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STATE OF WASHINGTON

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Court of Appeals No. 33823-8-II

COURT OF APPEALS
DIVISION II
OF THE STATE OF WASHINGTON

WASHOUGAL MOTOCROSS, LLC, a Washington limited liability corporation, and MOSS & ASSOCIATES, a Washington corporation,

Appellants,

v.

EUGENE GREER, an Oregon resident, and JIM TASKA, a Washington resident, and CLARK COUNTY, a political subdivision of the State of Washington;

Respondents.

RESPONDENTS' OPENING BRIEF

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INTRODUCTION

This matter arises from the issuance of a conditional use permit (CUP) to the Appellant to convert a nonconforming use into a conforming, permitted use. Through the CUP, Respondent Clark County placed conditions on the Appellant's activities to mitigate the existing "significantly detrimental"¹ impacts from the use. After the Clark County Board of Commissioners (BOCC) orally ruled to affirm the Hearing Examiner's issuance of the CUP,² Appellant informed the BOCC that it would not accept the permit.³ The BOCC did not buckle under the threat, and instead issued the CUP.⁴ Appellant did not appeal the BOCC's decision.

At the Superior Court, Appellant moved to dismiss Respondent's LUPA petition on grounds that its attempted withdrawal of the application made the issuance of the CUP was *ultra vires* and invalid, depriving the

¹Citations to the Clerk's Papers are referenced as "CP," followed by page number as identified in the Index transmitted to the Court and attached in the several stipulations. We recognize that the record in this matter has been the subject of several attempted resolutions between the parties.

²CP at 0774.

³CP at 0162.

⁴CP at 0123-0124. See Resolution 2004-02-10, at 2-3, (cited by Appellants as App-2: Board of County Commissioners Resolution 2004-02-10), attached hereto in Appendix C.

Respondents (as Petitioners below) of standing and the Superior Court of jurisdiction over the case. The Superior Court rejected Motocross' Motion and asserted jurisdiction over the case.⁵

In this appeal, Appellants request reversal of the Superior Court's (1) application of estoppel preclude the Appellant, as a development applicant, from refusing to accept a development approval, and (2) holding that the issuance of a conditional use permit converted the nonconforming right into a permitted land use. Although not addressed by the Superior Court, Appellants also argue that it did not abandon its nonconforming rights. Appellant does not challenge the finding that Appellant failed to appeal the BOCC's decision.

The Appeal should be denied for three reasons. First, the Appeal is precluded by the Appellant's failure to appeal the land use decision. Second, the Superior Court's estoppel decision is substantially supported by the record, and the Appellant fails to demonstrate that the Superior Court abused its discretion. Third, the unappealed findings in this matter indicate that the Appellant's use is "significantly detrimental" to health, safety and welfare, giving rise to the valid exercise of the County's police power authority; the

⁵CP at 0220.

nonconforming rights alleged by the Appellant are not protected property rights. Finally, Respondent requests an award of attorneys fees and costs.

. . .

STATEMENT OF THE CASE

This case involves the legal status of land use activities at the Washougal Motocross site, owned and operated by the Appellant. The Appellant has previously operated under allegedly nonconforming rights to hold commercial Motocross events and other activities. Noise levels from these activities are so high at adjacent properties that people lose sleep and cannot carry on conversations.⁶

The Clark County Code allows the Appellant's land use as a conditional use, "which reflects that it could cause significant detrimental impacts rising to the level of a public nuisance."⁷ The Appellant submitted an application to convert nonconforming rights into a conditional use permit (CUP) on June 15, 2001, and then delivered a letter to the Clark County Prosecutor's Office attempting to reserve a right to withdraw the application if the County's approval was not acceptable to Appellant.⁸ Under the

⁶CP at 0096-0097.

⁷CP at 0092.

⁸CP at 0217. There is no evidence that this letter was ever put on the record, or was available at any time to the public, the Hearing Examiner, the BOCC or the Respondent.

applicable conditional use standards, an applicant must demonstrate that the "establishment, maintenance or operation of the use applied for will not, under the circumstances of the particular case, be significantly detrimental to the health, safety or general welfare of persons residing or working in the neighborhood of such proposed use or be detrimental or injurious to the property and improvements in the neighborhood or to the general welfare of the County."⁹

Initially, the Appellant's application was approved based on the Hearing Examiner's conclusion that many of the activities at issue in the land use application were exempt from noise control.¹⁰ However, the BOCC reversed the initial decision and remanded the matter to the Examiner to assess noise impacts and fashion mitigation measures to make noise impacts less intrusive on neighbors and the public.¹¹ On remand, the Hearing Examiner reviewed the application for the purpose of conditioning it in such a way that it would not cause nuisance impacts: "[t]he noise impact of the Motocross is its most pervasive and significant impact. The county has an obligation to consider noise in the context of the CUP regulations and thereby

⁹CCC 18.404.060(A) (prior).

¹⁰CP at 0052.

¹¹CP at 0062 (Resolution 2002-10-02, attached hereto in Appendix C).

to avoid authorizing a nuisance."¹² The Appellant participated in subsequent proceedings.¹³ Individual respondents, the County and the public in general prepared expert analysis and testimony and participated in the administrative process to resolution.¹⁴ The testimony was focused, of course, on the noise levels emitted from the Motocross activities and received at neighboring residential properties.¹⁵

On remand, the Examiner again approved the CUP. However, the Examiner specifically found that "noise from some activities on the Motocross site is significantly detrimental to people who reside nearby."¹⁶ The Examiner recognized that many of the Appellant's activities resulted in a doubling (or even quadrupling) of background noise levels in all directions, and was "persuaded that [such noise levels] keeps people from enjoying their property,

¹²CP at 0092. See also, CP at 0092 ("One of the principal purposes of zoning is to separate incompatible uses.... By applying the conditional use standards, the county prevents the creation of public nuisances that would otherwise result from the location, operation and/or maintenance of uses that are incompatible.").

¹³CP at 0077-0079; CP at 0082-0084.

¹⁴CP at 0080-0081; CP at 0085.

¹⁵See eg., CP at 0428 ("They say it doesn't have any impact. I can't be outside on my property when there's races going on. I can't carry on a conversation. I don't want to work in the yard. I don't want to deal with it."); CP at 0431 ("... and the noise, you can not be in the yard.... [We're going to school and we were going to do some studying and you can't be outside to enjoy the yard or anything out there."); CP at 0462 ("They started the loudspeakers up by 7:00 am. And I could hear every word nice and clearly. I would like not to hear the loudspeakers. I would like to be able to sleep in.").

¹⁶CP at 0096.

such as by drowning-out conversations out-of-doors and disturbing sleep."¹⁷
The Examiner determined that the Appellant's activities would be significantly detrimental to health, safety and welfare unless the Appellant was "required to reduce noise impacts."¹⁸

It is notable that the Examiner made specific inquiry into to the reasonableness and practicability of the mitigation proposed in his decision. The Examiner considered the costs of noise monitoring,¹⁹ certain restrictions on mufflers and the Appellant's public address system,²⁰ and course design modifications,²¹ and found those conditions reasonable. Against the alternative of prohibiting the use altogether, the Examiner found reasonable the establishment of noise level standards, together with a condition that where violations of the standards occurred, the County would afford the Motocross a hearing to determine reasonable mitigation measures to prevent such significant noise impacts.²² All parties appealed.

At a public hearing on January 20, 2004, the BOCC orally ruled to

¹⁷CP at 0096-0097.

¹⁸CP at 0097.

¹⁹CP at 0099.

²⁰CP at 0100-0101.

²¹CP at 102-104.

²²CP at 0105, 0106.

affirm the Hearing Examiner's decision, finding the conditions supported on the record of evidence.²³ The BOCC recognized again that there "specific purpose for the conditional use permit" is to place limitations on noise emissions.²⁴ On February 9, 2004, Appellants executed and delivered a letter to the BOCC indicating that the permit would not be accepted.²⁵ After considering both the legal effect of an applicant's withdrawal of an application, as well as the consequence that the CUP would convert the nonconforming rights into permitted, conforming rights,²⁶ the BOCC "rejected the attempt to withdraw the application, and approved the resolution."²⁷

Respondent Greer and Taska (as Petitioner below) appealed the BOCC's decision to the Superior Court under the *Land Use Petitions Act*.²⁸ Appellant did not file an appeal of the BOCC decision.²⁹ Nevertheless, the

²³See CP at 0722- 0774.

²⁴CP at 0741. Exception is taken for condition LU-4(b)(ii), which amends the Hearing Examiner's condition to allow noise levels of 5 dBA less than the WAC standards at surrounding homes. See Resolution 2004-02-10, at 2, (cited by Appellants as App-2: Board of County Commissioners Resolution 2004-02-10), attached hereto.

²⁵CP at 0162.

²⁶CP at 0800 ("There may be legal issues of having come into the process for a CU they, by doing that, they have abandoned their nonconforming rights.").

²⁷CP at 0219; CP 1684 ("The BOCC, understandably, chose not to recognize the withdrawal of the petition.").

²⁸Chapter 36.70C RCW.

²⁹CP at 1684; CP at 0219.

Appellant moved to dismiss Respondent's LUPA petition on grounds that, because it had attempted to withdraw the application, there was no valid land use decision to review.³⁰ The Superior Court denied the Motion.

Although the Appellant describes this case as one in which a mere filing of an application had the effect of terminating a pre-existing use,³¹ the Superior Court found that this case exhibits unique and "peculiar" circumstances.³² Under the particular circumstances of this case, the Superior Court found that the Appellants were estopped from withdrawing the application, especially *after* hearing the oral ruling from the BOCC:

[G]iven all the effort and expenditure of private and government resources that have been put into this 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 CUP to its penultimate step in conclusion, Defendants are estopped from withdrawing the application.³³

The Superior Court later affirmed its holding with a more explicit balancing of the equities, as follows:

My conclusion is that, under the peculiar facts of this case, WMX's attempt to withdraw an application was ineffective. As pointed out by Mr. Lowery, there are competing interests involved. To allow a party to withdraw its application would

³⁰CP at 0159-0160.

³¹Appellant's Opening Brief, at 30-32.

³²CP at 1684.

³³CP at 0220, emphasis in original.

seriously undermine the integrity of the administrative process. To refuse the allow withdrawal could discourage the filing of such applications. Here, however, **this is not a case where merely filing an application for a CUP terminates a party's nonconforming rights. This case goes astronomically beyond 'mere filing' of an application.** 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, 2004.³⁴

The Superior Court held that the approval of the CUP effected a conversion of the Appellant's alleged nonconforming rights, stating that "WMX's nonconforming 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."³⁵ The Superior Court also ruled that Appellant was precluded from challenging the approval due to the failure to file an appeal under LUPA.³⁶

. . .

STANDARD OF REVIEW

As noted, the Superior Court based its ruling on several grounds. First, the Court found that although the BOCC's decision to affirm the CUP

³⁴CP at 1684, emphasis added

³⁵CP at 1685.

³⁶CP at 1685.

approval had not been appealed by the Appellant.³⁷ This ruling was not appealed under LUPA by the Appellant. Second, the Superior Court expressly engaged in a balancing of the equities.³⁸ Third, the Court found that although the Appellant's land *use* remained legal, its *rights* to operate as a nonconforming use had ceased and been replaced with a permitted use.³⁹

The Appellate Court reviews the application of equitable estoppel for an abuse of discretion.⁴⁰ The Supreme Court has recognized the "inherent discretion" in a trial court in a trial court deciding equitable issues, even going so far as to state: "it is true the judge who tried this suit in the Court below did not state the legal basis on which the order was formed as fully as he might, but that cannot affect the correctness of the decree, nor render the order erroneous."⁴¹

On the remaining issues, this Appeal arises from Appellant's *Motion to Dismiss*, which was affirmed by the Superior Court in denying

³⁷CP at 1687; CP at 1685.

³⁸CP at 0220; CP at 1684.

³⁹CP at 1684, 1685.

⁴⁰*Wilhelm v. Beyersdorf*, 100 Wash. App. 836, 848, 999 P.2d 54 (2000) ("A trial court's application of equity is reviewed for an abuse of discretion."); *Ford v. Bellingham-Whatcom County District Board of Health*, 16 Wash.App. 709, 716, 558 P.2d 821 (1977) ("In the consideration of an equitable doctrine, the trial court has certain inherent discretion it can exercise."); *Hoefler v. Babbit*, 130 F.3d 726, 727 (9th Cir. 1998) ("Because estoppel is an equitable concept that is invoked by the court in its discretion, we review the . . . equitable estoppel argument under the abuse of discretion standard.").

⁴¹*Coy v. Raabe*, 77 Wash.2d 322,326, 462 P.2d 214 (1970) (citations omitted).

reconsideration and in granting Respondent's *Motion for Summary Judgment*.⁴² When reviewing an order of summary judgment, this Court engages in the same inquiry as the trial court.⁴³ In considering a summary judgment motion, the Court views the facts and all reasonable inferences from them in the light most favorable to the nonmoving party.⁴⁴ Of course, this Court reviews questions of law *de novo*.⁴⁵

Finally, "an appellate court may sustain a trial court on any correct ground, even though that ground was not considered by the trial court."⁴⁶

. . .

ARGUMENT

The Superior Court's ruling should be affirmed. First, the attempt to

⁴²It is notable that this case arises from the issuance of a land use decision. The Court reviews such decisions under the 'clearly erroneous' standard of RCW 36.70C.130(1)(d), under which the reviewing court may only reverse an administrative determination when the court is left with the "definite and firm conviction that a mistake has been made." *King County v. Boundary Review Bd.*, 122 Wash.2d 648, 661, 860 P.2d 1024 (1993) (quoting *Norway Hill Preservation Ass'n v. King County*, 87 Wash.2d 267, 274, 552 P.2d 674 (1976)). On challenges to factual findings, an appellant must demonstrate that there was not "evidence [in the record] in sufficient quantum to persuade a fair-minded person of the truth of the declared premises." *Clausing v. State*, 90 Wash.App. 863, 871, 955 P.2d 394, review denied 136 Wash.2d 1020, 969 P.2d 1063 (1998).

⁴³*Wilson v. Steinbach*, 98 Wash.2d 434, 437, 656 P.2d 1030 (1982).

⁴⁴*Wagg v. Estate of Dunham*, 146 Wash.2d 63, 67, 42 P.3d 968 (2002); *Wilson v. Steinbach*, 98 Wash.2d 434, 437, 656 P.2d 1030 (1982).

⁴⁵*City of Pasco v. Pub. Employment Relations Comm'n*, 119 Wash.2d 504, 507, 833 P.2d 381 (1992).

⁴⁶*Nast v. Michels*, 107 Wash.2d 300, 308, 730 P.2d 54 (1986).

collaterally attack the land use decision is precluded by the Appellant's failure to appeal. Second, the Superior Court's balancing of the equities should be afforded substantial deference, where there is no evidence of an abuse of discretion. Third, the Superior Court's decision is correct as a matter of law, as the conditions of approval at issue constitute a reasonable exercise of the BOCC's police power authority.

A. Appellant May Not Collaterally Attack the BOCC's Decision

Although the appeal is couched in terms of estoppel, due process and statutory construction, the primary issue in this appeal is whether the CUP permit issuance was *ultra vires*.⁴⁷ The defect in this appeal is that the Appellant failed to appeal the BOCC's permit issuance. Because the Appellant did not appeal the BOCC decision, Appellant's arguments are merely an improper collateral attack and should be rejected.

The *Land Use Petitions Act* (LUPA), Chapter 36.70C RCW, was adopted to "reform the process for judicial review of land use decisions made by local jurisdictions."⁴⁸ LUPA provides the "exclusive means of judicial

⁴⁷"The primary issue for this appeal is whether Washougal MX can continue to operate under its nonconforming use rights or whether it must operate under the permit in accordance with Judge Bennett's ruling." Appellant's Opening Brief at 20.

⁴⁸RCW 36.70C.010.

review of land use decisions.”⁴⁹ Under LUPA, a “land use decision” is defined as follows:

a final determination by a local jurisdiction's body or officer with the highest level of authority to make the determination, including those with authority to hear appeals, on:

(a) An application for a project permit or other governmental approval required by law before real property may be improved, developed, modified, sold, transferred, or used....⁵⁰

LUPA requires “expedited” review of land use decisions.⁵¹

In Clark County, the BOCC is the “body ... with the highest level of authority to make the determination,” that qualify as ‘land use decisions’ under RCW 36.70C.020(1)(a). Under the plain meaning of the Clark County Code, the BOCC’s appellate resolution of the Hearing Examiner’s decision is final unless appealed, as follows:

The action of the board in approving or rejecting a decision of the examiner shall be final and conclusive unless a land use petition is timely filed in Superior Court pursuant to RCW 36.70C.040.⁵²

Because LUPA provides the “exclusive”⁵³ means of challenging a land use

⁴⁹RCW 36.70C.030(1).

⁵⁰RCW 36.70C.020(1).

⁵¹RCW 36.70C.010.

⁵²CCC 2.51.170 (emphasis added).

⁵³RCW 36.70C.030(1).

decision, the BOCC's final⁵⁴ resolution of the Hearing Examiner's decision required an appeal within the timelines set in LUPA.⁵⁵ The Court has strictly construed the 21-day appeal timeline specified in LUPA.⁵⁶

In this case, the Superior Court rejected the Appellant's attempt to avoid the BOCC's decision, as follows:

Throughout Respondent's briefing, there is a suggestion that the conditions imposed by the Hearing Examiner in granting the CUP were overly burdensome, or an abuse of discretion. Whether or not this is the case is not before this court, as **WMX has not appealed the issuance of the CUP. Instead, WMX has taken the position that it may disregard CUP, due to its late withdrawal of the application.... Having placed all its marbles in that basket, WMX is not entitled to piecemeal relief from those conditions.**⁵⁷

The Superior Court specifically relied on Appellant's failure to appeal in its ruling, stating:

This appeal to the court followed, filed by petitioners, with no counter petition, nor counter claim by WMX. In fact, WMX has not filed an answer to Petitioners' petition and complaint. WMX relies on its withdrawal of the application as its defense, and **has not appealed the Hearing Examiner's findings as to its pre-existing non-conforming use, and is therefore**

⁵⁴*Samuel's Furniture, Inc. v. Department of Ecology*, 147 Wash.2d 440, 452, 54 P.3d 1194 (2003) ("A 'final decision' is 'one which leaves nothing open to further dispute and which sets at rest cause of action between the parties.'"). Finality of the BOCC's decision is not at issue in this appeal.

⁵⁵See, RCW 36.70C.040.

⁵⁶*Chelan County v. Nykriem*, 146 Wash.2d 904, 931-932, 52 P.3d 1 (2002); *Lakeside Ind. v. Thurston County*, 119 Wash.App. 886, 889-900, 83 P.3d 433 (2004).

⁵⁷CP at 1685 (emphasis added).

bound by the Hearing Examiner's determination.⁵⁸

The Superior Court's ruling embodies the need for finality in the LUPA process.⁵⁹

Because Appellant has failed to appeal the issuance of the CUP approval, the Appellant may not now challenge that decision. A challenge to the land use decision that *could* have been made, *must* have been timely raised under the *Land Use Petitions Act*. In this case, Appellant challenges the application of police power regulations to the Motocross' noise impacts: The Hearing Examiner and the BOCC rejected those challenges below,⁶⁰ and the Appellant failed to appeal these decisions to the Superior Court under LUPA.

Once the appeal period expired, any question of the propriety of the BOCC permit issuance is deemed immune from collateral attack, even if *ultra vires* or otherwise illegal. Hence, the Court in *Habitat Watch v. Skagit County*,⁶¹ rejected an untimely challenge to allegedly *ultra vires* award of

⁵⁸CP at 1684 (emphasis added); CP at 0219 ("Apparently, Defendants chose not to appeal the Board's decision.").

⁵⁹See *Lakeside Ind.*, 119 Wash.App. at 900 (rejecting cross-petition as a collateral attack).

⁶⁰CP at 0090 ("Counsel for the applicant argued that the noise produced at the track is exempt from WAC 173-60-040, because it is nonconforming. The examiner disagrees. WAC 173-60050 contains exceptions to the WAC standard. It does not exempt all noise from the site. Based on the Rhod-a-Zalea case, police power regulations (such as WAC 173-60-040) apply to the Motocross except as otherwise provided by law.").

⁶¹155 Wash.2d 397, 409-410, 120 P.3d 56 (2005).

extensions without notice to party. In *Lakeside Ind. v. Thurston County*,⁶² the Court rejected an untimely cross-petition by successful appellants in administrative appeal. And, in *Asche v. Bloomquist*,⁶³ the Appellate Court rejected an untimely challenge to allegedly *ultra vires* building permit approval due to failure to properly process permit. In rejecting the challenge to the allegedly *ultra vires* decision, the *Asche* Court could not have been more clear: "failure to file a land use petition within 21 days of the issuance of the building permit as required by RCW 36.70C.040 is determinative."⁶⁴

Appellant argues that the BOCC's approval is *ultra vires*. However, Appellant has waived that argument by failing to appeal the BOCC's decision. The Superior Court decision should be affirmed, and the appeal dismissed.

B. The Superior Court's Estoppel Ruling was Not an Abuse of Discretion

Although Respondent believes there is no reason to reach the Appellant's challenge to the estoppel ruling, the Superior Court did not err in ruling that Appellant was estopped from withdrawing the CUP application. In reviewing the Superior Court's estoppel ruling, this Court's review is

⁶²119 Wash.App. at 900.

⁶³132 Wash.App. 784, 796, 133 P.3d 475 (2006)

⁶⁴*Asche*, 132 Wash.App. at 788.

limited to whether the Superior Court's decision constitutes an abuse of discretion.⁶⁵ The record supports the Superior Court's decision, and the Appellant fails to identify any abuse of discretion.

Equitable estoppel is justified upon a showing of: 1) a party's admission, statement or act inconsistent with its later claim; 2) action by another party in reliance on the first party's act, statement or admission; and 3) injury that would result to the relying party from allowing the first party to contradict or repudiate the prior act, statement or admission.⁶⁶ The Superior Court's estoppel ruling is well-supported on each of these elements and should be affirmed.

In both the Ruling Denying Respondent's CR12(b)(6) Action and the Ruling on Petition for Judicial Review and Petitioners' Motion for Summary Judgment, the Superior Court considered the immense public and private expense involved, balanced the potential consequences of his ruling, and made findings on the timing of the attempted withdrawal of the permit application.⁶⁷ The Superior Court stated as follows:

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

⁶⁵*Wilhelm*, 100 Wash. App. at 848.

⁶⁶*Kramarevsky v. Department of Social and Health Services*, 122 Wash.2d 738, 743, 863 P.2d 535 (1993).

⁶⁷CP at 1684.

inequitable to allow Defendants to simply walk away from the matter after knowing what the hearings officer and the Board's decision is. Having pursued the C.U.P. to its penultimate step in conclusion, Defendants are estopped from withdrawing the application....⁶⁸

Appellant's attack on the Superior Court's estoppel ruling relies heavily on its idea that it notified the County that it *only* wanted a permit to continue emitting the same noise levels it had emitted previously.⁶⁹ In this argument, Appellant would have this Court assume that its nonconforming rights protected a right to cause 'significantly detrimental' noise impacts.⁷⁰ On this basis, Appellant asserts that its attempted withdrawal from the permitting process could not be perceived as an "inconsistent" act with prior statements.

Appellant's argument is not reasonable and relies on an error of law. The Appellant was aware that the County's validly-adopted police power regulations were otherwise applicable to the land uses at issue.⁷¹ It is well-settled that a person with nonconforming rights does not have a valid

⁶⁸CP at 0220; See also CP at 1684.

⁶⁹Appellant's Opening Brief at 34.

⁷⁰Indeed, the Appellant's witness testified that the application to the County was intended to avoid compliance with otherwise applicable code requirements. CP at 0169. In particular, the Hearing Examiner's noise conditions were identified by the Appellant as the basis for the attempt to withdraw the application. CP at 0167.

⁷¹CP at 0169.

expectation of being exempt from later-enacted police power regulations.⁷² Essentially, Appellant is asserting that it informed Clark County that it would only accept a permit if the County agreed to suspend its police power authority – which the County is not authorized to do⁷³ -- "those who deal with public officers must ascertain the extent of their authority, and public officers cannot permit citizens to act contrary to the law."⁷⁴ Given that Appellant could not expect the County to make such a concession or agreement, Appellant's reliance on such a statement is simply not reasonable.

Moreover, Appellant was not misled to believe that the CUP process would merely be used to 'rubber stamp' a permit for the existing impacts. Rather, the County viewed its review process as a means to conform the activities to the County's comprehensive planning and zoning schemes. Consistent with the CUP ordinance,⁷⁵ the Hearing Examiner found:

⁷²*Rhod-a-Zalea & 35th, Inc. v. Snohomish County*, 136 Wash.2d 1, 9-16, 959 P.2d 1024 (1998) (and cases cited therein).

⁷³See *Board of County Sup'rs of Prince William County, Va. v. U.S.*, 23 Cl.Ct. 205, 212 (1991) ("Impermissible contract zoning results from a legislative authority bargaining away its zoning power.").

⁷⁴*City of Mercer Island v. Steinmann*, 9 Wash.App. 479, 482, 513 P.2d 80 (1973), citing *Bennett v. Grays Harbor County*, 15 Wash.2d 331, 341, 130 P.2d 1041 (1942).

⁷⁵Under the applicable conditional use standards, an applicant must demonstrate that the "establishment, maintenance or operation of the use applied for will not, under the circumstances of the particular case, be significantly detrimental to the health, safety or general welfare of persons residing or working in the neighborhood of such proposed use or be detrimental or injurious to the property and improvements in the neighborhood or to the general welfare of the County." CCC 18.404.060(A) (prior).

By applying the conditional use standards, the county prevents the creation of public nuisances that would otherwise result from the location, operation and/or maintenance of uses that are incompatible. The Motocross is permitted only as a conditional use, which reflects that it could cause significant detrimental impacts rising to the level of a public nuisance. The county must consider and assess its impacts... so the Motocross is not such a nuisance.⁷⁶

The Hearing Examiner's statement follows the BOCC's notice that the County would exercise its police power authority early in this process. In October, 2002, in granting Respondent's appeal after the first decision by the Hearing Examiner, the BOCC ruled that the Appellant's races could not be granted a wholesale exemption from noise control and remanded the matter to the Hearing Examiner to identify findings and mitigation measures to control the noise impacts of the Appellant's land use.⁷⁷ Appellant was therefore aware that its noise impacts would be limited by the reasonable exercise of police power authority, and Appellant's failure to withdraw its application at that time was certainly inconsistent with its later attempt to do so.

Indeed, if Appellant intended to withdraw its application due to the imposition of noise control conditions, October, 2002 would have been more appropriate, and perhaps effective. At that time and in subsequent proceedings, Appellant did not withdraw its application or object to

⁷⁶CP at 0092.

⁷⁷CP at 0062-0063.

Respondent's filing of appeals and appeal fees, nor the County's attention to and review of this matter. Hence, the analogy to waiver is applicable: even where the pleadings identify an issue for resolution, a party may effectively (through her attorney) withdraw that issue from contest.⁷⁸ Where this waiver is accomplished by implication, such "waiver is not dependent upon the waiving party's subjective intent not to waive. His conduct, if inconsistent with any such intent, controls."⁷⁹ On the first element of estoppel, Appellant fails to identify an abuse of discretion.

Appellant's argument on the second element suggests that reliance by the individual Respondents on possibility of a resolution of the Appellant's permit application does not constitute reasonable reliance. This argument also fails to demonstrate abuse of discretion. As a preliminary matter, Appellant fails to recognize that the Superior Court's decision relied upon the immense private *and* public reliance and expenditures in this process – not only the individual Respondents.⁸⁰ The length of time, number of lengthy hearings, meetings and expectations in this process justify the Superior Court's estoppel

⁷⁸*Stratton v. U.S. Bulk Carriers, Inc.*, 3 Wash.App. 790, 795, 478 P.2d 253 (1970), citing *Birmingham Ry. Light & Power Co. v. Taylor*, 44 So. 580 (Ala. 1907) and *McGhee v. Cashin*, 30 So. 367 (Ala. 1901).

⁷⁹*Stratton*, 3 Wash.App. at 795, citing *Pennsylvania Casualty Co. v. Suburban Service Bus Co.*, 211 S.W.2d 524, 525, 530 (Mo.App.1948), *Mundt v. Mallon*, 76 P.2d 326, 328 (Mont. 1938), and *Tisel v. Central Sav. Bank & Trust Co.*, 6 P.2d 912, 917 (Colo. 1931).

⁸⁰CP at 0220.

decision.⁸¹

Nevertheless, Appellant asserts that, because the application could have resulted in approval or denial, Respondents could not have relied on the *issuance* of a permit. Although Appellant acknowledges that estoppel has been applied as a result of participation in judicial proceedings,⁸² Appellant attempts to distinguish these cases by the fact that this case involves *administrative* proceedings. This argument, likewise, fails to suggest abuse of discretion. At the least, when Appellant failed to withdraw its application after the BOCC's decision to apply noise mitigation to the application,⁸³ the Respondent's (and public's) reliance on the administrative process created a reasonable expectation that the process would resolve the Motocross' noise impacts. Of course, even an administrative decision may have a preclusive effect on subsequent actions where, as in this case, the parties had an ample opportunity and incentive to litigate the issues.⁸⁴

On this issue, Appellant attempts to cast the circumstances as one in which a property owner submits an application for a building permit, but later decides not to build according to the permit. Appellant's analogy is

⁸¹CP at 0220.

⁸²Appellant's Brief, at 27.

⁸³CP at 0062-0063.

⁸⁴*Thompson v. State Dept. of Licensing*, 138 Wash.2d 783, 796, 982 P.2d 601 (1999).

misleading; under the Appellant's proposed circumstances, the withdrawal of the permit application would not result in a *noncompliant* land use, it would result in *no land use at all*. Moreover, as indicated above, the doctrine of administrative *res judicata* would likely intervene to bind future applications for that land use.⁸⁵

Likewise, the Superior Court rejected the Appellant's characterization, and instead analogized to voluntary dismissal under CR 41(a)(2), recognizing that there is a time at which an attempted voluntary dismissal is ineffective.⁸⁶ The Superior Court's analogy is well-reasoned and applicable to the Civil Rule counterpart:

[A] voluntary nonsuit cannot be taken after the court has announced its decision. We do not mean by this that a final judgment must have been entered, or that any formal order must have been signed; but after the matter has been submitted to the court for determination and the court has, either orally or in writing, stated its decision the application for a voluntary nonsuit is too late.⁸⁷

Finally, Appellant asserts that Respondent's filing of a LUPA action challenging the approval of the permit evidences lack of reliance.⁸⁸ This

⁸⁵*Thompson*, 138 Wash.2d at 796. See also, *Satsop Valley Homeowners Ass'n, Inc. v. Northwest Rock, Inc.*, 126 Wash.App. 536, 542-543, 108 P.3d 1247 (2005).

⁸⁶CP at 0219.

⁸⁷*German Mexican Co. v. Mexican Pacific Co.*, 163 Wash. 282, 290-291, 1 P.2d 296 (1931) (emphasis added) (quoting *Olinger v. Lancaster*, 143 Wash. 20, 254 P. 452).

⁸⁸Appellant's Opening Brief, at 29.

argument likewise fails the straight face test. Respondent's challenge to the issuance of the permit sought *more* restrictive conditions for the CUP.

The Superior Court's estoppel ruling is well-supported. Under the "peculiar" circumstances of this case, the Superior Court's equitable holding is entitled to discretion.

C. The CUP Decision was a Reasonable Exercise of the BOCC's Police Power

The Appellant states that the "preexisting activities could not have possibly continued and also complied with Epstein's sound standards."⁸⁹ Appellant argues that the preexisting noise levels were exempt from police power regulation.⁹⁰ Appellant then assumes that, due to these allegations, enforcement of the BOCC's decision terminates the nonconforming *use*⁹¹ and constitutes a due process violation.⁹²

Appellant's argument is without merit. Nonconforming rights are subject to police power regulations. In this case, Appellant's land uses were

⁸⁹Appellant's Opening Brief, at 35.

⁹⁰Appellant's Opening Brief at, 34.

⁹¹Appellant's Opening Brief, at 35, 37.

⁹²Appellant's Opening Brief, at 36-40.

found to be "significantly detrimental" to others.⁹³ In the reasonable exercise of its police power authority, Clark County imposed conditions to curtail the noise impacts and avoid maintenance of a nuisance.⁹⁴ Appellant's challenge to Clark County's authority is neither supported nor proper.

1. The Conditions at Issue Are a Reasonable Exercise of Police Power Authority

If the Appellate Court does reach the Appellant's challenge to the noise conditions,⁹⁵ it should be recognized that such conditions are a valid exercise of the County's police power authority. Nonconforming rights are not exempt from such regulations. Because the County's noise conditions are a reasonable exercise of the County's police power, the Appellant's challenges should be dismissed.

A nonconforming use is defined as "a use which lawfully existed prior to the enactment of a zoning ordinance, and which is maintained after the effective date of the ordinance, although it does not comply with the zoning

⁹³CP at 0096-0097.

⁹⁴CP at 0099- 0110.

⁹⁵Once again, these challenges should have been raised under LUPA, but were not. See *supra*.

restrictions applicable to the district in which it is situated."⁹⁶ Nonconforming rights are the legal anomaly of zoning law: "[t]he theory of the zoning ordinance is that [a] nonconforming use is in fact detrimental to some or more of those public interests (health, safety, morals or welfare) which justify the invoking of the police power."⁹⁷ Nonconforming uses are understood to threaten the very survival of a comprehensive land use plan, and so the regulation of nonconforming rights is repeatedly upheld as a valid exercise of police power.⁹⁸ Accordingly, non-conforming uses are extremely disfavored.⁹⁹

⁹⁶*Rhod-a-Zalea*, 136 Wash.2d at 6 (emphasis added), citing 1 Robert M. Anderson, *American Law of Zoning* §§ 6.01 (Kenneth H. Young ed., 4th ed.1996).

⁹⁷*State ex rel. Miller v. Cain*, 40 Wash.2d 216, 220, 242 P.2d 505 (1952); See also, *City of Tuscon v. Whiteco Metrocom*, 983 P.2d 759, 767 (Ariz. 1999) (nonconformities "would never be replaced if . . . upgrade and replacement of structural portions. . . was permissible.").

⁹⁸*Rhod-a-Zalea*, 136 Wash.2d at 8. The Court has stated:

The ultimate purpose of zoning ordinances is to confine certain classes of buildings and uses to certain localities. The continued existence of those which are nonconforming is inconsistent with that object, and it is contemplated that conditions should be reduced to conformity as completely and as speedily as possible with due regard to the special interests of those concerned, and where suppression is not feasible without working substantial injustice, that there shall be accomplished 'the greatest possible amelioration of the offending use which justice to that use permits.'

State ex rel. Miller, 40 Wash.2d at 221.

⁹⁹*Rhod-a-Zalea*, 136 Wash.2d at 8, citing (among others), *Ackerley Communications, Inc. v. City of Seattle*, 92 Wash.2d 905, 920, 602 P.2d 1177 (1979) ("It is a valid exercise of the City's police power to terminate certain land uses which it deems adverse to the public health and welfare within a reasonable amortization period."); *Keller v. City of Bellingham*, 92 Wash.2d 726, 730-31, 600 P.2d 1276 (1979) ("the severity of limitations in phasing out [nonconforming uses] is within the discretion of the legislative body of the city"); *Bartz v. Board of Adjustment*, 80 Wash.2d 209, 217, 492 P.2d 1374

Because nonconforming rights pose such a public health, safety and welfare problem, Washington law favors the earliest possible cessation of a nonconforming use.¹⁰⁰ Consistent with this disfavored status, nonconforming uses "may be regulated, and even girded to the point that they wither and die," since "in no case does the owner of property acquire immunity against the exercise of the police power because he constructed it in full compliance with the existing laws."¹⁰¹ So long as the exercise of police power is reasonably related to public health, safety and welfare, a nonconforming use may be regulated even though "the ordinance completely prohibits a beneficial use to which the property has previously been devoted."¹⁰²

In line with the disfavored status of nonconforming rights, Washington Courts have consistently held that a nonconforming right *only* protects a pre-

(1972) ("phasing out a nonconforming use ... is the desirable policy of zoning legislation" and is "within the discretion of the legislative body of the city or county."); *State v. Thomasson*, 61 Wash.2d 425, 427, 378 P.2d 441 (1963) ("there are conditions under which a nonconforming use may be constitutionally terminated"); *State ex rel. Miller*, 40 Wash.2d at 220, 242 P.2d 505 ("It was not and is not contemplated that preexisting nonconforming uses are to be perpetual."); *Goldblatt v. Town of Hempstead*, 369 U.S. 590, 82 S.Ct. 987, 8 L.Ed.2d 130 (1962).

¹⁰⁰*State ex rel. Miller*, 40 Wash.2d at 221; McQuillin's Municipal Corporations §25.183

¹⁰¹*City of Columbus v. Union Cemetery Assn.*, 341 N.E.2d 298, 300-301 (Ohio 1976); See also, *Hadacheck v. Sabastian*, 239 U.S. 394, 410, 36 S.Ct. 143, 60 L.Ed. 348 (1915).

¹⁰²*Goldblatt*, 369 U.S. at 592.

existing use against immediate termination.¹⁰³ Hence, in *Rhod-a-Zalea*, the Court upheld a local government's decision to require a nonconforming peat mining operations's compliance with grading requirements, even though the nonconforming right *involved* grading.¹⁰⁴

In this case, the application of police power to the Motocross impacts was a valid and reasonable exercise of the County's police power, and otherwise does not offend nonconforming rights. Indeed, the Hearing Examiner expressly relied on police power authority in rejecting the applicant's assertion of nonconforming rights and in fashioning noise conditions.¹⁰⁵ Those conditions conform the use to the comprehensive zoning scheme adopted by the County, and otherwise protect the public health, safety and welfare by preventing the Motocross from causing a nuisance.¹⁰⁶ In particular, the Hearing Examiner imposed conditions that were designed to be reasonable to the Appellant and to reduce impacts that are causing a

¹⁰³*Rhod-A-Zalea* 136 Wn.2d at 19- 20.

¹⁰⁴*Rhod-a-Zalea*, 136 Wash.2d at 9-10.

¹⁰⁵CP at 0090 ("Counsel for the applicant argued that the noise produced at the track is exempt from WAC 173-60-040, because it is nonconforming. The examiner disagrees. WAC 173-60050 contains exceptions to the WAC standard. It does not exempt all noise from the site. Based on the *Rhod-a-Zalea* case, police power regulations (such as WAC 173-60-040) apply to the Motocross except as otherwise provided by law.").

¹⁰⁶*See eg., Northend Cinema, Inc. v. Seattle*, 90 Wash.2d 709, 722, 585 P.2d 1153, *cert. denied*, 441 U.S. 946, 99 S.Ct. 2166, 60 L.Ed.2d 1048 (1978) (the public benefit of regulating the impacts from the nonconforming use outweighed the harm to the property owners).

significant detriment to neighbors.

Appellant, however, inaccurately casts this issue only as a *termination* of nonconforming uses and unconstitutional burden on the Appellant's property rights. Nevertheless, as expressly found by the Hearing Examiner (and not appealed under LUPA by the Appellant), the conditions of approval are *not* intended to terminate the Appellant's Motocross uses. To this end, the Hearing Examiner specifically engaged in an *extensive* analysis to determine whether the noise (and other) conditions were reasonable as applied to the land use, and these findings are verities on appeal.¹⁰⁷

2. Appellant's Land Use Has Not Been Terminated

Appellant argues that the CUP terminates its nonconforming use, and that the CUP was not reasonable because it did not result in a permit for the full scope of its prior nonconforming rights. The Appellant's argument requires this Court to assume that its nuisance activities were protected as

¹⁰⁷For instance, the Examiner considered the costs of noise monitoring, and found that, "[g]iven the potential for noise impacts being significantly adverse, and given the predominantly commercial nature of the Motocross, the examiner finds costs in this range are not unreasonable." CP at 0099. The Examiner determined that certain restrictions on mufflers and the Appellant's public address system reasonable and practicable. CP at 0100-0101. Against the alternative of prohibiting the use altogether, the Examiner found reasonable the implementation of mitigation measures (such as berming and course design modifications) to prevent significantly detrimental noise levels from 'grand prix' events and practices. CP at 102-104.

Most notably, the Examiner found that where violations of the noise standards occurred, the County would afford the Motocross a hearing to determine reasonable mitigation measures to prevent such significant noise impacts. CP at 0105, 0106.

legal uses of the property under its nonconforming rights. Appellant's argument is in error.

The overwhelming weight of authority fails to support the Appellant's assertion of the *scope* of the lawful nonconforming use at issue: by arguing that its nonconforming right involves a motocross use *and* the right to cause noise pollution in excess of the state and local standards, the Appellant essentially asserts a nonconforming right to cause a nuisance.¹⁰⁸ Of course, a nonconforming use is determined by the lawful uses of property established at the time the zoning was imposed.¹⁰⁹ Yet, there is **never** a time at which the maintenance of a nuisance constitutes a lawful property use protected as a nonconforming right.¹¹⁰ The limits of a property rights have historically been found at the point that a proposed use causes a nuisance, under the principle

¹⁰⁸In addition, Appellant's nonconforming rights are clearly more limited than represented to this court, as decided by the Hearing Examiner and left unappealed by the Appellant. As noted by the Hearing Examiner in the Final Order, the Motocross does not have nonconforming rights in creekside trails (CP at 0039), "The examiner is not persuaded that the nonconforming use included trails through the creeks on the site, because the applicant intentionally abandoned trails through the creeks in or about 1998 and has allowed those former trails to become revegetated, effectively abandoning them."), in the 4X4 track (CP at 0039-0040), and only demonstrated pre-existing races and other uses on a limited basis. (CP at 0040)

¹⁰⁹*Meridian Minerals Co. v. King County*, 61 Wash.App. 195, 207, 810 P.2d 31 (1991).

¹¹⁰See eg., *State ex rel. Fisher v. Reno Hotel, Inc.*, 641 N.E.2d 1155, 1158 (Ohio 1994); See, eg., *Suzuki v. City of Los Angeles*, 44 Cal.App.4th 263, 280-281, 51 Cal.Rptr 880 (1996); *Union County v. Hoffman*, 512 N.W.2d 168, 171 (S.D. 1994); *Town of Delafield v. Sharpley*, 568 N.W.2d 779781 (Wis. 1997); *Maykut v. Plasko*, 365 A.2d 1114, 1118 (Conn. 1976).

sic utere tuo ut alienum non laedus (one may not use property in a manner that injures another).¹¹¹ Hence, in *Town Board of Southhampton v. 1320 Entertainment, Inc.*,¹¹² a challenged racetrack was enjoined *despite the fact that it was protected by nonconforming status*.¹¹³

Similarly, Appellant's claim for constitutional protection fails to provide a valid basis for its appeal. The problem with Appellant's assertion (in addition to the failure to appeal) is that the emission of noise levels is legal only as a contingency, and not as a fundamental attribute of property ownership.¹¹⁴ Likewise, emission of noise rising to nuisance levels is not a fundamental attribute of the activity of motocross racing. In fact, the BOCC expressly identified an absence of evidence on the record that "it's going to

¹¹¹See *John R. Sand & Gavel Co. v. United States*, 2004 LEXIS 69 (Ct. Fed. Claims Apr. 2, 2004).

¹¹²236 A.2d 387 (N.Y.1997)

¹¹³Other state courts have not hesitated to enjoin racetracks which fail to curtail noise emissions and other impacts. See, e.g., *Gustafson v. Cotco Enterprises, Inc.*, 328 N.E.2d 409, 411 (Ohio App. 1974) (enjoining racetrack because "serious interference would be caused to owners and occupants of surrounding property in their use and enjoyment of their property."); *Township of Bedminster v. Vargo Dragway, Inc.*, 253 A.2d 659, 662 (1969) (enjoining racetrack based on finding that noise from the racetrack made it "impossible to carry on a conversation in a normal tone of voice."); *State v. Waterloo Stock Car Raceway, Inc.*, 409 N.Y.S.2d 40, 43 (1978) (enjoining operation of racetrack because of "the cumulative effect of the noise, dust and danger to safety."); *Jones v. Queen City Speedways, Inc.*, 172 S.E.2d 42 (N.C. 1970) (same); *Kohr v. Weber*, 166 A.2d 871 (Pa. 1960) (same).

¹¹⁴See e.g., *City of Des Moines v. Gray Businesses, LLC*, 130 Wash.App. 600, 614, 124 P.3d 324 (2005) ("Because the ability to use or lease property for mobile home use is contingent, it is not a part of the 'bundle of sticks' which the owner enjoys as a vested incident of ownership. It is thus not a fundamental attribute of ownership.").

cost too much to come into compliance.”¹¹⁵ Appellant has made no demonstration that it cannot comply with the reasonable noise conditions, or that such conditions will terminate the Motocross use of the property:¹¹⁶ the conditions merely require noise studies, and further regulatory review (as opposed to revocation of the CUP or outright cessation of the use) in the event that compliance with noise level standards is deemed impossible.¹¹⁷ Until Appellant proceeds to make that showing, such a challenge is not ripe.¹¹⁸

3. The Nonconforming Right Was Converted to a Conforming Right

Under the Clark County Code, private recreational facilities are expressly allowed as a conditional use in an R-5 zoning district.¹¹⁹ The dilemma facing this Court, without regard for whether the Motocross’ assertion of rights is valid, is that the use is no longer nonconforming: Clark

¹¹⁵CP at 0757.

¹¹⁶Appellant’s *Affidavits*, submitted to the Superior Court offer such a conclusion, but clearly do not take into account the actual operation of the conditions of approval. CP 0167, 1017.

¹¹⁷CP at 105, 106.

¹¹⁸See *Rhod-a-Zalea*, 136 Wash.2d at 19 (recognizing that substantive due process challenge to the imposition of police power against nonconforming rights would not be ripe until the Appellant had received a final decision on the permit).

¹¹⁹CCC §18.303A.030(G) (prior).

County issued a conditional use permit (CUP) to curtail the impacts caused by the manner in which the Appellant's operated the land use. Accordingly, the Motocross' nonconformities have been "reduced to conformity as completely and as speedily as possible."¹²⁰ Under the law of Washington, and in light of those states which have considered the question at hand, the Appellant's nonconforming rights have become ineffective because they have been subsumed by the issuance of a permit for the use – the use is now conforming -- and therefore the use no longer meets the definition of a nonconforming use.

The Clark County Code defines “nonconforming use,” to mean “a use of land, building, or structure which use lawfully existed at the time of the adoption of this title or of any amendments thereto, but **which use does not conform with the use regulations imposed by this title** or such amendment thereto.”¹²¹ Of course, it is explicit in this definition that the use must be *lawful*. Consistent with this definition, the Clark County Code provides that a nonconforming right is extinguished when the use becomes conforming:

Legal nonconforming use rights shall be considered abandoned or discontinued in terms of legal nonconforming status if the legal nonconforming use...is changed to a conforming use.¹²²

¹²⁰*State ex rel. Miller*, 40 Wash.2d at 221.

¹²¹CCC §18.104.530 (prior) (emphasis added).

¹²²CCC 18.412A.030(A)(1) (prior).

Nonconforming rights may not be revived once they have been extinguished, and cannot be changed to a different nonconforming use.¹²³ Accordingly, once the *lawful* use of the Motocross converted from nonconforming rights to the confines of a lawfully issued permit,¹²⁴ the lawful use became conforming, and the nonconforming rights became a legal fiction.¹²⁵

In the case at hand, the right governing operation of the Motocross now requires conformance of th use to the zoning regulations. Accordingly, the Superior Court appropriately determined that the Appellant’s nonconforming rights ceased, and that failure to appeal the Hearing Examiner’s findings resulted in that decision binding the Appellants to the scope of lawful Motocross uses at the site.¹²⁶

¹²³*Miller v. City of Bainbridge Island*, 111 Wash.App. 152, 164, 43 P.3d 1250 (2002), citing *Coleman v. City of Walla Walla*, 44 Wash.2d 296, 300-01, 266 P.2d 1034 (1954) (nonconforming rooming house cannot be changed to fraternity house), *Open Door Baptist Church v. Clark County*, 140 Wash.2d 143, 150- 51, 995 P.2d 33 (2000) (legal nonconforming use as church could not be resumed after intervening years as art school); *Shields v. Spokane Sch. Dist. No. 81*, 31 Wash.2d 247, 255, 196 P.2d 352 (1948) (nonconforming elementary school cannot change to trade school).

¹²⁴Appellant, however, argues that the Motocross use has not become conforming as a matter of fact, as the Motocross has not ceased producing nuisance-level noise emissions. On this point, the fact that the Motocross consistently violates the limits of its lawful use is not a basis to argue that such violations are legal. *City of Mercer Island v. Steinmann*, 9 Wash.App. 479, 482, 513 P.2d 80 (1973)

¹²⁵*See eg., Patelmo v. Zoning Board of Adjustment*, 10 Pa. D. & C.2d 606, 613 (Pa.Com.Pl. 1956) (“it should be clear that where there has been an actual compliance with zoning requirements, the very purpose for reserving nonconforming rights has ceased.”).

¹²⁶CP at 1685.

4. Abandonment is Not at Issue

Appellant argues that the Superior Court's decision "can be framed" as a question of whether *submittal of a CUP application* effects an abandonment of a nonconforming right.¹²⁷ There are two defects in this argument. First, the Superior Court did not address or rely on abandonment in its decision, and specifically distinguished the ruling from the scenario in which the termination of a nonconforming right was effected by the *mere filing* of an application, finding that "this is not a case where merely filing an application for a CUP terminates a party's nonconforming use rights.... This case goes astronomically beyond 'mere filing' of an application."¹²⁸ The Superior Court's estoppel ruling is addressed above.

The Appellant's second, related argument concerns Appellant's assumption that its right to a nonconforming use was terminated by operation of abandonment. If abandonment were at issue, Appellant's argument that the Motocross *use* has not ceased might be more appropriate. Indeed, abandonment is a doctrine which applies to the cessation of an otherwise protected use: in determining whether abandonment operates to extinguish a nonconforming use, the inquiry focuses on whether *non-use* of the property

¹²⁷Appellant's Opening Brief, at 31 (emphasis added).

¹²⁸CP at 1684.

is supported by the intent to abandon the use altogether.¹²⁹

The problem is that abandonment is *not* at issue: the Motocross use was permitted, not terminated. The most persuasive, on-point authority on this issue arises from the land use board in Oregon. In *Morris v. Clackamas County*,¹³⁰ the Oregon Land Use Board of Appeals (LUBA) held that the issuance of a permit for a nonconforming use constitutes a discontinuance of the nonconforming right, and subjects to the use to the conditions of the permit. In *Morris*, the property owners applied for a regulatory permit for the pre-existing use, where it was agreed that the use was protected by a nonconforming status. As here, the property owner argued that their nonconforming rights could not be abandoned without a showing of intent to abandon. LUBA rejected that argument, concluding that the **legal status of the use was no longer nonconforming because, by definition, the use no longer violated the zoning regulations**: “bringing the use of the 1969 mobile home into compliance with county zoning regulations through obtaining a temporary permit, in itself, is a sufficient basis for determining the 1969

¹²⁹See eg., *Andrew v. King County*, 21 Wash.App. 566, 572, 586 P.2d 509 (1978) (the cessation of a use for the period prescribed by the zoning code is *prima facie* evidence of an intent to abandon the nonconforming use); *Skamania County v. Woodall*, 104 Wash.App. 525, 540-41, 16 P.3d 701, *review denied*, 144 Wash.2d 1021, 34 P.3d 1232 (2001) (same).

¹³⁰27 Or. LUBA 438 (1994)

mobile home is no longer a nonconforming use.”¹³¹ Because the conformance of the use with zoning regulations was at issue, abandonment was not before the Court.

Abandonment is not at issue in this case. In this case, the Motocross use has not been terminated, and in fact, the use has been permitted. Accordingly, the issue decided by the Superior Court was that the nonconforming *right* had been terminated by the issuance of a permit, *conforming the use* to the County’s police power regulations. The Superior Court’s decision is supported and should be affirmed.

D. Respondents are Entitled to An Award of Attorneys Fees Under RCW 4.84.370.

RCW 4.84.370 provides for the award of attorney’s fees to the “prevailing or substantially prevailing” party before the appellate court where the party also prevailed before the local jurisdiction and in prior judicial proceedings. On the issues before this Court, Respondents prevailed before the local jurisdiction and in prior judicial proceedings. An award of fees to the Respondents is appropriate.

RCW 4.84.370(1) provides, in relevant part:

[R]easonable attorneys' fees and costs shall be awarded to the prevailing party or substantially prevailing party on appeal

¹³¹*Morris*, Or. 27 LUBA 438, *7.

before the court of appeals or the supreme court of a decision by a county, city, or town to issue, condition, or deny a development permit involving a site-specific rezone, zoning, plat, conditional use, variance, shoreline permit, building permit, site plan, or similar land use approval or decision. The court shall award and determine the amount of reasonable attorneys' fees and costs under this section if:

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

An award of fees and costs under this provision is mandatory, given the use of the term "shall."¹³² The award is, however, restricted to costs incurred at the appellate level.¹³³

In this case, the Respondent prevailed at the local level on the Appellant's challenge to the permit conditions by the BOCC's decision to affirm the CUP in its entirety.¹³⁴ Respondent prevailed at Superior Court in the court's ruling that the CUP issuance was valid.¹³⁵ Assuming Respondent prevails on appeal, Respondent is entitled to an award of fees.

. . . .

¹³²"[T]he use of the word 'shall' in the statute is presumptively imperative and operates to create a duty rather than to confer discretion." *Crown Cascade, Inc. v. O'Neal*, 100 Wash.2d 256, 261, 668 P.2d 585 (1983).

¹³³*Baker v. Tri-Mountain Resources, Inc.*, 94 Wash.App. 849, 851, 973 P.2d 1078 (1999).

¹³⁴CP at 0123. See Resolution 2004-02-10, at 2-3, (cited by Appellants as App-2: Board of County Commissioners Resolution 2004-02-10), attached hereto in Appendix C.

¹³⁵CP at 1685, 0220. See, *J.L. Storedahl & Sons, Inc. v. Cowlitz County*, 125 Wash.App. 1,13, 103 P.3d (2004) (finding that a party is 'prevailing' where its position is improved).

CONCLUSION

Pursuant to the foregoing, Respondents respectfully request denial of this Appeal. The Superior Court's ruling was well-reasoned and supported. Appellant failed to preserve the issues raised in this matter, and as a result, the Superior Court's decision should be affirmed.

DATED this 23rd Day of August, 2006

ERIKSON & HIROKAWA, PLLC
Attorneys for the Appellants

By:



Keith H. Hirokawa, WSBA #29339

2.51.170 Board action.

The board by resolution may accept, modify or reject the examiner's decision, or any findings or conclusion therein, or may remand the decision to the examiner for further hearing. A decision by the board to modify, reject or remand shall be supported by findings and conclusions.

The action of the board in approving or rejecting a decision of the examiner shall be final and conclusive unless a land use petition is timely filed in Superior Court pursuant to RCW 36.70C.040 (Section 705 of Chapter 347, Laws of 1995); PROVIDED, that no person having actual prior notice of the proceedings of the examiner or board shall have standing to challenge the board's action unless such person was a party of record at the examiner's hearing. (Sec. 17 of Res. 1979-04-56; amended by Sec. 3 of Ord. 1982-08-60; amended by Sec. 2 of Ord. 1996-04-28; amended by Sec. 16 of Ord. 1997-04-19)

18.104.530 Nonconforming use.

“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)

18.303A.030 Conditional uses.

The following are the conditional uses, in accordance with the provisions of Chapter 18.404:

- A. Churches.
- B. Cemeteries and mausoleums, crematoria, columbaria, and mortuaries within cemeteries; provided, that no crematorium is within two hundred (200) feet of a lot in a residential district.
- C. Public or private schools, but not including business, dancing or technical schools.
- D. Golf courses.
- E. Kennels.
- F. Riding stables.
- G. Private recreational facilities, such as country clubs and golf courses, including such intensive commercial recreation uses as a golf driving range, race track, amusement park or gun club.
- H. Veterinary clinics.
- I. Government facilities necessary to serve the area outside urban growth boundaries, including fire stations, ambulance dispatch facilities and storage yards, warehouses, or similar uses.
- J. Private ambulance dispatch facility.
- K. Residential care homes. (Sec. 3 (Exh. C) of Ord. 1998-07-19)

18.404.060 Action by the hearings examiner.

The hearings examiner may approve, approve with conditions or disapprove the application for a conditional use permit subject to the Type III procedure in Chapter 18.600. In permitting a conditional use the hearings examiner may impose, in addition to regulations and standards expressly specified in this title, other conditions found necessary to protect the best interests of the surrounding property or neighborhood, or the county as a whole. These conditions may include requirements increasing the required lot size or yard dimensions, increasing street widths, controlling the location and number of vehicular access points to the property, increasing the number of off-street parking or loading spaces required, limiting the number of signs, limiting the coverage or height of buildings because of obstructions to view and reduction of light and air to adjacent property, limiting or prohibiting openings in sides of buildings or structures or requiring screening and landscaping where necessary to reduce noise and glare and maintain the property in a character in keeping with the surrounding area, and requirements under which any future enlargement or alteration of the use shall be reviewed by the county and new conditions imposed.

A. In order to grant any conditional use, the hearings examiner must find that the establishment, maintenance or operation of the use applied for will not, under the circumstances of the particular case, be significantly detrimental to the health, safety or general welfare of persons residing or working in the neighborhood of such proposed use or be detrimental or injurious to the property and improvements in the neighborhood or to the general welfare of the county.

B. The hearings examiner shall render a decision pursuant to Chapter 18.600.

18.412A.030 Legal nonconforming uses.

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.

2. A nonconforming use not involving a structure or one involving a structure (other than a sign) having an assessed value of less than two hundred dollars (\$200), shall be discontinued.

3. Uses which are nonconforming with respect to provisions for screening shall not be considered as legally nonconforming, and shall provide screening as required under current standards and regulations of the underlying zoning district within a period of five (5) years of the initial nonconformity. In cases of nonconforming screening where the existing use is not permitted in the underlying zoning dis-

trict, the planning director may impose screening standards of the district in which the use is normally permitted.

4. That portion of a commercial or industrial nonconforming use of property involving outside storage of inventory, supplies, or other material shall be abated within six (6) months of the adoption of this ordinance unless, within such period, application for site plan approval is made and thereafter granted for such outside storage. Site plan approval for nonconforming outside storage shall be processed in accordance with the standards of the district within which such use is permitted.

B. Changes of Legal Nonconforming Uses.

1. The planning director may allow a legal nonconforming use to be changed to another legal nonconforming use, subject to a Type II review, only if all of the following conditions are met:

a. The proposed new use can be clearly demonstrated to involve equal or lesser adverse impacts to the surrounding area, as it currently exists and as it is likely to develop in the future consistent with the underlying zoning district; and

b. The proposed change in use will involve minimal structural alteration; and

c. The proposed new use will not increase the amount of space occupied by a nonconforming use, except in cases where a legal nonconforming use proposes to expand within an existing building without structural alteration except as required by law, where such building had been originally designed for such internal expansion of use.

2. The proposed change in use is subject to Chapter 18.402A, Site Plan Review, if applicable.

C. Expansions or Alterations of Legal Nonconforming Uses and Associated Structures.

1. Legal nonconforming single-family dwellings or duplexes and accessory structures may undergo expansion or alteration within an existing legal lot, provided such expansion does not violate standards for setbacks, height, or other applicable code provisions. Such expansions shall be subject to Type I review under this code.

2. Legal nonconforming uses and associated structures other than single-family dwellings or duplexes may undergo expansion or alteration, subject to compliance with all of the following listed

criteria. Conditions of approval shall be required as necessary to ensure compliance.

Such proposed expansions or alterations shall require site plan approval under Chapter 18.402A. Substantive requirements of Chapter 18.402A which cannot be complied with because of the nature of the existing use may be modified at the discretion of the planning director. Conditional use permit approval under Chapter 18.404 may also be required if the planning director finds that the proposed expansion raises significant community concerns relative to the criteria of this chapter.

a. The proposed expansion or alteration will not increase the extent of adverse impacts to the surrounding area and its character, or increase the extent of adverse impacts to future development likely to occur in the surrounding area consistent with the underlying zoning district; and

b. The proposed expansion or alteration is limited to the legal lot of record of the existing use, unless expansion to adjacent lots serves to limit potentially adverse impacts; and

c. The proposed expansion or alteration fully complies with all applicable local, state or federal requirements.

3. In considering approval of the proposed expansion or associated conditions thereof, the planning director may apply the standards of the underlying zoning district and those of the zoning district in which the expanding use is normally allowed, as deemed necessary to ensure compliance with the intent of this chapter.

4. The planning director may also consider applications for expansion or alteration of existing nonconforming uses which have been established pursuant to a valid planned unit development, site plan approval or covenant agreement with Clark County, subject to the following:

a. To consider alteration or expansion under this subsection, at least thirty percent (30%) of total public infrastructure construction of the development authorized by the covenant must have been completed; and

b. All applicable provisions of the planned unit development, site plan approval or covenant agreement shall be fully complied with; and

c. The director may apply specific standards of the zoning district established by the covenant,

planned unit development or site plan approval, rather than standards of the underlying zoning district, as deemed necessary to ensure compliance with this chapter.

D. Destruction of Legal Nonconforming Uses. If a structure containing a nonconforming use is destroyed by any cause leading to a loss of sixty percent (60%) or greater of appraised value as determined by the records of the county assessor from the previous year, any future structure on the site shall conform to regulations of the underlying zoning district. (Sec. 1 (Att. A) of Ord. 1995-08-15; amended by Sec. 1 of Ord. 1996-10-24; amended by Sec. 9 (Att. A) of Ord. 2001-02-08)

RCW 4.84.370

Appeal of land use decisions — Fees and costs.

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

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

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

(2) In addition to the prevailing party under subsection (1) of this section, the county, city, or town whose decision is on appeal is considered a prevailing party if its decision is upheld at superior court and on appeal.

[1995 c 347 § 718.]

Notes:

Finding -- Severability -- Part headings and table of contents not law -- 1995 c 347: See notes following RCW 36.70A.470.

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RCW 36.70C.010
Purpose.

The purpose of this chapter is to reform the process for judicial review of land use decisions made by local jurisdictions, by establishing uniform, expedited appeal procedures and uniform criteria for reviewing such decisions, in order to provide consistent, predictable, and timely judicial review.

[1995 c 347 § 702.]

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RCW 36.70C.020
Definitions.

Unless the context clearly requires otherwise, the definitions in this section apply throughout this chapter.

(1) "Land use decision" means a final determination by a local jurisdiction's body or officer with the highest level of authority to make the determination, including those with authority to hear appeals, on:

(a) An application for a project permit or other governmental approval required by law before real property may be improved, developed, modified, sold, transferred, or used, but excluding applications for permits or approvals to use, vacate, or transfer streets, parks, and similar types of public property; excluding applications for legislative approvals such as area-wide rezones and annexations; and excluding applications for business licenses;

(b) An interpretative or declaratory decision regarding the application to a specific property of zoning or other ordinances or rules regulating the improvement, development, modification, maintenance, or use of real property; and

(c) The enforcement by a local jurisdiction of ordinances regulating the improvement, development, modification, maintenance, or use of real property. However, when a local jurisdiction is required by law to enforce the ordinances in a court of limited jurisdiction, a petition may not be brought under this chapter.

(2) "Local jurisdiction" means a county, city, or incorporated town.

(3) "Person" means an individual, partnership, corporation, association, public or private organization, or governmental entity or agency.

[1995 c 347 § 703.]

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RCW 36.70C.030

**Chapter exclusive means of judicial review of land use decisions —
Exceptions.**

(1) This chapter replaces the writ of certiorari for appeal of land use decisions and shall be the exclusive means of judicial review of land use decisions, except that this chapter does not apply to:

(a) Judicial review of:

(i) Land use decisions made by bodies that are not part of a local jurisdiction;

(ii) Land use decisions of a local jurisdiction that are subject to review by a quasi-judicial body created by state law, such as the shorelines hearings board, the environmental and land use hearings board, or the growth management hearings board;

(b) Judicial review of applications for a writ of mandamus or prohibition; or

(c) Claims provided by any law for monetary damages or compensation. If one or more claims for damages or compensation are set forth in the same complaint with a land use petition brought under this chapter, the claims are not subject to the procedures and standards, including deadlines, provided in this chapter for review of the petition. The judge who hears the land use petition may, if appropriate, preside at a trial for damages or compensation.

(2) The superior court civil rules govern procedural matters under this chapter to the extent that the rules are consistent with this chapter.

[2003 c 393 § 17; 1995 c 347 § 704.]

Notes:

Implementation -- Effective date -- 2003 c 393: See RCW 43.21L.900 and 43.21L.901.

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Page 4 of 6

RCW 36.70C.040**Commencement of review — Land use petition — Procedure.**

(1) Proceedings for review under this chapter shall be commenced by filing a land use petition in superior court.

(2) A land use petition is barred, and the court may not grant review, unless the petition is timely filed with the court and timely served on the following persons who shall be parties to the review of the land use petition:

(a) The local jurisdiction, which for purposes of the petition shall be the jurisdiction's corporate entity and not an individual decision maker or department;

(b) Each of the following persons if the person is not the petitioner:

(i) Each person identified by name and address in the local jurisdiction's written decision as an applicant for the permit or approval at issue; and

(ii) Each person identified by name and address in the local jurisdiction's written decision as an owner of the property at issue;

(c) If no person is identified in a written decision as provided in (b) of this subsection, each person identified by name and address as a taxpayer for the property at issue in the records of the county assessor, based upon the description of the property in the application; and

(d) Each person named in the written decision who filed an appeal to a local jurisdiction quasi-judicial decision maker regarding the land use decision at issue, unless the person has abandoned the appeal or the person's claims were dismissed before the quasi-judicial decision was rendered. Persons who later intervened or joined in the appeal are not required to be made parties under this subsection.

(3) The petition is timely if it is filed and served on all parties listed in subsection (2) of this section within twenty-one days of the issuance of the land use decision.

(4) For the purposes of this section, the date on which a land use decision is issued is:

(a) Three days after a written decision is mailed by the local jurisdiction or, if not mailed, the date on which the local jurisdiction provides notice that a written decision is publicly available;

(b) If the land use decision is made by ordinance or resolution by a legislative body sitting in a quasi-judicial capacity, the date the body passes the ordinance or resolution; or

(c) If neither (a) nor (b) of this subsection applies, the date the decision is entered into the public record.

(5) Service on the local jurisdiction must be by delivery of a copy of the petition to the persons identified by or pursuant to RCW 4.28.080 to receive service of process. Service on other parties must be in accordance with the superior court civil rules or by first class mail to:

(a) The address stated in the written decision of the local jurisdiction for each person made a party under subsection (2)(b) of this section;

(b) The address stated in the records of the county assessor for each person made a party under subsection (2)(c) of this section; and

(c) The address stated in the appeal to the quasi-judicial decision maker for each person made a party under subsection (2)(d) of this section.

(6) Service by mail is effective on the date of mailing and proof of service shall be by affidavit or declaration under penalty of perjury.

[1995 c 347 § 705.]

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RCW 36.70C.130
Standards for granting relief.

(1) The superior court, acting without a jury, shall review the record and such supplemental evidence as is permitted under RCW 36.70C.120. The court may grant relief only if the party seeking relief has carried the burden of establishing that one of the standards set forth in (a) through (f) of this subsection has been met. The standards are:

(a) The body or officer that made the land use decision engaged in unlawful procedure or failed to follow a prescribed process, unless the error was harmless;

(b) The land use decision is an erroneous interpretation of the law, after allowing for such deference as is due the construction of a law by a local jurisdiction with expertise;

(c) The land use decision is not supported by evidence that is substantial when viewed in light of the whole record before the court;

(d) The land use decision is a clearly erroneous application of the law to the facts;

(e) The land use decision is outside the authority or jurisdiction of the body or officer making the decision; or

(f) The land use decision violates the constitutional rights of the party seeking relief.

(2) In order to grant relief under this chapter, it is not necessary for the court to find that the local jurisdiction engaged in arbitrary and capricious conduct. A grant of relief by itself may not be deemed to establish liability for monetary damages or compensation.

[1995 c 347 § 714.]

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OCT 11 2002

RESOLUTION NO. 2002-10-02

A RESOLUTION relating to land use; adjudicating the appeal from the hearing examiner's final order in the matter of CUP 2002-00001; SEP 002-00003 (Washougal Motocross).

1 **WHEREAS**, by final order dated July 22, 2002, the hearing examiner granted a
2 conditional use permit (CUP 2002-0001) and denied a related procedural SEPA appeal
3 (SEP 2002-00003) for the Washougal Motocross property; and

4 **WHEREAS**, timely appeals were filed with the Board from such final order; and

5 **WHEREAS**, the Board has considered these appeals at a duly noticed public
6 meeting; now, therefore,

7 BE IT ORDERED AND RESOLVED BY THE BOARD OF COUNTY
8 COMMISSIONERS OF CLARK COUNTY, STATE OF WASHINGTON, as follows:

9 **Section 1. Disposition of Assignment of Error.**

10 1. Procedural SEPA.

11 a. The Board lacks jurisdiction over procedural SEPA appeals.
12 CCC 20.50.030(2)(b)(iii).

13 b. A claimed error in not withdrawing a DNS is not subject to
14 administrative appeal. WAC 197-11-680(3)(a)(iii).

15 2. Nonconforming Rights.

16 a. *Reliance:* The hearing examiner did not accord undue
17 significance to established nonconforming rights or "rewrite" the
18 standard for conditional use permits, except as noted below.

19 b. *Proof:*

20 i. Substantial evidence supports the examiner's findings
21 relating to the lawful establishment and use of rest and
22 relocation trails. Compliance with state hydraulic permit
23 requirements is not relevant to the existence of such rights;
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APPENDIX C
Page 1 of 7

29 CCC 18.412A.020(A) focuses upon compliance with county
30 land use standards.

- 31
32 ii. Substantial evidence supports the examiner's findings that
33 the 4X4 track was not established as a nonconforming use.
34 The Board lacks authority to accept new evidence on the
35 issue, as requested by the applicant.

36
37 c. *Extinguishment:*

- 38
39 i. Substantial evidence supports the examiner's finding that
40 the Motocross involves a structure having a value of more
41 than \$200, so that CCC 18.412A.030(A)(1) does not apply.
42
43 ii. The examiner did not err in concluding that "resting" trails
44 did not constitute cessation of use for purposes of the
45 abandonment or discontinuance provisions of CCC
46 18.412A.030(A)(1).
47
48 d. *Intensity of Use:* The examiner erred in concluding that
49 nonconforming rights are limited to the number of historic racing
50 events. Although Chapter 18.412A CCC and Washington
51 decisional law generally limits structural alteration or geographic
52 expansion of nonconforming uses, intensity of use is not similarly
53 restricted unless the increased intensity functionally constitutes a
54 change in use.

55
56 3. Noise.

- 57
58 a. *State Exemption:* The examiner erred in assuming that the state
59 noise exemption applies to racing events.
60
61 i. Under WAC 173-60-050(3)(g), sounds from racing events
62 are exempt only if "existing" (defined in WAC 173-60-020(7)
63 to mean prior to September 1, 1975) and "authorized"
64 (defined in WAC 173-60-020(12) to mean governmentally
65 permitted or undertaken under the auspices of a recognized
66 sanctioning body).
67
68 ii. The Board lacks authority to make the necessary findings,
69 given the factually disputed state of the record.
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71 iii. The examiner did not conclude that violation of state noise
72 standards is acceptable or environmentally insignificant, as
73 alleged in an appeal.

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- b. *Noise Analysis:* The examiner did not err in requiring the applicant to undertake additional noise analysis, although the timing provided for in Condition LU-5 is not possible. However, further analysis should:
 - i. Not be limited to the national event;
 - ii. Be reviewed through a Type III process; and
 - iii. Result in mitigation measures which reflect the applicability or inapplicability of the state exemption and the county aspirational SEPA policy in CCC 20.50.025(3)(g).

4. Intensity of Use. The examiner has authority to limit the intensity (days of racing) of use. However, the examiner erred in basing such limitations on faulty conclusions regarding nonconforming right limitations on intensity (as adjusted utilizing the provisions of CCC 18.404.105). Such limitations must be founded upon an impact analysis with evidence of more frequent events, if any, since 1994 being fully relevant.

5. Trails.

- a. The examiner properly conditioned any new development on compliance with county stormwater, erosion control, habitat and wetland ordinances. This condition is sufficiently broad to conclude major work to reopen rested trails.
- b. The examiner gave appropriate consideration to WDFW recommendations, pursuant to CCC 13.51.080(4).
- c. Given the public interest and conflicting testimony, review of the trail plan provided for in Condition LU-4(a)(ii) should be through a public process.

6. Miscellaneous. Except as otherwise provided above, the findings, conclusions and conditions of the final order are affirmed. The Board additionally complements the examiner on the quality of the decision and concurs in his observations regarding the deficiencies in the record.

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Section 2. Remand.

This matter is remanded to the hearing examiner for further proceedings consistent with this resolution relating to:

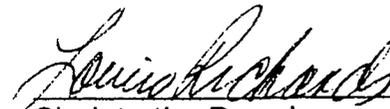
1. Applicability of the state noise exemption to racing events.
2. Imposition of appropriate noise mitigation measures.
3. Imposition of appropriate conditions addressing durational intensity of use.
4. Approval of a plan showing the location of rest and relocation trails.

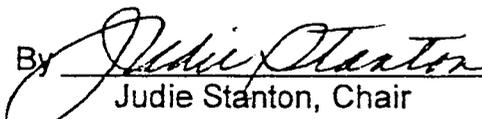
Section 3. Interlocutory Decision. Because it remands for further proceedings, this resolution does not constitute an appealable land use decision under Chapter 36.70C RCW.

ADOPTED this 8 day of October, 2002.

Attest:

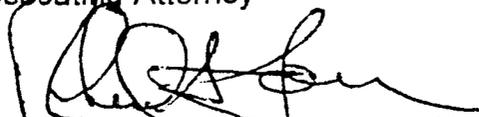
BOARD OF COUNTY COMMISSIONERS
FOR CLARK COUNTY, WASHINGTON


Clerk to the Board

By 
Judie Stanton, Chair

Approved as to Form Only
ARTHUR D. CURTIS
Prosecuting Attorney

By _____
Craig Pridemore, Commissioner

By 
Richard S. Lowry
Chief Deputy Prosecuting Attorney

By _____
Betty Sue Morris, Commissioner

APPENDIX C
Page 4 of 7

1
2
3 RESOLUTION NO. 2004-02-10
4

5 A RESOLUTION relating to land use, regarding an appeal of the
6 Hearings Examiner's decision approving with conditions an
7 application for CUP2002-00001; SEP2002-00003 (Washougal
8 Motocross), a request for a site plan and environmental review for
9 an existing motorcycle racing facility. The site is located on a 225-
10 acre combination of parcels north of Borin Road and west of the
11 extension of NE 412th Avenue; in Section 25, Township 2 North,
12 Range 4 East of the Willamette Meridian.
13

14 WHEREAS, the Clark County Hearings Examiner received testimony about this
15 application at public hearings on May 9, 2002, July 22, 2002, September 9, 2003, and September
16 23, 2003.

17 WHEREAS, the Examiner concluded that the conditional use should be approved with
18 conditions; and,

19 WHEREAS, Keith Hirokawa has petitioned the Board of County Commissioners on behalf
20 of Eugene Greer to overturn the Hearings Examiner's decision on grounds that the Examiner erred
21 in his reapproval of the conditional use.

22 WHEREAS, Bradley Anderson has petitioned the Board of County Commissioners on
23 behalf of Jim Taska to overturn the Hearings Examiner's decision on grounds that the Examiner
24 erred in declining to order the DNS to be withdrawn and erroneously concluded that all of the
25 motocross activities on the site were exempt from the State Noise Control Act.

26 WHEREAS, Michael Kepcha has petitioned the Board of County Commissioners on
27 behalf of himself on a plurality of issues relating to the conditional use.

APPENDIX C
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1 **WHEREAS**, James Sellers has petitioned the Board of County Commissioners on behalf of
2 the applicants to overturn the Hearings Examiner's decision on grounds that the Examiner erred in
3 his reapproval of the conditional use.

4
5 **WHEREAS**, the Board of County Commissioners have considered the appeals at a duly
6 advertised public meeting on January 20, 2004; and,

7 **WHEREAS**, the Board has determined to uphold the decision of the examiner; now
8 therefore,

9 **BE IT ORDERED AND RESOLVED BY THE BOARD OF COUNTY**
10 **COMMISSIONERS OF CLARK COUNTY, STATE OF WASHINGTON, as follows:**

11 Section 1. Analysis.

12 The Final Order by the Hearing Examiner was sufficient and was not in error.

13 Section 2. Disposition. The Hearings Examiner's decision in the matter of
14 CUP2002-00001; SEP2002-00003 (Washougal Motocross), a request for a
15 conditional use and environmental review for a motorcycle racing facility is
16 upheld with the conditions of approval amended as follows by the Board.

17 Section 3. Amended Condition of Approval

18 Condition LU-4(b)(ii) be amended to read as follows:

19
20 Noise levels measured at any surrounding home near the site shall be at least 5 dBA less
21 than the standard in WAC 173-60-040.
22

23
24 **ADOPTED** this 10 day of February, 2004.
25

APPENDIX C
Page 6 of 7

BOARD OF COUNTY COMMISSIONERS
FOR CLARK COUNTY, WASHINGTON

1 Attest:

2 *Louise Richards*
3
4
5 Clerk to the Board

6
7
8 Approved as to Form Only
9 ARTHUR D. CURTIS
10 Prosecuting Attorney

11 *Richard S. Lowry*
12 By
13 Richard S. Lowry
14 Chief Deputy Prosecuting Attorney

By *Betty Sue Morris*
Betty Sue Morris, Chair

By _____
Craig Pridemore, Commissioner

By _____
Judie Stanton, Commissioner

1 competent to be a witness herein.

2 On the 23rd day of August, 2006, I served true and complete copies, of the following
3 documents :

4 (i) *Respondents' Opening Brief*

5 (ii) *Affidavit of Service*

6 to the following addresses by **Hand Delivery**:

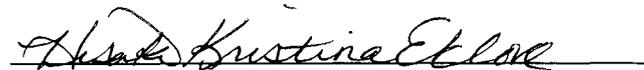
7 Mr. Rich Lowry
8 Chief Civil Prosecuting Attorney
9 1013 Franklin
10 P.O. Box 5000
11 Vancouver, WA 98668-5000

James Sellers
Sellers Law Office
PO Box 61535
415 E. Mill Plain Blvd.
Vancouver, WA 98666

12 
13 Laura L. Longee

14 **SUBSCRIBED AND SWORN** to before me this 23rd day of August, 2006.



16 
17 Hisako Kristina Eklove
18 NOTARY PUBLIC in and for the State of
19 Washington, residing in Washougal.
20 My commission expires July 15, 2009.

20

21