand, Dated Nov. 4, 2003, page 2-3, 8a. (Also CP 2, Ex C); CP 13, attachment, page 2, line 21 through page 4, line 2.

<sup>60</sup> App-2: Board of County Commissioners Resolution No. 2004-2-10.

<sup>61</sup> App-2: Final Order On Remand, Dated Nov. 4, 2003, page 38, C (Also CP 2, Ex C).

<sup>62</sup> CP 33, Page 3, Lines 6-9; BB-1A.

<sup>63</sup> *Id.*; BB-2A, page 2, lines 11-13.

continue to operate under its nonconforming use rights or whether it must operate under the permit in accordance with Judge Bennett's ruling.

Judge's Bennett's estoppel ruling was made in the denial of Washougal MX's 12(B)(6) motion to dismiss<sup>64</sup> and it is confirmed in response to Greer and Taska's motion for summary judgment on the declaratory judgment action.<sup>65</sup> It was based on the LUPA record and the evidentiary materials submitted for the summary judgment motion.<sup>66</sup> Included in the evidentiary materials were the Declarations of Hayward,<sup>67</sup> Huffman,<sup>68</sup> Sellers<sup>69</sup> and Lowry.<sup>70</sup> As stated in **Lybbert v. Grant County**, 141 Wn.2d 29, 33, 1 P.3d 1124, 1127 (2000):

“When ruling on a summary judgment motion, the court is to view all facts and reasonable inferences therefrom most favorably toward the nonmoving party. *Weyerhaeuser Co. v. Aetna Cas. & Sur. Co.*, 123 Wash.2d 891, 897, 874 P.2d 142 (1994). A court may grant summary judgment if the pleadings, affidavits, and depositions establish that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Ruff v. County of King*, 125 Wash.2d 697, 703, 887 P.2d 886 (1995); see also CR 56(c).”

**1. THE CIRCUMSTANCES OF THE WASHOUGAL MX APPLICATION FOR A CONDITIONAL USE PERMIT DO NOT GIVE RISE TO AN ESTOPPEL.**

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<sup>64</sup> CP 30; CP 31.

<sup>65</sup> CP 13, attachment, page 7, line 6 through page 9, line 16.

<sup>66</sup> CP 13 (attachment); SECOND STIPULATION OF COUNSEL DESIGNATING DOCUMENTS OR OTHER EVIDENCE IN ACCORDANCE WITH RAP 9.12; CP 11 & CP 12.

<sup>67</sup> CP 10.

<sup>68</sup> CP 9.

<sup>69</sup> CP 7.

<sup>70</sup> CP 19, attached Declaration of Richard S. Lowry..

“Equitable estoppel is based on the notion that a party should be held to a representation made or position assumed where inequitable consequences would otherwise result to another party who has justifiably and in good faith relied thereon.’ *Kramarevcky v. Department of Soc. & Health Servs.*, 122 Wn.2d 738, 743, 863 P.2d 535 (1993) (quoting *Wilson v. Westinghouse Elec. Corp.*, 85 Wn.2d 78, 81, 530 P.2d 298 (1975)). The elements of equitable estoppel are: ‘(1) an admission, statement or act inconsistent with a claim afterwards asserted, (2) action by another in [reasonable] reliance upon that act, statement or admission, and (3) injury to the relying party from allowing the first party to contradict or repudiate the prior act, statement or admission.’ *Board of Regents v. City of Seattle*, 108 Wn.2d 545, 551, 741 P.2d 11 (1987). Where both parties can determine the law and have knowledge of the underlying facts, estoppel cannot lie. *Chemical Bank v. Washington Pub. Power Supply Sys.*, 102 Wn.2d 874, 905, 691 P.2d 524 (1984). Equitable estoppel must be shown ‘by clear, cogent, and convincing evidence.’ *Berschauer/Phillips Constr. Co. v. Seattle Sch. Dist. No. 1*, 124 Wn.2d 816, 831, 881 P.2d 986 (1994).” **Lybbert v. Grant County**, 141 Wn.2d 29, 35, 1 P.3d 1124, 1127 (2000).

*See also Rel v. Douglas County Civil Service Commission*, 20 Wash. App. 764, 581 P.2d 1090 (1978), rev. den. 91 Wn.2d 1011.

An estoppel is not favored, and the party asserting an estoppel must prove each of its elements by clear, cogent, and convincing evidence.

**BerschauerPhillips Constr. Co. v. Seattle School District No. 1**, 124 Wn.2d 816, 881 P.2d 986 (1994), *appeal after remand* 88 Wash. App. 1005, rev. den. 135 Wn.2d 1010, 960 P.2d 937.

(a). **Washougal MX made no “admission, statement or act inconsistent with a claim afterwards asserted”:**

The only “admission or statement” was Washougal MX’s expressed intention to process an application for a conditional use permit to continue its preexisting nonconforming activities.<sup>71</sup> The “act” was Washougal MX’s submission and processing of the application.<sup>72</sup>

Without benefit of the existing authorized facility exemption, sounds from the preexisting activities exceeded the State’s sound standards.<sup>73</sup> That the existing activities could not comply with the sound standards is evidenced by the Declarations of Hayward<sup>74</sup> and Huffman,<sup>75</sup> and the Tables on pages 21, 22 & 23 of Epstein’s Final Order On Remand,<sup>76</sup> which showed when activities exceeded the State sound standards based on actual measurements by the sound consultants for Washougal MX.<sup>77</sup> Those sounds were a part of the use for which Washougal MX sought approval in its permit application.<sup>78</sup> By requiring adherence to sound standards with which the use for which approval was

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<sup>71</sup> App-1: Final Order, Dated July 22, 2002, Page 1, A.1.a. Also appears at CP 2, Ex. A. See also AE-6, enclosed Environmental Checklist, page 2, top.

<sup>72</sup> AE-6.

<sup>73</sup> App-2: Final Order On Remand, Dated Nov. 4, 2003, pages 21-23. (Also CP 2, Ex C).

<sup>74</sup> CP 10.

<sup>75</sup> CP 9.

<sup>76</sup> App-2: Final Order On Remand, Dated Nov. 4, 2003, pages 21-23.

<sup>77</sup> *Id.*

sought could not comply,<sup>79</sup> Epstein did not approve the activities for which Washougal MX made the application. Washougal MX did not mislead Greer or Taska, or do anything to cause them to be misled. There is no promise implicit in making an application for a permit that the applicant will exercise his rights under the permit. For instance, a person could apply for a building permit for a residence and simply elect not to build it. That person might elect to submit another permit application for a different residence to build. The law allows that. The fact that a third party might choose to challenge the permit proposal should confer no rights in the challenging party to force the permit applicant to accept the permit that is issued as a result of the challenge.

There is no promise implicit that the applicant will not withdraw a permit application, especially as here, where the permit does not allow the activities for which the permit application was submitted.<sup>80</sup> All that the making of an application announces is the intent of the applicant to get a permit for the activities for which the permit application is submitted. In the instance of this permit application, Washougal MX resisted the imposition of sound standards of a type under which Greer and Task

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<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

argued that the site should be operated,<sup>81</sup> and which the Examiner imposed as a condition of the approval of the permit.<sup>82</sup>

Washougal MX opposed Greer and Taska's efforts to impose sound standards to the point of appealing both of the Examiner's decisions of approval.<sup>83</sup> Counsel for Washougal MX stated at the hearings before the Examiner that Washougal MX would decline the permit and continue to operate under its nonconforming rights rather than accept a limitation on its preexisting nonconforming activities.<sup>84</sup> Counsel for Washougal MX sent a letter to the County's attorney early in the process announcing that Washougal MX was not waiving its nonconforming use rights in pursuing the permit.<sup>85</sup> And again, in Washougal MX's written comments to the Board for its January 20, 2004 appeal hearing, Washougal stated that if the sound limits were upheld the applicant "will be forced to refuse the conditional use permit and to continue to operate under their

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<sup>81</sup> CP 38, page 29, lines 15-24; *Id* at page 168, lines 19-23; CP 19, attached Declaration of Richard S. Lowry; BB-2A, page 2, lines 6-8, and page 2, lines 11-13; App-2: Applicant's And Landowners' Amended Appeal, James L. Sellers; CP 33, Page 3, Lines 6-9; BB-1A.

<sup>82</sup> App-2: Final Order On Remand, Dated Nov. 4, 2003, page 38, C (Also CP 2, Ex C).

<sup>83</sup> App-1: Appeal letter of Aug. 4, 2002 from Hirokawa and Greer; "Motorcross Appeal" (5 page) by Greer; Appeal of Taska, John S. Karpinski, Aug. 2, 2002. App-2: Jim Taska's Appeal Of The Hearings Examiners' Final Order On Remand, Nov. 18, 2003, Bradley W. Andersen; Letter from Keith Hirokawa (notice of appeal on behalf of Greer), Nov. 17, 2003.

<sup>84</sup> CP 38, page 29, lines 15-24; *Id* at page 168, lines 19-23.

<sup>85</sup> CP 19, attached Declaration of Richard S. Lowry.

nonconforming use rights.”<sup>86</sup> In short, Washougal MX did not merely ask for a permit for its preexisting activities; throughout the hearing and approval process, Washougal MX contested sound limitations of a type that Epstein ultimately imposed and the Board upheld, all the while stating its position that Washougal MX would operate as a nonconforming use and abandon its permit if State sound standards were imposed.<sup>87</sup>

Therefore, Washougal MX’s withdrawal of the permit application and refusal to accept the permit if it was issued was not inconsistent with any prior admission, statement or act of Washougal MX. Actually, it was consistent with the action taken in withdrawing and repudiating the permit, which was entirely consistent with everything Washougal MX did prior to that time.

(b). **Any reliance by Greer and Taska’s on Washougal MX’s conditional use permit application that Washougal MX would operate under a conditional use permit with conditions that did not permit the continuance of Washougal MX’s preexisting activities was not reasonable.**

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<sup>86</sup> BB-2A, page 2, lines 11-13.

<sup>87</sup> *Id.*

Greer and Taska opposed the continuation of the prior nonconforming activities under the permit that Washougal MX applied for,<sup>88</sup> especially the preexisting level of sound. Greer and Taska presented arguments at the hearings before the Examiner regarding the applicability of the State's sound standards (Ch. 173-60 WAC) in an attempt to limit the scope of the historical operation of the preexisting nonconforming activities.<sup>89</sup> That those activities could not comply with the sound standards imposed by Epstein when he rendered his Final Order Upon Remand became known at the hearings before Epstein.<sup>90</sup>

Greer and Taska were represented by attorneys in the hearings before the Examiner.<sup>91</sup> Under Clark County's Code the decision to approve a conditional use permit is discretionary<sup>92</sup>; that a permit could be approved, denied, or withdrawn was a fact that should have been known to both Greer and Taska through their attorneys. Without any question one of the possible outcomes of a decision on a permit would be to condition it so that the applicant would fail to receive approval for the continued operation of preexisting activities for which the application was made. In

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<sup>88</sup> App-1: Final Order, Dated July 22, 2002, Page 6, Item 3.a. Also appears at CP 2, Ex A; App-2: Final Order On Remand, Dated Nov. 4, 2003, page 6, items i, & j.iv; page 8, item iii; page 11, item e, f & g. The Final Order On Remand also appears at CP 2, Ex. C. See note 83.

<sup>89</sup> *Id.*

<sup>90</sup> App-2: Final Order On Remand, Dated Nov. 4, 2003, pages 21-23.

<sup>91</sup> App-2: Final Order On Remand, Dated Nov. 4, 2003, page 1, item 3; page 6, item j.

fact, that is what happened in this case: Epstein's imposition of mandatory noise standards precluded the operation of Washougal MX as those activities had preexisted.

As the Court stated in **Lybbert v. Grant County**, 141 Wn.2d 29, 35, 1 P.3d 1124, 1127 where all the parties can determine the law and have knowledge of the underlying facts, estoppel cannot lie. It is stated more strongly in **Patterson v. Horton**, 84 Wn.App. 531, 544, 929 P.2d 1125 (1997):

"The party asserting estoppel must establish not only lack of knowledge of the state of facts, but also the absence of any convenient and available means of acquiring such knowledge. *Chemical Bank v. Washington Pub. Power Supply Sys.*, 102 Wn.2d 874, 691 P.2d 524, (1984) (citing *Leonard v. Washington Employers, Inc.*, 77 Wn.2d 271, 280, 461 P.2d 538 (1969)), cert. denied, 471 U.S. 1065 (1985)."

*See also* **PUD No. 1 v. Washington Public Power Supply System**, 104 Wn.2d 353, 705, P.2d 1195, rec. den., modified 713 P.2d 1109 (1986).

Estoppel has been applied as a result of a party's participation in judicial proceedings, which is similar to the circumstances of Washougal MX, except that these circumstances involve administrative proceedings. In cases where an estoppel has been found against a party, the party has taken a position in judicial proceedings on which another party relied that

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<sup>92</sup> App-1: Final Order, Dated July 22, 2002, Page 19, Item E.1.. Also appears at CP 2, Ex

was inconsistent with a later asserted position by the party against whom the estoppel was found. For instance, in **Witzel v. Tena**, 48 Wn.2d 628, 295 P.2d 1115 (1956), a divorced wife was held to be estopped in an action in Washington to assert her title to her share of community property that a Nevada court had failed to award 14 years earlier. The divorced wife had induced her former husband to sign a waiver and appear in the Nevada divorce action by her prior promise that the community property would be his if he did so. For a similar result, see **Hartman v. Smith**, 100 Wn.2d 766, 674 P.2d 176 (1984).

For Greer and Taska to rely that Washougal MX would accept the permit with any conditions that were imposed, or that Washougal MX would accept a permit that did not authorize the activities for which it was submitted, was not reasonable reliance.

Nor could Greer and Taska reasonably rely that Washougal MX would choose to follow the difficult road of challenging the conditions of the permit in court,<sup>93</sup> where much deference is given to municipal decision making,<sup>94</sup> rather than decline the permit and elect to operate under its nonconforming sue rights. Further, Washougal MX had made it absolutely clear that it was prepared to decline the permit and operate

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<sup>93</sup> Ch. 36.70C RCW.

<sup>94</sup> RCW 36.70C.130.

under its nonconforming use rights if the permit were denied or if it were approved with conditions that interfered with the conduct of its preexisting activities.<sup>95</sup>

However, probably the strongest evidence of the fact that Greer were not relying on the approval of the conditional use permit is the fact that they challenged the approval of the permit by filing a LUPA action,<sup>96</sup> in which they asked for the reversal of the decisions approving the permit.<sup>97</sup> As their lawsuit was pled and argued, Greer and Taska's theory for relief was that Washougal MX had neither a valid permit nor nonconforming use rights.<sup>98</sup> That does not constitute reliance on the issuance of the permit. Furthermore, Greer and Taska had no right to rely on Washougal MX becoming so hopelessly mired in the permitting process that Washougal MX would either receive no permit or get stuck with an approval that did not authorize the exercise of the activities for which the permit application had been submitted. Greer and Taska's argument to Judge Bennett that it was unfair to allow Washougal MX to withdraw its application or decline the issuance of the permit was simply disingenuous.

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<sup>95</sup> CP 38, page 29, lines 15-24; *Id* at page 168, lines 19-23; CP 19, attached Declaration of Richard S. Lowry; BB-2A, page 2, lines 11-13.

<sup>96</sup> CP 2.

<sup>97</sup> *Id.* at page 3 line 7 through page 15, line 3; page 21 lines 1-11.

<sup>98</sup> CP 2; CP 18; CP 22; CP 23; CP 24; CP 25; CP 26; CP 27; CP 28; CP 29.

Judge Bennett makes the statement in his final ruling that a party who causes the County and other interested parties to expend substantial resources and time in reliance on an expectation of a resolution of the issues becomes estopped from withdrawing its application.<sup>99</sup> There is no legal authority to support that conclusion. Nevertheless, there was no reliance because Washougal MX did not receive the approval or permit (to continue its preexisting activities) for which it made its application, and during the process it announced that it would decline the permit if the conditions of approval interfered with its ability to continue with its preexisting operations.<sup>100</sup> Further, there was no reliance because Greer and Taska challenged the decision to approve the permit by filing a LUPA action requesting that the approval decisions be overturned.<sup>101</sup>

**2. WASHOUGAL MX DID NOT ABANDON ITS  
NONCONFORMING USE RIGHTS.**

- (a). **Nonconforming use rights are only abandoned if the landowner evidences an intent to abandon those rights.**

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<sup>99</sup> CP 13, attachment, page 8, line 12 through page 9, line 7.

<sup>100</sup> CP 38, page 29, lines 15-24; *Id* at page 168, lines 19-23; CP 19, attached Declaration of Richard S. Lowry; BB-2A, page 2, lines 11-13.

<sup>101</sup> CP 2, page 3 line 7 through page 15, line 3; page 21 lines 1-11.

The issue can be framed with respect to whether the Washougal MX abandoned its nonconforming use rights by submitting the application for a conditional use permit. The determination of whether those rights are abandoned is based on the landowner's intent. *See Andrew v. King Count*, 21 Wn.App. 566, 586 P.2d 509 (1978). Once the landowner has established his nonconforming right, the burden shifts to the party claiming abandonment to prove such. *City of University Place v. McGuire*, 102 Wn. App. 658, 9 P.3<sup>rd</sup> 918, reversed 144 Wn.2d 640, 30 P.3<sup>rd</sup> 453, rec. den. (2000); *Van Sant v. Everett*, 69 Wn.App. 641, 849 P.2<sup>nd</sup> 1276 (1993).

There was no abandonment. The May 7, 2002 letter from James L. Sellers to Richard S. Lowry that reserves Washougal MX's nonconforming use rights early in the process negates any intent to abandon.<sup>102</sup> In the hearings before the Examiner in 2003 and in the appeal comments submitted for the Boards January 20, 2004 appeal hearing, Washougal MX's counsel stated that if the permit approval interfered with Washougal MX's operation of its preexisting activities, Washougal MX would decline the permit and continue to operate under its nonconforming use rights.<sup>103</sup> A statement to that effect appeared in Washougal MX's

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<sup>102</sup> CP 19, attached Declaration of Richard S. Lowry.

<sup>103</sup> CP 38, page 29, lines 15-24; *Id* at page 168, lines 19-23; BB-2A, page 2, lines 11-13.

written argument to the Board for its January 20, 2004 appeal hearing.<sup>104</sup> The Declarations of Huffman<sup>105</sup> and Hayward<sup>106</sup> reflect that there has been no cessation in the preexisting activities after the permit application was submitted. It is clear from the record that the application for the conditional use permit was to merely continue the exercise of the nonconforming rights under a permit.<sup>107</sup> When it became clear that the County's decision on the permit would limit the exercise of the preexisting nonconforming activities, Washougal MX withdrew its application and repudiated the permit.<sup>108</sup> Prior to the appeal hearing before the County Commissioners on January 20, 2004, no one could have known for sure how the permit decision would come out. All of those facts demonstrate that there was no abandonment by Washougal MX of its nonconforming use rights. The intent by Washougal MX not to abandon the nonconforming activities if the permit did not provide for the continuation of the nonconforming activities was consistently expressed.

- (b). **Washougal MX's nonconforming use rights did not become changed to a conforming use by the County's decision to approve the conditional use permit.**

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<sup>104</sup> *Id.*

<sup>105</sup> CP 9.

<sup>106</sup> CP 10.

<sup>107</sup> App-1: Final Order, Dated July 22, 2002, Page 1-2, A.1.b. Also appears at CP 2, Ex. A. *See also* SEPA checklist in AE-6, enclosed Environmental Checklist, page 2, top.

A Nonconforming use is defined by CCC 18.104.503 as follows:

“Nonconforming use” shall mean a use of land, building, or structure which **use** lawfully existed at the time of the adoption of this title or of any amendment thereto, but which use does not conform with the use regulations imposed by this title or such amendment thereto. (Sec. 18.104.530 of Ord. 1980-06-80) [Bolding added for emphasis.]

CCC 18.104.750 defines “Use” as:

“Use” shall mean **an activity or purpose** 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. (Sec. 18.104.750 of Ord. 1980-06-80) [Bolding added for emphasis.]

Under CCC 18,406A.020:

For purposes of interpretation of this chapter, **any uses**, structures or lots **which in whole or part** are not in conformance with current zoning standards shall be considered as follows:

A. Legal Nonconforming. Those uses, structures or lots which in whole or part are not in conformance with current zoning standards, but were legally established at a prior date at which time they were in conformance with applicable standards. [Bolding added for emphasis.]

Clearly the nonconforming uses were the activities that were originally, lawfully occurring on the property, including the sounds produced from those activities, which we now know were exceeding the

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<sup>108</sup> CP 33, Page 3, Lines 6-9; BB-1A.

State's sound standards.<sup>109</sup> Because the activities preexisted the State's sound standards, the activities and sounds were exempt under the existing authorized facility exemption.<sup>110</sup> At the time the conditional use permit application was made, those preexisting activities required a conditional use permit to be considered "conforming" under the prevailing R-5 zone.<sup>111</sup>

CCC 18.406A.030 provides as follows:

A. Discontinuation of Legal Nonconforming Status.

1. Nonconforming uses shall be considered abandoned and discontinued in terms of legal nonconforming status if the legal nonconforming use ceases for a period of six (6) months or more, or **is changed to a conforming use.** (Ord. 1995-08-15)<sup>112</sup>[Bolding added for emphasis.]

Under the position advocated by Greer and Taska, and in Judge Bennett's holding on summary judgment, the nonconforming uses of this property were abandoned when the conditional use permit was granted because the nonconforming uses then became a "conforming use".<sup>113</sup> However, CCC 18.104.750 defines "use" as an "activity or purpose". The sound produced was a part of the activity. As the Declarations of

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<sup>109</sup> AE-23: Clark County Staff report and Recommendation for the Washougal MX CUP, April 24, 2002, Page 4, Paragraph 8; App-2: Final Order On Remand, Dated Nov. 4, 2003, pages 21-23. (Also CP 2, Ex C).

<sup>110</sup> App-2: Final Order On Remand, Dated Nov. 4, 2003, page 2-3, 8a.. (Also CP 2, Ex C).

<sup>111</sup> AE-23: Clark County Staff report and Recommendation for the Washougal MX CUP, April 24, 2002, Page 4, Paragraph 8

<sup>112</sup> CP 11, attached Ord. 1995-08-15, attachment, page 2.

Hayward<sup>114</sup> and Huffman<sup>115</sup> established, the preexisting activities could not have possibly continued and also complied with Epstein's sound standards.<sup>116</sup> In order for the abandonment contemplated by CCC 18.406A.030 to occur, Washougal MX would have had to restrict preexisting activities to those activities that complied with the sound standards imposed by Epstein. That never happened. Washougal MX never became a "conforming use" because the preexisting activities never complied with the permit conditions. Those uses (or activities) never became conforming because the "uses, . . . in whole or part" were not in conformance with current zoning standards or the conditions of the permit.<sup>117</sup> (CCC 18.406A.020) There was never the change of the use to a conforming use.<sup>118</sup> There was only a permit approved with conditions imposed to which the preexisting activities never conformed.<sup>119</sup>

Greer and Taska argued to Judge Bennett that because the preexisting activities were of a type that were authorized by the permit, the nonconforming use rights became subsumed into the permit

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<sup>113</sup> CP 13, page 9, lines 4-7.

<sup>114</sup> CP 10.

<sup>115</sup> CP 9.

<sup>116</sup> *See also* App-2: Final Order On Remand, Dated Nov. 4, 2003, page 21-23 & 38. (Also CP 2, Ex C).

<sup>117</sup> *Id.*

<sup>118</sup> CP 10; CP 9; App-2: Final Order On Remand, Dated Nov. 4, 2003, page 21-23 & 38. (Also CP 2, Ex C).

<sup>119</sup> *Id.*

authorization.<sup>120</sup> However, whether a particular application of property is one permitted by the terms of a municipal zone code is determined on the basis of the actual use of the property. *See State v. Bellingham*, 25 Wn. App 33, 605 P.2d 788 (1979). In the instance of the preexisting nonconforming activities at Washougal MX, those activities included the sound produced. Since the sound exceeded the sound standards imposed by Epstein’s Final Order On Remand,<sup>121</sup> the preexisting activities were not “conforming” – were not a “conforming use” as that term is used in CCC 18.406A.030.

**3. CONSTITUTIONALLY PROTECTED  
NONCONFORMING USE RIGHTS CANNOT BE  
DESTROYED BY REGULATORY ACTION UNDER  
THE SUBSEQUENTLY ENACTED ZONING  
ORDINANCE.**

If Washougal MX is not allowed to decline the conditional use permit or withdraw its application, its preexisting nonconforming rights will have been destroyed by the sound standards imposed by Epstein’s Final Order on Remand because the preexisting activities cannot continue

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<sup>120</sup> CP 25, page 7, lines 11-14; page 58, line 8 through page 64, line 14.

<sup>121</sup> App-2: Final Order On Remand, Dated Nov. 4, 2003, page 21-23 & 38. (Also CP 2, Ex C).

and comply with those standards.<sup>122</sup> It is a denial of due process of law and a taking without just compensation for an abrupt loss of nonconforming use rights to occur through governmental regulation. *See* Wash. St. Const, Art. 1, §§ 3 and 16; United States Constitution, amendment 5 & 14, § 1; **State ex Modern Lbr. & Millwork Co. v. MacDuff**, 161 Wash. 600, 613, 297 P. 733, 737 (1963); **State ex rel. Warner v. Hayes Investment Corp.**, 13 Wn.2d 306, 317-318, 125 P.2d 262 (1942).

The Supreme Court of Idaho has directly considered the issue of whether nonconforming use rights are lost by the issuance of a conditional use permit for the use that was nonconforming. **Glengarry-Gamlin Protective Ass'n v Bird**, 675 P.2d 344 (1984); **Lewis-Clark Memorial Gardens, Inc., v. Blaine County**, 99 Idaho 680, 587 P.2d 821 (1978); and **Gordon Paving Co. v. Blaine County**, 98 Idaho 730, 572 P.2d 164 (1977).

In **Glengarry-Gamlin**, the court first noted that the limited right to continue a nonconforming use is constitutionally protected and cannot be destroyed by regulatory action, and that a property owner will not lose that protection merely by making an application for a variance or permit under

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<sup>122</sup> CP 10; CP 9; App-2: Final Order On Remand, Dated Nov. 4, 2003, page 21-23 & 38. (Also CP 2, Ex C).

the mistaken belief that the activity is not protected. However, the court went further and held that:

“Accordingly, it cannot be presumed, from the mere fact that a landowner applies for a conditional use permit, that he intends to waive his constitutional protection for those activities which represent prior nonconforming uses. In such a case, the outcome of the application will not affect the scope of uses constitutionally protected.” (675 P.2d 350)

If Washougal MX can no longer operate in accordance with its prior nonconforming rights and is limited to operation under the conditions of the conditional use permit approval, Washougal MX will have either been denied due process of law or will have had property rights taken without compensation in violation of Article 1, section 3 and 16, of the Washington State Constitution and by the 5th amendment to the U.S. Constitution, as applied to the States through the 14<sup>th</sup> Amendment, because until the Examiner and the board ruled, Washougal MX could not have known for sure what the permit conditions would be, or that Washougal MX was relinquishing its constitutionally protected prior nonconforming rights to conditions of the approval that had not until that point been adopted. *See Presbytery of Seattle v. King County*, 114

Wn.2d 320, 329-32, 787 P.2d 907, cert. denied, 498 U.S. 911 (1990).<sup>123</sup> Further, Washougal MX would be denied equal protection of the law, the privileges and immunities available to other citizens, and procedural and substantive due process, as protected by Article 1, sections 3 and 12 of the Washington State Constitution, and the 5th and 4th amendments to the U.S. Constitution, through the 14<sup>th</sup> Amendment. **Euclid vs Ambler Realty Co.**, 272 US 365, 71 L. Ed. 303, 47 S. Ct. 114, 54 ALR 1016 (1926). *See also* **Paulson v County of Pierce**, 99 Wn.2d 645, 652-53, 664 P.2d 1202, appeal dismissed, 464 U.S. 957 (1983). The conditions of the permit are not uniform requirements within a zoning district within which the property is located. Further the involuntary application of the non-legislatively adopted conditions would not be anything an applicant could reasonably anticipate, rendering the rules under which the permit was issued unconstitutionally void for vagueness as applied. **Burien Bark Supply v. King County**, 106 Wn.2d 868, 725 P.2d 994 (1986).

In its holding in **Glengarry-Gamlin, supra**, at 675 P.2d 350, the Idaho court reasoned, in part, that if a landowner engaged in prior nonconforming use sought to add non-preexisting uses requiring a permit, it would be beneficial if the landowner and local authorities placed the

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<sup>123</sup> Alternatively, a violation of RCW 82.02.020 **Trimen Dev.Co. v. King County**, 124 Wn.2d 261, 270, 877 P.2d 187 (1994).

regulation of all activities (conforming and nonconforming) under one permit.

“The governing board might be able to achieve comprehensive rather than piecemeal regulation of the land uses. The landowner might obtain a permit that otherwise legitimately could be denied or burdened with conditions which he finds unacceptable. Each side could avoid future disputes over which activities had been constitutionally protected and which of them were allowed only under the terms of the permit.” (675 P.2d 350)

That is essentially what Washougal MX and Clark County’s Community Development Department attempted to do. If the rule becomes that nonconforming rights can be lost by processing a permit application to exercise those rights as a conforming use, there will be a strong disincentive to risk the loss of those rights by processing the permit. The law should not be construed to foster such a disincentive. Allowing the withdrawal of the permit application, or allowing the applicant to decline the permit, does not undermine the integrity of the administrative process, it furthers it by protecting constitutional rights while subjecting those rights to voluntary administrative regulation.

**4. THE BOARD OF COMMISSIONERS DID NOT CHOOSE TO REFUSE TO RECOGNIZE THE WITHDRAWAL OF THE CONDITIONAL USE PERMIT APPLICATION.**

The record is clear. The facts are set forth on page 13 of the Statement of the Case herein.<sup>124</sup> The Board of Commissioners met on February 10, 2004 to consider the adoption of the written Resolution upholding the Examiner's decision on the conditional use permit. When confronted with the February 9, 2006 letter withdrawing the application, the Board was somewhat unsure of what to do. Their attorney advised that the Board to simply pass the resolution in order to conclude the matter. There was no expression of any intent to refuse to recognize the withdrawal and much uncertainty expressed about where events would go in light of the withdrawal. In fact the County's attorney clearly stated that Washougal MX was entitled to withdraw the application or decline the permit. Both he and the Board evidenced an understanding that Washougal MX would continue in the exercise of its nonconforming use rights rather than operating under the permit.

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<sup>124</sup> Also CP 34, pages 3-5.

**E. CONCLUSION**

The record in this case does not support an estoppel against Washougal MX that it could not withdraw its permit application or decline to accept the permit, or that Washougal MX cannot assert the continuation of its prior nonconforming use rights. Nor does it support a ruling that those rights were abandoned or became a conforming use.

Judge Bennett should not have granted summary judgment against Washougal MX in light of the evidence marshaled by Washougal MX in opposition, which is contained in the LUPA record and the declarations that were submitted by Washougal MX.

Washougal requests that the Court rule that it is not estopped by the County's decision of approval of the conditional use permit to decline the permit and to elect to operate under its nonconforming use rights. It is requested that the Court rule that Washougal MX withdrew its permit application in any event. Washougal MX requests that the Court overrule Judge Bennett's decision.

June 20, 2006

Respectfully submitted,



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James L. Sellers, WSBA # 4770  
Attorney for Washougal MX, Appellant

**APPENDIX**

**HEARING EXAMINER EXHIBITS**

**APPLICATION: Washougal Motocross**  
**CUP2002-00001**

**HEARING DATE: May 9, 2002**

EXHIBIT NO.	DATE	SUBMITTED BY	DESCRIPTION
1. a		CC Development Services	Aerial map (Set 1)
1 b		CC Development Services	Aerial map (Set 2)
2. a		CC Development Services	Vicinity map (Set 1)
2 b		CC Development Services	Vicinity map (Set 2)
2 a		CC Development Services	Zoning map (Set 1)
3 b		CC Development Services	Zoning map (Set 2)
4. a		CC Development Services	Comp. Plan Map (Set 1)
4 b		CC Development Services	Comp. Plan Map (Set 2)
5.	12/20/01	CC Development Services	Pre-Application Conference Report
6.	1/10/02	Applicant- Moss & Associates	Application Packet: Application Form; Application for Worksheet; Pre-Application Report; GIS Packet; Narrative; Nationals Type Event Requirements; Prior Non-Conforming Uses; Proposed Site Plan; SEPA; Soil Analysis Report; SWWHD Comments; Water Purveyor Utility Review; Road Mod Application; Addendum to Road Rod Application; Potable Water Supply; Archaeological Pre-Determination; Sample Traffic Plan; Easement over BPA Property; Proof of Ownership
7.	1/22/02	CC Public Works – Shelley Oylear	Email regarding Traffic Study and Traffic Plan
8.	1/30/02	CC Development Services	Not Fully Complete Letter to Applicant
9.	3/6/02	CC Development Services	Fully Complete Letter to Applicant
10.	3/13/02	Applicant- Sellers and Jacobs	Additional Submittal regarding the Narrative
11.	3/14/02	CC Development Services	Notice of Type III Review and Public Hearing
12.	3/14/02	CC Development Services	Affidavit of Mailing of Public Notice

SEQ#	DATE	SUBMITTED BY	DESCRIPTION
13.	4/3/02	SWWHD – Carla Sowder	Comments regarding Project
14.	4/4/02	Applicant – Sellers & Jacobs	Letter regarding the Sanitary Survey and Existing System Approval
15.	4/5/02	CC Public Works – Shelley Oylear	Comments re: Transportation Concurrency and the Traffic Management Plan
16.	4/9/02	CC Dev Engineering- Ken Burgstahler	Comments regarding the proposed project
17.	4/15/02	CC Development Services	Notice of Public Hearing to Columbian – Published 4/19/02
18.	4/18/02	CC Prosecuting Attorney – Rich Lowry	Email to Jim Vandling re:applicability of site plan review
19.	4/19/02	CC Development Services	Newspaper Notice of SEPA Determination of Nonsignificance – Published 4/24/02
20.	4/4/02	CC FMO – Curtis Eavenson	Comments regarding project
21.	4/23/02	Phillip Johnson	Comment Letter
22.	4/24/02	CC Development Services	Affidavit of Posting
23.	4/24/02	CC Development Services	Staff Report Written by Jim Vandling
24.	4/24/02	Jay Ponce	Comment Letter
25.	4/26/02	John Kaiser	Comment Letter
26.	4/29/02	Kevin Morgan	Comment Letter
27.	4/29/02	Gary & Tracy Roe	Comment Letter
28.	4/29/02	A.W. Brown	Comment Letter
29.	4/30/02	Robert Reed	Comment Letter
30.	5/1/02	Nick Rhine	Comment Letter
31.	5/1/02	Alan Petrasek	Comment Letter
32.	5/1/02	Scott & Laura Stewart	Comment Letter
33.	5/1/02	Hans J. Kaplick	Comment Letter
34.	5/3/02	Bob & Billie Strong	Comment Letter
35.	5/3/02	Michael Jolma	Comment Letter
36.	5/3/02	Michael Creager	Comment Letter

EXHIBIT #	DATE	SUBMITTED BY	DESCRIPTION
37.	5/3/02	Chuck Hallsted	Comment Letter
38.	5/6/02	Paul Kitchen & Family	Comment Letter
39.	5/6/02	Mark Joslin	Comment Letter
40.	5/6/02	Warren Fossum	Comment Letter
41.	5/7/02	Rhonda Brewer	Comment Letter
42.	5/7/02	Cindy Page	Comment Letter
43.	5/7/02	Ken Steinke & Patrick Steinke	Comment Letter
44.	5/7/02	Paul Rettinger	Comment Letter
45.	5/7/02	Frank & Carolyn de la Rosa	Comment Letter
46.	5/7/02	Tim & Fawn Ray	Comment Letter
47.	5/7/02	Frank & Carolyn de la Rosa	Comment Letter
48.	5/7/02	Valerie & John Ulver	Comment Letter (DUPLICATE EX SEE #45)
49.	5/7/02	Therese Lavallee	Comment Letter
50.	5/8/02	David Ross	Comment Letter
51.	5/8/02	Michael Wirth	Comment Letter
52.	5/8/02	Tammy Fauley	Comment Letter
53.	5/9/02	Marty Green, Jason Hannah, & Jennifer Hannah	Comment Letter
54.	5/9/02	Frank Carwan	Comment Letter
55.	5/9/02	Bob Clancy	Comment Letter
56.	5/9/02	Thomas Rigo	Comment Letter
57.	5/8/02	Aly Albin	Comment Letter
58.	5/8/02	Alex Toth	Comment Letter
59.	5/8/02	Dept of Fish & Wildlife – Steve Manlow	SEPA Response
60.	5/9/02	SWWHD – Carla Sowder	Memo to Jim Vandling re: update on previous comments (Exhibit #13)

EXHIBIT NO	DATE	SUBMITTED BY	DESCRIPTION
61.	5/9/02	Applicant – Moss & Associates -Trevor Hayward	Speed Study
62.	5/9/02	David Jett	Comment Letter
63.	5/9/02	David Goodell	Comment Letter
64.	5/9/02	Don & Guy Schneider	Comment Letter
65.	5/9/02	Kevin Larson	Comment Letter
66.	89	Development Services	Final Order CUP89-15
67.	7/23/96	Development Services	CUP96-008 Hearing Examiner Decision
68.	7/6/01	Development Services	MZR2001-00091
69.	5/9/02	Development Services	Memo to Hearing Examiner from Jim Vandling
70.	8/89	Larry Epstein	CUP89-15 Hearing Examiner Decision
71.	5/9/02	Applicant	Map and Addresses of People Interviewed on Video Tape
72.	5/9/02	Promoto Promotions	Comment Letter
73.	5/9/02	William Kleine	Comment Letter
74.	5/9/02	Applicant	Video Tape
75.	5/16/02	Development Services	Revised Staff Report – Written by Jim Vandling
76.	5/17/02	Development Services	Second Revised Staff Report – Written by Jim Vandling
77.	5/23/02	Development Services	Notice and Order sent to Skamania County Residents within 500 feet of project
78.	5/23/02	Development Services	Affidavit of Mailing Notice
79.	5/23/02	Applicant – Jim Sellers	Post Hearing Response to the Revised Staff Report
80.	5/20/02	Eugene Greer, Jr	1 <sup>st</sup> Comment Letter – Skamania County Resident
81.	5/20/02	J. Taska	1 <sup>st</sup> Comment Letter- Skamania County Resident

EXHIBIT NO	DATE	SUBMITTED BY	DESCRIPTION
82.	5/22/02	Eugene Greer, Jr	2 <sup>nd</sup> Comment Letter – Skamania County Resident
83.	5/29/02	Robert & Judith Wilson	Comment Letter – Skamania County Resident
84.	5/30/02	Judy & Lee Lupfer	Comment Letter – Skamania County Resident
85.	6/3/02	J. Taska	2 <sup>nd</sup> Comment Letter – Skamania County Resident
86.	6/3/02	P.E. Kenck	Comment Letter – Skamania County Resident
87.	6/4/02	Eugene Greer, Jr	3 <sup>rd</sup> Comment Letter – Skamania County Resident
88.	6/4/02	Darrel & Lana Wilhoit	Comment Letter – Skamania County Resident
89.	6/5/02	Judith Wilson	Email to Jim Vandling re: Project
90.	6/5/02	Keith Hirokawa- Law Office of John Karpinski	Comment and Notice of Appeal
91.	6/13/02	Applicant – Jim Sellers	Fax re: Hearing being reopened and creek beds
92.	6/18/02	CC Development Services	Video of May 9 <sup>th</sup> Hearing
93.	6/18/02	CC Development Services	Notice of Type III Review and Public Hearing to be held on July 2, 2002
94.	6/18/02	CC Development Services	Affidavit of Mailing Notice
95.	6/21/02	Applicant	Washougal National Weekend -2002 Security Plan
96.	6/25/02	Applicant – Gifford R. Glidden Consultant	Letter to Mark Zack re: the Loud Speaker System
97.	6/26/02	George Gust	Comment Letter
98.	6/27/02	Dept of Fish & Wildlife – Steve Manlow	Letter & Photographs of Washougl Motocross Trails- Headwaters of Coyote Creek
99.	6/27/02	Timothy Pesch	Comment Letter
100.	6/27/02	Applicant – Gifford R. Glidden Consultant	Letter to Police Chier Chaney re: Security Plan for 2002 Washougal Motocross Event
101.	6/27/02	CC Sheriffs Dept- Steve Harrison	Email to Jim Vandling re: The Traffic Management Plan

EXHIBIT NO.	DATE	SUBMITTED BY	DESCRIPTION
102.	7/1/02	Charles & Renée Moore	Comment Letter
103.	6/28/02	Keith Hirokawa – Law Offices of John S. Karpinski	Demand for Withdrawal of DNS
104.	6/28/02	CC Development Services- David Howe	Habitat Biologist Comments
105.	7/1/02	CC Development Services	REVISED Habitat Biologist Comments
106.	7/1/02	P.E. Kenck	Comment Letter
107.	7/2/02	CC Development Services - Jim Vandling	REVISED Staff Report
108.	7/2/02	Applicant – Jim Sellers	Letter re: Exhibit # 103
109.	7/2/02	SWWHD – Carla Sowder	Email to Jim Vandling re: Washington State Dept of Health State Comments
110.	7/2/02	Eugene Greer	Video Tape
111.	7/2/02	Eugene Greer	Map from Motocross
112.	7/2/02	Eugene Greer	Audio Cassette
113.	7/2/02	Keith Hirokawa – Law Offices of John S. Karpinski	Declaration of Keith Hirokawa
114.	7/2/02	Keith Hirokawa – Law Offices of John S. Karpinski	Declaration of Jim Taska
115.	7/2/02	Keith Hirokawa – Law Offices of John S. Karpinski	Declaration of Eugene Greer
116.	7/2/02	Applicant – Trevor Hayward	Comment letter from the Bellamy Family
117.	7/2/02	Applicant- Trevor Hayward	Comment Letter from Nicholas Haria – AMA
118.	7/2/02	Applicant-Trevor Hayward	Response to Letters from Skamania County
119.	7/2/02	Michael Kepcha	Comment letter
120.	7/2/02	Dan Huntington	Letter to Jim Taska re: Motocross
121.	7/2/02	G. Taska	Comment Letter re: Current Water Rights
122.	7/2/02	CC Development Services	Appeal Staff Report – 96-008-2524
123.	7/2/02	Michael Kepcha	Fire Traffic Line Site Photos
124.	7/2/02	Applicant-Trevor Hayward	Maintenance Plan for Legally Established Nonconforming Existing Trails

EXHIBIT NO	DATE	SUBMITTED BY	DESCRIPTION
125.	7/2/02	Applicant-Trevor Hayward	Schematic for Trail Maintenance
126.	7/2/02	Eugene Greer	Testimony
127.	7/2/02	Applicant - Jim Sellers	WAC 197-11-158
128.	7/2/02	Applicant - Jim Sellers	WAC197-11-100
129.	7/2/02	Applicant - Jim Sellers	RCW 43.21C.090
130.	7/2/02	Applicant - Jim Sellers	RCW 43.21C.031
131.	7/2/02	Applicant - Jim Sellers	WAC197-11-660
132.	7/2/02	Applicant - Jim Sellers	RCW 43.21C.060
133.	7/2/02	Applicant - Trevor Hayward	Power Point Presentation USGS Maps & Aerial Photos
134.			
135.			
136.			
137.			
138.			

# HEARING EXAMINER EXHIBITS



**APPLICATION:** Washougal Motocross Remand

**HEARING DATE:** September 9, 2003

EXHIBIT NO	DATE	SUBMITTED BY	DESCRIPTION
1		Applicant -Moss & Associates - Trevor Hayward	Existing Trail Map of the Washougal MX Park
2	12/6/03	Appellant - Erikson & Hirokawa, PLLC	Letter re: Compliance with the Hearing Examiners Decision
3	2/3/03	CC Development Services	Email From Craig Pridemore re: Email from Concerns from Ed Greer
4	4/03	Applicant -Moss & Associates - Trevor Hayward	Stream and Protection Plan Map - Trail Maintenance Plan
5	4/10/03	CC Development Service -	Type 1 Development Review Staff Report & Decision
6	4/21/03	Hearing Examiner - Larry Epstein	Email to Jim Vandling re: Protocol for Noise Study
7	4/22/03	CC Development Services	Measurement Procedures for the Washougal Motocross Sound Study
8	4/24/03	CC Development Services - Jim Vandling	Letter to Hirokawa, Karpinski, Taska and Epstein re: Joint Meeting with the Hearings Examiner and Map of Existing Trails
9	4/25/03	Appellant - Erikson & Hirokawa, PLLC	Letter regarding the Trail Plan and Noise Study
10	4/27/03	J. Taska	Letter re: Exhibit #1
11	5/1/03	CC Development Services	Remand Notice of Development Review & Public Hearing
12	5/1/03	CC Development Services	Affidavit of Mailing of Public Notice
13	5/2/03	J. Taska	Letter re: Noise Study Protocol
14	5/9/03	Appellant - Erikson & Hirokawa, PLLC	Letter re: Procedural Objection
15	5/12/03	Applicant -Moss & Associates - Trevor Hayward	Letter re: Map that was submitted and Meeting time for Field Visit

EXHIBIT NO	DATE	SUBMITTED BY	DESCRIPTION
16	5/12/03	Applicant -Moss & Associates - Trevor Hayward	Letter re: Rescheduling of June 17 <sup>th</sup> Hearing
17	5/13/03	Jeffery Alberda	Letter re: PA System being used during week
18	5/13/03	Wayne Shannon	Letter re: Trails and Noise
19	5/16/03	J. Taska	Letter re: Rescheduling of Hearing
20	5/15/03	Eugene Greer	Letter re: Noise Study
21	5/22/03	CC Development Services	REVISED Remand Notice of Development Review & Public Hearing
22	5/22/03	CC Development Services	Affidavit of Mailing Public Notice
23	5/23/03	Clifford Glidden	Letter re: Inter-Agency Event Planning Meeting
24	6/9/03	Eugene Greer	Letter re: Noise Study
25	6/12/03	Applicant -Moss & Associates - Trevor Hayward	Letter in response to Exhibit #17
26	6/13/03	Ronald Williams	Letter re: Noise at Motocross
27	6/19/03	Appellant - Erikson & Hirokawa, PLLC	Letter re: Noise Study
28	6/24/03	Applicant -Moss & Associates - Trevor Hayward	REVISED Sound Measurement Protocol
29	7/14/03	CC Development Services - Brent Davis	Wetland Determination Staff Report
30	7/17/03	Appellant - Erikson & Hirokawa, PLLC	Letter re: Noise Study
31	8/4/03	Wayne Shannon	Comment Letter
32	8/7/03	Eugene Greer	Comment Letter
33	8/11/03	Clifford Glidden	Comment Letter
34	8/21/03	Darrel Wilhoit	Comment Letter
35	8/25/03	Judi Wilson	Comment Letter
36	4/10/03	CC Development Services - Habitat Biologist	Habitat Review - HAB2003-00081 Written by David Howe
37	8/26/03	CC Development Services - Jim Vandling	Remand Staff Report

EXHIBIT NO.	DATE	SUBMITTED BY	DESCRIPTION
38	8/19/03	Appellant- Schwabe, Williamson & Wyatt - Brad Andersen,	Letter regarding representation of Jim Taska and Notice of Appearance Documentation
39	8/26/03	Michael D. Green	Comment Letter
40	9/2/03	Eugene Greer	Comment Letter with Exhibits
41	9/3/03	William Kessinger	Comment Letter
42	9/5/03	Appellant- Schwabe, Williamson & Wyatt - Brad Andersen	Skamania County 911 Calls associated with the Washougal Motocross
43	9/5/03	Applicant - Rick Huffman	Habitat Fencing Photos
44	9/5/03	Ronald Williams	Comment Letter
45	9/5/03	Appellant- Schwabe, Williamson & Wyatt - Brad Andersen	Letter from Brad Anderson in response to letter from Jim Sellers
46	7/25/03	Michael Kepcha	Comment Letter
47	7/31/03	Michael Kepcha	Comment Letter
48	9/2/03	Applicant - Clifford Glidden - Consultant	Letter regarding Traffic Improvement
49	9/4/03	Applicant - Clifford Glidden - Consultant	Letter to Washington State Trooper Roy Rhyne
50	9/4/03	Applicant - Clifford Glidden - Consultant	Letter to Clark County Sheriff's Commander Rusty Warren
51	9/5/03	Appellant - Erikson & Hirokawa, PLLC	Noise Study
52	9/8/03	Applicant - Jim Sellers	Letter to Keith Hirokawa and Brad Anderson regarding Noise Study and continuance of hearing
53	9/8/03	Shawn Glidden, Esq.	Comment Letter
54	9/9/03	P.E, Kenck	Comment Letter
55	9/9/03	Appellant- Schwabe, Williamson & Wyatt - Brad Andersen	Memorandum in Support of Imposing Certain Conditions on the Conditional Use Permit and Supplemental Affidavit of Jim Taska
56	9/9/03	Appellant - Erikson & Hirokawa, PLLC	Letter regarding Notice of Appeal
57	9/8/03	Michael Kepcha	Comment Letter

EXHIBIT NO.	DATE	SUBMITTED BY	DESCRIPTION
58	9/9/03	Appellant – Erikson & Hirokawa, PLLC	Letter regarding Exhibit #52
59	9/9/03	Jim Taska	Letter regarding track and aerial photographs from 1984, 1990, 1994, 1996, 1998, 2000 and 2002
60	9/9/03	Ronald & Phyllis Williams	Comment Letter
61	9/9/8/03	Michael Kepcha	Comment Letter
62	9/9/03	Applicant – Clifford Glidden – Consultant	Letter re: Public Comment and factual Input: Traffic Improvement
63	9/9/03	Applicant -Moss & Associates – Trevor Hayward	Trevor's Testimony
64	9/9/03	CC Dev Services – Habitat Biologist	Memorandum to the Hearings Examiner re: Stream Protection Plan Updates
65	9/9/03	Applicant – Rick Huffman	Photos of Trails – Habitat Protection
66	9/9/03	Applicant -Moss & Associates – Trevor Hayward	Trevor's Presentation
67	9/9/03	Applicant -Moss & Associates – Trevor Hayward	Affidavits for Bob Leach, Glen Gordon, Dave Dimeo & Stu Peters
68	9/9/03	Art Malfait	Comment Letter
69	9/9/03	Applicant – Ralph Huffman	Letter to Jim Vandling re: The level of use of the Motocross Park
70	9/9/03	Applicant – Daly & Standlee	Washougal MX Sound Study
71	9/9/03	Applicant – Jim Sellers	Legal Memorandum
72	9/9/03	Appellant- Schwabe, Williamson & Wyatt - Brad Andersen	CC Staff Report dated 8/8/96 APPEAL 96-008-2524
73	9/9/03	Appellant- Schwabe, Williamson & Wyatt - Brad Andersen	CC Post Decision Review Staff Report Dated 7/19/96
74	9/9/03	William Kessinger	Comment Letter dated 5/17/02
75	9/9/03	Applicant -Moss & Associates – Trevor Hayward	Article from the Columbian 'Washougal River Gets Too Wild'
76	9/11/03	Appellant – Erikson & Hirokawa, PLLC	Letter requesting appeal be placed on hold for HAB2003-00001

EXHIBIT NO.	DATE	SUBMITTED BY	DESCRIPTION
77	9/15/03	Appellant- Schwabe, Williamson & Wyatt - Brad Andersen	Letter to Jim Sellers re: Applicants submittal of additional information related to the noise study
78	9/18/03	Applicant -Moss & Associates - Trevor Hayward	Sound Level Plots from Noise Study
79	9/23/03	CC Development Services - Jim Vandling	Supplemental Staff Report for the 9/23/03 Continued Hearing
80	9/23/03	CC Development Services	Resolution No. 2002-10-02
81	9/16/03	Timothy Pesch	Comment Letter
	9/21/03	P.E. Kenck	Comment Letter
83	9/23/03	Applicant - Daly & Standlee	Memo to the Hearings Examiner re: Additional Information regarding Motocross Sound Generation
84	9/23/03	Applicant - Jim Sellers	Letter to Appellants regarding revision to the Sound Study
	9/23/03	Eugene Greer	Comment Letter
86	9/23/03	Applicant - Jim Sellers	Applicant's Position on Hearing Procedure & Criteria for Approval
87	9/23/03	Applicant - Jim Sellers	Clark County Code 18/411060 - Authorization for similar uses
	9/23/03	Applicant - Jim Sellers	Clark County Code Chapter 10.30 - F-X Rural Use Zone
89	9/23/03	Applicant - Jim Sellers	Clark County BOCC Resolution passed April 27, 1961
90	9/23/03	Applicant - Jim Sellers	Advertisement for Mt. Scott Grand Prix 11/12/03
91	9/23/03	Appellant- Schwabe, Williamson & Wyatt - Brad Andersen	Jone's Creek trail Riders
92	9/23/03	Appellant- Schwabe, Williamson & Wyatt - Brad Andersen	County SEPA Code
	9/23/03	Applicant -Moss & Associates - Trevor Hayward	Newspaper Trolley Park Gazette 4/9/73

EXHIBIT NO.	DATE	SUBMITTED BY	DESCRIPTION
94	9/23/03	Applicant -Moss & Associates - Trevor Hayward	Newspaper Trolley Park Gazette 4/30/73
95	9/23/03	Applicant -Moss & Associates - Trevor Hayward	Receipts for sod builder
96	9/23/03	Applicant -Moss & Associates - Trevor Hayward	Reference Books - AMA 2003 RULEBOOK & AMA SPORTS 2003 RULES
97	9/23/03	Applicant -Moss & Associates - Trevor Hayward	Letter to Jim Vandling - General response to testimony from opponents
98	9/23/03	Applicant -Moss & Associates - Trevor Hayward	Letter to Ralph Huffman from the AMA dated 6/9/03
99	9/23/03	Applicant -Moss & Associates - Trevor Hayward	Letter to Ralph Huffman from the AMA dated 9/18/03
100	9/23/03	Applicant - Daly & Standlee	Credentials for Charles Oppenheimer, PHD and Kerrie Standlee, P.E.
101	9/23/03	Applicant -Moss & Associates - Trevor Hayward	US Motocross Championship Washougal Motocross 7/27/03 - 125 Motocross
102	9/23/03	Applicant -Moss & Associates - Trevor Hayward	US Motocross Championship Washougal Motocross 7/27/03 - 250 Motocross

Copies of these exhibits can be viewed at:

Department of Community Development / Planning Division  
1408 Franklin Street  
Vancouver, WA 98666-9810

## RULINGS TO WHICH ERROR WAS ASSIGNED

“The BOCC, understandably, chose not to recognize the withdrawal of the petition” (CP 13, attachment, page 8, lines 3-4. [Relates to Assignment of Error No. 5]

“My conclusion is that, under the peculiar facts of this case, WMX’s attempt to withdraw an application was ineffective.” (CP 13, attachment, page 8, lines 12-13). [Relates to Assignment of Error No. 1]

“To allow a party to withdraw its application would seriously undermine the integrity of the administrative process.” (CP 13, attachment, page 8, lines 15-16). [Relates to Assignment of Error No. 7]

“At some point, a party which causes the County and other interested parties to expend substantial resources and time, in reliance upon an expectation of resolution of the issues, becomes estopped from withdrawing its application. Where exactly that point may be unknown to me, but obviously it had been reached prior to WMX’s withdrawal in February 9, 2004” (CP 13, attachment, page 8, line 21 through page 9, line 3) [Relates to Assignment of Error No. 6]

“Therefore, the court concludes that WMX’s non-conforming rights ceased upon approval of the CUP by the BOCC on February 10, 2004, and WMX’s rights were converted to those permitted under the CUP.” (CP 13, attachment, page 9, lines 4-7) [Relates to Assignment of Error No. 4]

“ . . . WMX has taken the position that it may disregard the CUP, due to its late withdrawal of the application therefore. Having placed all its marbles in that basket, WMX is not entitled to piecemeal relief from those conditions.” (CP 13, attachment, page 9, lines 12-16) [Relates to Assignments of Error No. 2, 3, 4 & 6]

“My ruling is that, given all the effort and expenditure of private and government resources that have been put into the matter, at the request of Defendants, it would be grossly inequitable to allow Defendants to simply walk away from the matter after knowing what the hearings officer and Board’s decision is. Having pursued the C.U.P. to its penultimate step in conclusion, Defendants are estopped from withdrawing the application, . . . .” (CP 30, page 3, lines 1-8)  
[Relates to Assignments of Error No. 8 & 9]

“I deny both requests.” (CP 31, page 2, line 6.) [Relates to Assignment of Error No. 10]

### **RULINGS TO WHICH ERROR WAS ASSIGNED**

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STATE OF WASHINGTON )  
 ) ss.  
County of Clark )

On June 22, 2006, I deposited in the mails of the United States, a properly stamped and addressed envelope, which was addressed and directed to Mr. Keith Hirokawa; and to Mr. Richard S. Lowry; and which contained a true and correct copy of the Brief of Appellants to which this declaration is affixed.

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



James L. Sellers

Date: June 22, 2006  
Place: Vancouver, Washington

ATTORNEY FOR APPELLEE CLARK COUNTY:

Mr. Richard S. Lowry  
Clark County Prosecuting Attorneys Office  
PO Box 5000  
1013 Franklin  
Vancouver, WA 98666-5000  
fax: (360) 397-2184

ATTORNEY FOR APPELLEE EUGENE GREER:

Mr. Keith Hirokawa  
Erikson and Hirokawa, P.S.  
Fourth Floor Main Place  
1111 Main Street, Suite 402  
Vancouver, WA 98660-2958  
fax: (360) 737-0751

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CLARK COUNTY  
BY [Signature]