

No. 34050-0-II

COURT OF APPEALS
DIVISION II
OF THE STATE OF WASHINGTON

COLIN F. YOUNG,
Appellant

v.

KITSAP COUNTY,
a municipal corporation in the State of Washington,
Respondent

APPELLANT'S BRIEF
(2nd amended)

FILED
COURT CLERK
APR 14 2014
10:42 AM
KCO

Table of Contents

A. Assignments of Error	page
Assignments of Error	1
Issues Pertaining to Assignments of Error	2
B. Statement of the Case	3
D. Argument	6
Single subject - Subject in Title	6
Representative Standing	10
Tax vs. Fee	12
Preemption of Public Nuisances Ordinance	17
Due Process	24
Vagueness	28
Vested Rights	29
Impairment of Contracts	32
E. Conclusion	33

Table of Authorities

	page
Table of Cases	b
Constitutional Provisions	c
Statutes	c

Table of Cases

	page
Amalgamated 142 Wn.2d 183 (2000)	9
Citizens for Responsible Wildlife Mgmt. v. State 149 Wn.2d 622 (2003)	9
Covell v. Seattle, 127 Wn.2d 874 (1995)	12,17
Hillis Homes v. PUD, 105 Wn.2d 288, 714 P.2d 1163 (1986)	14
Kueckelhan v. Fed. Old Line Ins. Co., 69 Wn.2d 392, (1966)	8
Local 587 v. State 142 Wn.2d 183 (2000)	6
Margola Assocs. v. Seattle, 121 Wn.2d 625, 854 P.2d 23 (1993)	14
Mathews v. Eldridge, 96 S.Ct 893	25
McQuillin Municipal Corporations 20.09	27,31
Power Inc. v. Huntley 39 Wn.2d 191 (1951)	6
Presbytery of Seattle v. King County, 114 Wn.2d 320 (1990)	22,27
Rourke v. Department of Labor & Indus., 41 Wn.2d 310, 249 P.2d 236 (1952)	7
State v. Broadway, 133 Wn.2d 118 (1997)	9
Seattle Sch. Dist. No. 1 v. State, 90 Wn.2d 476, 585 P.2d 71 (1978)	10
Samis Land Co. v. Soap Lake, 143 Wn.2d 798 (2000)	17
State v. Blilie, 132 Wn.2d 484 (1997)	21
Teter vs. Clark County 104 Wn.2d 227, 704 P.2d 1171 (1985)	14
Van Sant v. Everett 69 Wn. App. 641, 849 P.2d 1276 (1993)	30
Wash. Fed'n of Employees v. State, 127 Wn.2d 545, 901 P.2d 1028 (1995)	8

Constitutional Provisions

	page
Washington State Constitution, Article I Section 3	29
Washington State Constitution, Article I Section 23	31
Washington State Constitution, Article II Section 19	6
Washington State Constitution, Article XI Section 11	12

Statutes

	page
RCW 7.48.130 Public nuisance defined	19
RCW 7.48.150 Private nuisance defined	24
RCW 7.48.160 - Authorized act not a nuisance.	19
RCW 46.04.125 Collector.	18,19,29
RCW 46.04.3815 Parts car.	18
RCW 46.08.010 State preempts licensing field.	13
RCW 46.12.430 Parts Cars.	18
RCW 46.55 Towing and Impoundment	25
RCW 46.70.021 (3) (a) License required for Dealers	22
RCW 59.18.310 & 59.18.312 Under the Landlord Tenant Act	9

A. Assignment of Error

Assignments of Error

- 1) The Superior court erred when it held that Kitsap's Nuisance Ordinance did not violate the single subject in title requirements of the State Constitution.
- 2) The Superior court erred when it denied the petitioner/appellant representative standing, and did not consider constitutional violations presented in a representative capacity including summary abatement, impairment of contracts, and vested rights of business in Kitsap.
- 3) The Superior court erred when it did not consider the tax versus fee argument holding the case did not include a fee assessment.
- 4) The Superior court erred when held that Kitsap's Public Nuisance Ordinance was not preempted by state law.
- 5) The Superior court erred when it found that Kitsap's Public Nuisance ordinance applies equally to all parties, and does not apply unequally to the appellant/petitioner, and is not overly burdensome, unduly oppressive, vague, and an unreasonable exercise of police power.

Issues pertaining Assignments of Error

1) Do the three major components of Kitsap's Public Nuisance ordinance; extensive regulation of stored and junked vehicles, abatement of nuisances, and landlord-evicted tenant procedures, constitute sufficiently different and independent subjects to invalidate the ordinance for violating the single subject and subject in title provision of the State Constitution?

(Assignment of Error 1.)

2) Is representative standing justified and necessary to examine all constitutional violations of Kitsap's Nuisance Ordinance presented to the Superior court when such an examination serves both a large public interest and judicial economy? *(Assignment of Error 2.)*

3) Does the fact the appellant was required by Kitsap's Public Nuisance ordinance procedures to choose between paying a \$10 "Environmental Mitigation fee" for storage of each vehicle and bringing the issue before the Hearing Examiner determine the appellant was not subject to the \$10 fee and thus validity of the \$10 fee will not be considered by the courts?

(Assignment of Error 3.)

4) Does Kitsap's \$10 "Environmental Mitigation Fee" constitute an illegal tax on automotive collector/hobbyists and not a fee, or is this fee preempted by RCW 46.08.010?

(Assignment of Error 3.)

5) Do summary abatement procedures within Kitsap's Public Nuisance ordinance violate constitutional due process requirements?

(Assignment of Error 5.)

6) Does RCW 46.04.125 Collector, RCW 46.04.3815 Parts Cars, RCW 46.12.430 Parts Car and the extraordinary finding following: RCW 46.04.125 referenced by all three RCW's, protect automotive collector/hobbyist activities by declaring those activities and practices lawful and preempt KCC 9.56 with regard to "junk vehicles" and "vehicle lots" containing collector cars as in the instant matter?

(Assignment of Error 4.)

7) Does Kitsap's declaration of a myriad of new public nuisances without any administrative guidelines, a grandfathering provision, or an amortization period invalidate the ordinance?

(Assignment of Error 5.)

B. Statement of the Case

Colin F. Young, the appellant herein, is the sole owner, responsible party, and legal owner of Kitsap tax parcel 26701-4-010-2004, 14 acres currently subject to an abatement action under Kitsap's Public Nuisances Ordinance codified at chapter 9.56 of the Kitsap County Code [CP p.141,142]. The respondent and local jurisdiction, County of Kitsap, is a municipal corporation in the State of Washington.

The subject property is principally low lying pasture land and some forested area with hills on 2 sides [RP 6/27/05 p. 9]. Young's property is located 5 miles north of Poulsbo in a North Kitsap rural farming area know as Big Valley. Parcels in Big Valley generally range in size from 5 to 100 acres. [CP p.185] As it has been for the past 50 years, it is quite typical to see landowners keep tractors, trucks, trailers, farm equipment, and numerous vehicles of all nature parked in the open in Big Valley.

The Young family has owned this property for approximately 40 years and has continuously stored vehicles and farm equipment on it, while harvesting hay nearly every year. The appellant, Colin Young, purchased the subject property from his mother some 6 years ago. [CP p. 186] & [CP p.141]

Young's Big Valley property is an irregular shaped parcel with no two intersecting lines of measurement exceeding 500 feet in length. Young practices automotive collector hobbyist activities on a small portion of the property and farms the remainder. [CP p.187]

On October 22, 2001, Kitsap County board of Commissioners passed what is commonly called the "Nuisance Ordinance"; Ordinance No. 261, Public Nuisances Relating to the abatement of conditions which constitute a public nuisance and adding a new chapter 9.56 "Public Nuisances" to the Kitsap County Code. [CP p. 188,189]

Public hearings on the Nuisance Ordinance were attended beyond capacity. As both the video recordings and minutes of each of the hearings demonstrate, Kitsap's property owners were overwhelmingly against the Nuisance Ordinance. Most citizens expressed grave concern with the proposed loss of property rights, and a certainty of broad abuse of police power by the county officials. [CP p. 189]

Ultimately, Commissioners Botkin and Endresen voted in favor of the Nuisance Ordinance, passing it on October 22, 2001, while the 3rd Commissioner, Jan Angel was not present. The Nuisance Ordinance took effect the date it was passed. The ordinance was then incorporated in the Kitsap County Code under Chapter 9.56 Public Nuisances. [CP p. 189]

Subsequently, in 2002, the principal proponent of the Nuisance Ordinance, Commissioner Tim Botkin, was subjected to a bipartisan grass roots campaign against his re-election. This grassroots campaign was born from Kitsap citizens concerned with Commissioner Botkin's disregard for property rights, and his vote supporting the Nuisance Ordinance in spite of great public opposition. This grassroots effort succeeded in removing Tim Botkin from office in November of 2002. *[CP p. 189]*

Subsequently, Kitsap initiated an abatement action against Young's Big Valley Property under the newly enacted Public Nuisances ordinance¹. Under the ordinance the appellant choose not to pay the \$10 Environmental Mitigation fee for each vehicle, but rather optioned to put the issue before the Hearing Examiner to determine the merit of the charges, the legality of the fee, the reasonableness of procedures within the ordinance, and the validity of the ordinance itself. *[CP p.141]*.

Reserving all constitutional issues for the Superior court under a LUPA appeal, Young testified and submitted briefing during the Examiner's hearing on July 22, 2004. Officials for Kitsap County also testified and submitted briefing. Cross examination of the parties was not permitted. In his ruling the Hearing Examiner found that both "junk vehicles" and a "vehicle lot" existed on the subject property, and sustained the abatement action. *[CP p. 218-220]*

In accordance with the Public Nuisance ordinance Young next filed a LUPA action to appeal the matter, and chose Mason county to hear the appeal. Both the previous record and extensive briefing was submitted to the Mason Superior court, and on June 27, 2005 oral arguments were heard by the Honorable Judge Sawyer.

¹ Young's property was the first attempt by Kitsap officials to use the "Nuisance Ordinance" (Ordinance 261) to abate an alleged "Public Nuisance" [K sub54 @ 3.6 &4.1]

In its ruling, the Mason Superior court vacated the Hearing Examiner's finding of "junk vehicles" on the subject property, but sustained Kitsap's abatement action finding a "vehicle lot" as defined in KCC 9.56.020(19) was present.

[RP 6/27/05 - p 32-38] & [CP p.12-15]

D. Argument

Single Subject - Subject in Title

Kitsap's Nuisance Ordinance violates Washington State Constitution under the "Single Subject" and "Subject in Title" provisions of Article II Section 19.

(1) Article II, section 19 has two requirements in its two clauses: An act must have only one subject, and the subject of the act must be contained in the act's title. The single subject rule of art. II, § 19 is intended to prevent legislators, whether the people or the Legislature, from having to vote for a law that they do not favor in order to obtain a law which they do. I-695 contains two subjects: (1) limiting license fees tabs to \$30; and (2) requiring voter approval of all future state and local tax increases. These two subjects are contained in both the title and the body of I-695. I-695 is therefore unconstitutional in its entirety.

(2) The second clause of art. II, § 19 requires that the subject of a measure appear in the title. The purpose of this requirement is to notify those voting on the measure of its contents

[Local 587 v. State 142 Wn.2d 183 (2000)]

Kitsap's Nuisance Ordinance incorporates more than one subject and not all subjects are reflected in the title, violating Washington State Constitution under the "Single Subject" and "Subject in Title" provisions of Article II Section 19. *See: Local 587 v. State, 142 Wn.2d at 217, Power Inc. v. Hintley 39 Wn.2d at 198-201.* Like *Local 587*, Kitsap's Public Nuisances ordinance contains three separate and distinct subjects or purposes within the body of one bill all under one title.

The first purpose of the Nuisance Ordinance provides for abatement of a variety of common nuisances such as trash, white goods, vegetation, dilapidated buildings, obstructions to the right of way, etc.

The second purpose incorporated in the ordinance is to charge a \$10 “fee” for “junk vehicles” stored on private through an “Environmental Mitigation Agreement” [KCC 9.56.070] designed to discourage and limit the number of vehicles stored on private property. This second purpose extensively defines numerous parameters and requirements relating to storage of vehicles, even defining a *new type of unlawful land use*; that being more than 10 vehicles stored on any single tax parcel [KCC 9.56.020 (19) “Vehicle Lot”] without regard for parcel size, which applies without limitation to all apartment complexes, trailer parks, private and community storage locations, and all government facilities within Kitsap county.

The third purpose incorporated in the Public Nuisances ordinance is a method by which landlords are able to dispose of a tenants personal belongings that are left behind by an absent or evicted tenant [KCC 9.56.090]

The test of the sufficiency of a title is that it must give notice of its object so as reasonably to lead to an inquiry into its contents. *Rourke v. Department of Labor & Indus.*, 41 Wn.2d 310, 249 P.2d 236 (1952); In the instant case, two subjects within the ordinance are in no fashion indicated by the title “Public Nuisances.” A \$10 fee for storing vehicles on private property is not indicated nor would the title lead to an inquiry of the ordinance by a Landlord evicting a tenant looking for guidance.

The overwhelming resistance to the proposed Nuisance Ordinance started with the release of the initial draft of the Nuisance Ordinance to the public. The “evicted tenant” aspect of the ordinance was a late addition “marketing” or “logrolling” this

very unpopular ordinance to Kitsap's rental property owners, and in turn sweetening the proposal for the Commissioners. *[CP p. 192]*

The oft-acknowledged purpose of the first clause, the single-subject provision, is to prevent 'logrolling or hodgepodge legislation' the tactic of attaching an unpopular bill to an popular one on an unrelated subject
[Wash. Fed'n, 127 wn.2d at 554]]

This "evicted tenant" provision was attached to the very end of the Nuisance Ordinance *[KCC 9.56.090]* to make the proposed ordinance more palatable to the landlord segment of the voters and to encourage any undecided commissioners to support the measure.

Neither the procedure for disposal of a tenants belongings, nor the extensive inhibitions against vehicles on private property (including "junk vehicles" with the "Environmental Mitigation Agreement") are reflected in the ordinances general title of "Public Nuisances"

Washington Supreme Court precedent clearly indicates that multiple purposes in any one act must relate to each other for the act to be valid.

An initiative embraces a single subject if its parts are rationally related to one another.
[Kueckelhan v. Fed. Old Line Ins. Co., 69 Wn.2d 392, 404]

The three above detailed separate purposes of the Nuisance Ordinance are neither necessarily, nor rationally related to each other, yet they must be for this ordinance to be valid.

If the title is general, the subject of the legislation must be accurately expressed in the title of the act and the provisions of the enactment must be connected by a rational unity. *[Amalgamated 142 Wn.2d at 209]*

clearly expressed in what has long been the true test for rational unity: "The existence of rational unity or not is determined by whether the matters within the

body of the initiative are germane to the general title and whether they are germane to one another." City of Burien 144 Wn.2d at 826; Amalgamated 142 Wn.2d at 209 [Citizens for Responsible Wildlife Mgmt. v. State 149 Wn.2d 622 (2003)]

Ordinance 261's title "Public Nuisances" is general in nature and the above rational unity test applies. Under the first prong of the rational unity test, the ordinance's section dealing with "evicted tenant" procedures is established in the RCW² and is not germane to the title "Public Nuisances." The same holds for ordinance's section imposing a \$10 fee for stored vehicles, in that the "Environmental Mitigation Agreement" section is not germane to the title "Public Nuisances." In fact, under the second prong of the test for rational unity, neither the \$10 fee on vehicles, nor the "Environmental Mitigation Agreement" are germane to abating either commonly defined nuisances, or a landlord's disposal of a tenant's personal effects. It is therefore the case that Ordinance 261 fails both prongs of the rational unity test and is unconstitutional.

Where proposed legislation with a single subject title has multiple subjects, those matters not encompassed within the title are invalid but the remainder is not unconstitutional if (a) the objectionable portions are severable in a way that a court can presume the enacting body would have enacted the valid portion without the invalid portion, and (b) elimination of the invalid part would not render the remainder of the act incapable of accomplishing the legislative purpose. See Municipality of Metro. Seattle v. O'Brien, 86 Wn.2d 339, 348-49, 544 P.2d 729 (1976); Swedish Hosp. v. Department of Labor Indus., 26 Wn.2d 819 832, 176 P.2d 429 (1947) [133 Wn.2d 118, STATE v. BROADAWAY (1997)]

It clear that the Public Nuisances ordinance is so seriously flawed with regard to single subject and subject in title constitutional provisions, that it cannot reasonably survive and should be declared invalid as a whole.

² See: RCW 59.18.310 and 59.18.312 under the Landlord Tenant Act for storage and disposal of tenants' property.

Representative Standing

Representative standing is required to examine certain constitutional violations raised relating to summary abatement, impairment of contracts, vested interest of Kitsap's businesses. These constitutional issues as well as others were presented in Young's briefing to the Mason Superior Court.

Our Supreme Court has criticized "unrealistically strict" considerations of standing, and it has noted that Washington is increasingly taking a broader, less restrictive view. Seattle Sch. 90 Wn.2d at 493.

Representative standing is justified and necessary to examine all perceived constitutional violations of Kitsap's Nuisance Ordinance³. Further Young obviously has a valid interest in the ordinances affect on the Kitsap's vehicle related business and storage facilities, as his ability to contract for storage or do repair work as affected by the Public Nuisances ordinance comes to bear directly on his collector activities in the form of economic considerations relating to supply of automotive services and space necessary for services and storage. [CP p. 243,244]

The basic test for standing is "whether the interest sought to be protected by the complainant is arguably within the zone of interest to be protected or regulated by the statute or constitutional guarantee in question." Seattle Sch. Dist. No. 1 of King County v. State, 90 Wn.2d 476, 493, 585 P.2d 71 (1978) (quoting Association of Data Processing Serv. Orgs., Inc. v. Camp, 397 U.S. 150, 153, 90 S. Ct. 827, 25 L. Ed. 2d 184 (1970)).

³ Young was informed by County Commissioner Botkin during one of the Nuisance Ordinance public hearings that the nuisance ordinance was being written specifically for him See: [Sub 14 attached dec CY p.4 item 15 & K sub54 p.30-23 for previous history of litigation between Young and Kitsap Code enforcement on a his residential property.

Representative standing on these issues serves both a large public interest and judicial economy. The issue of representative standing hinges on the importance of the “public issues” related or raised..

Historically, any expansion of county regulations applying to rural land use in Kitsap county is a “Hot Button” issue among landowners. Proposed legislation affecting Kitsap property rights typically causes public meetings to be heavily attended, draws media attention, and produces a proliferation of articles and editorials to the local newspapers. *[CP p.189]*

By consequence, any potential reduction in regulation, such as a constitutional challenge to the unpopular Nuisance Ordinance, is also an issue of great public interest and has commanded significant attention by the public. *[CP p.144]*

Due to Ordinance 261’s poor construction, and the general overbreadth woven therein, virtually every land owner in Kitsap county can conceivably have public nuisances subject to abatement, and be victimized in some fashion by one of the ordinance’s many unconstitutional provisions. *[CP 190]* It does not serve judicial economy for the courts to examine each of these constitutional issues individually as they arise from the trial courts.

Through untenable screening requirements *[KCC 9.56.020(17) & 9.56.020(10)(iii)(A)]* and subjective determination of what constitutes a nuisance⁴, every Kitsap landowner can conceivably be subjected to a Nuisance Ordinance abatement action. Whether that abatement action is summary or procedural is purely at the discretion of the enforcement officer, as there exists no administrative or

⁴ Anything that is offensive to the senses of any complainant is deemed a nuisance under KCC 9.56.020 (10) and is subject to abatement, including art.

procedural guidelines in this regard relating to the Nuisance Ordinance. [KCC 9.56.060(2)]

Additionally, once one of the Nuisance Ordinance's abatement processes are initiated, other serious constitutional violations arise, as detailed below.

On the forgoing basis, all citizens and businesses of Kitsap County are entitled to relief from Ordinance 261 and representative standing for the Young is necessary, and justified to prevent loss of property and other damages to Kitsap's citizens and businesses, and to minimize the resulting liability which will be shouldered by both local and state taxpayers.

Tax vs. Fee

Kitsap's Nuisance Ordinance violates provisions of Article XI Section 11 of the Washington State Constitution by establishing an illegal \$10 tax on each "junk vehicle." and labeling this \$10 tax an "Environmental Mitigation Fee."

The government's characterization of the charge is not dispositive in determining whether the charge is a fee or a tax [Covell v. Seattle, 127 Wn.2d 874]

Young was required by Kitsap's Public Nuisance ordinance procedures to choose between paying a \$10 "Environmental Mitigation fee" for storage of each vehicle on the subject property and bringing the issue of abatement of his alleged public nuisance before the Hearing Examiner. [CP 143] In doing so, the appellant clearly was subject to the ordinance's \$10 "fee". Rather than pay an illegal tax, Young chose a hearing on the merits of the matter before Kitsap's Hearing Examiner.

Having been subject to the \$10 "Environmental Mitigation" fee Young has personal standing to challenge the \$10 fee as an unlawful tax, and Young also has

personal standing argue preemption of this “fee” by RCW 46.08.010. which reserves the right to tax or fee vehicles to the state.

RCW 46.08.010 State preempts licensing field.

The provisions of this title relating to the certificate of ownership, certificate of license registration, vehicle license, vehicle license plates and vehicle operator's license shall be exclusive and no political subdivision of the state of Washington shall require or issue any licenses or certificates for the same or a similar purpose except as provided in *RCW 82.80.020, nor shall any city or town in this state impose a tax, license, or other fee upon vehicles operating exclusively between points outside of such city or town limits, and to points therein [1990 c 42 § 207; 1961 c 12 § Prior: 1937 c 188 § 75; RRS § 6312-75.]

***Reviser's note:** RCW 82.80.020 was repealed by 2003 c 1 § 5, (Initiative Measure No. 776, approved November 5, 2002).

Purpose -- Headings -- Severability -- Effective dates -- Application -- Implementation -- 1990 c 42: See notes following RCW 82.36.025

Regardless of whether the \$10 charge for storing a vehicle on private property is determined to be a fee or a tax, the state clearly preempts this \$10 charge as well as all other taxes and fees on motor vehicles through RCW 46.08.010. Specifically the state precludes its political subdivisions from establishing vehicle taxes or fees of any nature.

Under the Nuisance Ordinance Kitsap will incur costs removing old buildings, downed trees, discarded appliances, mattresses, furniture, and general garbage, dumped on both public and private lands.

3.6 Kitsap County is using a \$10 fee, charged only to those who store alleged “junk vehicles,” which is used to “clean up” violations associated with all aspects and all sections of the Nuisance Ordinance. No other landowner with any other type of “public nuisance” is subject to any such “fee.” [KCC 9.56 generally] Resultantly, any landowner who participates in the vehicle storage “Environmental Mitigation Agreement” is subjected to all “clean up costs” incurred by the county relating to the

Nuisance Ordinance, even though he is not the subject of the clean up or the source of the abatement action.

This court distinguished a "fee" from a "tax" in *HILLIS HOMES, INC. v. SNOHOMISH CY.*, 97 Wn.2d 804, 650 P.2d 193 (1982). In *HILLIS*, the counties involved passed ordinances which imposed "fees" on new residential developments as a condition of plat approval. These fees were to be used to pay for the additional services necessitated by the new developments. Significantly, the counties acted pursuant only to the general grant of police power in Const. art. 11, 11; the counties did NOT have any EXPRESS statutory or constitutional authority to impose the fees.

In distinguishing between a "fee" and a "tax", we stated that if charges are intended to raise money, they are actually taxes. Conversely, if the charges are primarily tools of regulation, they are not taxes. Finding that the ordinances in *HILLIS* clearly provided that the fees be applied to offset costs of specific services, and that the ordinances MADE NO PROVISION for regulation, this court held that the fees were actually taxes. Because counties cannot impose taxes based only on a general constitutional grant of police power and no express authority existed to tax, we held the tax invalid.

[*Teter vs. Clark County* 104 Wn.2d 227, 704 P.2d 1171 (1985)]

Ordinance 261 establishes a \$10 tax on each "junk vehicle," stored by the landowner under the Environmental Mitigation Agreement [KCC 9.56.070]

Local governments may tax only pursuant to specific legislation or constitutional authority. [*Margola Assoc. v. Seattle*, 121 Wn.2d at 634]

The Nuisance Ordinance requires that a "one-time fee of \$10 per vehicle" must be paid to store "up to six junk motor vehicles". The ordinance further states that the proceeds from this "fee" shall be used to "*assist in the clean up costs associated with this chapter*" (emphasis added) [KCC 9.56.070].

Clearly the "Chapter," referenced in KCC 9.56.070, slated to benefit from the receipt of the "one-time fee of \$10 per vehicle" is "Chapter 9.56 - Public Nuisances", in its entirety. It is not in any fashion indicated that the moneys collected from the \$10

fee are applied exclusively to any of this ordinance's subsections rather than the whole of the act.

Because these moneys are placed in a segregated , special purpose fund which can be used only for a particular purpose these moneys are fees, not taxes. [*Teter v. Clark County*, 104 Wn.2d at 228-29]

Kitsap does not indicate in KCC 9.56 or anywhere else, that the funds from the \$10 "fee" are placed in a separate account and thus it must be that the collected money is deposited into a general fund. Therefor, as in described in *Teter* these fees are not fees, but unlawful taxes.

The test for determining whether a charge imposed by a government entity is a tax or regulatory fee is found in *Hillis Homes v. Public Util. Dist. 1*, 105 Wn.2d 288,300-301:

Whether a charge imposed by a governmental entity is a tax or a regulatory fee depends upon three factors. 1) "whether the primary purpose of the county is to accomplish the desired public benefits which cost money, or whether the primary purpose of the charge is to raise revenue." 2) "whether the money collected is allocated only to the authorized regulatory purpose." 3) "whether there is a direct relationship between the fee charged and the service rendered by those who pay the fee." [*Hillis Homes v. Public Util. Dist. 1*, 105 Wn.2d 288,300-301]

Under the first prong of the tax vs. fee test, the county states the proceeds from this vehicle "fee" shall be used to "*assist in the clean up costs associated with this chapter.*" Realistically, county clean-up of white goods and mattresses on public lands will incur the lions share of non recoverable clean up costs. Provisions in the Public Nuisance Ordinance provide for recovery of clean up costs on private lands through a lien process against landowners. These same lien provisions apply to those landowners who pay the environmental mitigation fees for vehicle storage.

No statutory language or county guidelines account for deducting funds paid under the auspices of environmental mitigation fees from clean-up costs that are incurred on private lands. The “Environmental Mitigation” fee mechanism does not accomplish the desired public benefit which costs money. Clearly the \$10 fees paid by the landowners storing vehicles *will not* be expended on their behalf. Therefore, under the first prong of the tax vs. fee test, the \$10 fee is a tax.

Under the second prong of the tax vs. fee test, funds collected must be allocated only to the authorized regulatory purpose. However, there is no regulatory purpose stated in the ordinance. Rather, the ordinance states only that “clean up costs” are the end destination of the environmental mitigation funds, and it is not likely that any clean up cost will be associated with an “Environmental Mitigation Agreement” . Therefore, under the second prong of the tax vs. fee test, the \$10 fee is a tax.

Under the third prong of the tax vs. fee test, there must be a direct relationship between the fee charged and the service rendered by those who pay the fee or else the fee is a tax. Again, as clearly demonstrated above, there is no direct relationship between those landowners paying the \$10 “Environmental Mitigation” fee and a clean-up mechanism that accounts for spending that \$10 on the fee payer’s behalf. Therefore, once again, under the third prong of the tax vs. fee test, the \$10 fee is clearly a tax.

In fact those that pay the \$10 “fee” and enter into an “Environmental Mitigation Agreement” are, by design, the least likely to be the subject of the “clean up” costs associated with Ordinance 261. The \$10 fee imposed by Kitsap is essence an excise or property tax.

Their right to have and hold property cannot be the subject of an excise tax. An absolute and avoidable demand against property or the ownership of property is a property tax. [*Covell v. Seattle*, 127 Wn.2d 874]

Any regulatory fee that does not exclusively benefit those that pay the fee is actually a tax and not a fee.

In Ordinance 261 Kitsap's \$10 "Environmental Mitigation Fee" is labeled a fee, but clearly is a fee in no other fashion. In fact, it is a tax, and it is unconstitutional for Kitsap County to levy any tax.

A municipal corporation's general police power as conferred by Const. art. XI, section 11 does not include the power to tax. [*Samis Land Co. v. Soap Lake*, 143 Wn.2d 798]

The Nuisance Ordinance's "Environmental Mitigation Agreement" constitutes an unlawful tax on all those who store vehicles, be they collector cars, parts cars, or "junk cars".

Preemption of Public Nuisances Ordinance

Kitsap's Nuisance Ordinance conflicts with pre-existing state law.

The record demonstrates that Young is a long time car collector as defined in RCW 46.04.125, specializing in rare and collectable Chrysler automobiles, and in part, uses his Big Valley property in pursuit of this hobby. [*CP p. 142, 143*]

The record also demonstrates that under the Nuisance Ordinance Kitsap county views Young's hobby activities of collecting and restoring rare and valuable Chrysler automobiles as a public nuisance subject to abatement.

However, the Young's activities are protected under state statute and the Kitsap's Nuisance ordinance conflicts with this protection.

As automotive hobbyists are prolific in this state and accordingly provide significant economic stimulus, the State legislature has sought to protect the automotive hobbyist from the recent evils creeping of socialism and runaway bureaucracy by creating a statute identifying the importance of the automotive collector industry in the State's well being. Furthermore, the appropriate place to locate a statute that defines the nature and importance automobile collectors, their vehicles, and related hobby activities is clearly the definition section of the chapter on motor vehicles where we find RCW 45.04.125 Collector.

In 1996 the state legislature enacted three statutes which clearly identify automotive collectors and mandates that collecting and restoring automobiles is to be a recognized as a "most important" activity in Washington, as described at RCW 46.04.125 Collector, RCW 46.04.3815 Parts Car, RCW 46.12.430 Parts Cars and in the extraordinary finding following 46.04.125:

RCW 46.04.125 Collector.

"Collector" means the owner of one or more vehicles described in RCW 46.16.305(1) who collects, purchases, acquires, trades, or disposes of the vehicle or parts of it, for his or her personal use, in order to preserve, restore, and maintain the vehicle for hobby or historical purposes [1996 c 225 § 2.]

Finding -- 1996 c 225: "The legislature finds and declares that constructive leisure pursuits by Washington citizens is most important. This act is intended to encourage responsible participation in the hobby of collecting, preserving, restoring, and maintaining motor vehicles of historic and special interest, which hobby contributes to the enjoyment of the citizens and the preservation of Washington's automotive memorabilia." [1996 c 225 § 1.]

RCW 46.04.3815 Parts car.

"Parts car" means a motor vehicle that is owned by a collector to furnish parts for restoration or maintenance of a vehicle described in RCW 46.16.305(1), thus enabling a collector to preserve, restore, and maintain such a vehicle [1996 c 225 § 3.]

Notes: Finding -- 1996 c 225: See note following RCW 46.04.125

46.12.430 Parts Cars. The owner of a parts car must possess proof of ownership for each such vehicle. [1996 c225 § 7.]

Notes: Finding - 1996 c225: see note following RCW 46.04.125

RCW 7.48.160 - Authorized act not a nuisance.

Nothing which is done or maintained under the express authority of a statute, can be deemed a nuisance.

The foregoing statutes demonstrate that collector activities, cars, and their parts, are not subject classification as a nuisance.

RCWs 46.04.125, 46.04.3815, and 46.12.430, together with the extraordinary finding following 46.04.125 clearly express a legislative intent that goes well beyond a mere definition for a special license plate, and in fact is intended as a legislative edict of policy or regard to automobile collectors.

Kitsap has repeatedly attempted to minimize RCWs 46.04.125, 46.04.3815, and 46.12.430 as licensing statutes, but Kitsap's analysis is misplaced. *[RP 6/27/05 p.21]* The fact of the matter is that the state has designated definitions from section RCW 46.04 to apply to the entire RCW Chapter 46 Motor Vehicles, and these three collector statutes, collectively with their extraordinary finding, show great import, which has little to do with licensing, and much more to do with supremacy, meanwhile establishing RCW 64.04.125 and related statutes as an authorizing act.

By way of the extraordinary finding language following RCW 46.04.125 and RCW 7.48.160 (Authorized Act is Not a Nuisance), RCW 64.04.125 (Collector) and related statutes have controlling legal authority over Kitsap's Ordinance 261. This preempts definition by the ordinance of collector activities as public nuisance, and demonstrates the petitioner's automotive collector activities are protected and lawful under a superior legal authority.

RCW 7.48.130 -Public nuisance defined.

A public nuisance is one which affects equally the rights of an entire community or neighborhood, although the extent of the damage may be unequal.

It has yet to be demonstrated that automotive collector activity affects equally the rights of the entire neighborhood when complainants are far outnumbered by hobbyists as demonstrated by the attendance at the public hearing for Kitsap's Public Nuisances ordinance. *[CP p 144]*

Ordinance is Unduly Oppressive and Overly Burdensome

Kitsap's Nuisance Ordinance comes to bear unevenly on different "classes" of land owners and violates the fundamental right to privacy. The ordinance also declares storage of all types of vehicles beyond a maximum of 10 per parcel to be an invalid land use and a public nuisance, without the least regard to the parcel size, leading to rash of pre-existing lawful non-conforming land use through vested property rights. *[KCC 9.56.020(19) & 9.56.020(10)(b)(iv)]*

At KCC 9.56.070 and KCC (10)(b)(iii)(A) parameters and requirements for "screened" outdoor storage of "junk vehicles" are established. Here Ordinance 261 states that vehicles must be completely screened per KCC 9.56.020(17)⁵, or they must be more than 250 feet from all property lines.

"Screened" is defined as "not visible from any portion or elevation of any neighboring or adjacent public or private property, easement or right of way" *[KCC 9.56.020 (17)]*. All low elevation property owners with overlooking adjacent properties, such as the Young's property, are clearly oppressed in their ability to

⁵KCC 9.56.020 (17) "Screened" means not visible from any portion or elevation of any neighboring property, easement, or right of way.

comply with the ordinance, and are unduly burdened when attempting to comply. To comply with the ordinance's screening requirements, those landowners with low lying properties, such as the Young, will incur much greater costs by having to build higher fences and erect covered storage, while those on the hilltop will not.

Under the equal protection clause, persons similarly situated with respect to the law must receive similar treatment. [*State v. Blilie*, 132 Wn.2d 484, 493]

The Nuisance Ordinance's criteria for "Screened" storage can not realistically be met on a low lying property, and is therefor not reasonable. It will always be possible to look down from a high property into an adjoining low property such that screening is not possible. [*KCC 9.56.020(17)*] Relating such limiting criteria lawful storage of vehicles constitutes an equal protection violation under the Washington's State Constitution. Young has standing in this regard as the 3rd floor of the neighboring house has a view into his property over a row of 25 foot fir trees which should reasonably constitute screening, but does not, in the opinion of Kitsap superior court.

Considerations of new or existing construction artificially effecting elevation and providing "visible" entry into the screened area of an adjacent property are not considered or addressed in this ordinance, yet such artificial effects will most certainly be utilized by "department employees" to justify abatement.

All property owners with irregular shaped properties, such as the Young's property, are at a clear disadvantage over those with regular shaped, or square lot, of equal size. [*KCC 9.56.020(10)(b)(iii)(A)(2)*] Implementation of the ordinance's screening requirements disturbs the right of some landowners to be secure in their private affairs.

To determine whether an ordinance violates due process "1) there must be a public problem or 'evil' 2) the regulation must tend to solve this problem, and 3) the

regulation must not be unduly oppressive upon the persons regulated.” [*Presbytery of Seattle v. King County*, 114 Wn.2d 320, 330-31]

Property owners with any kind of an easement, or right of way, through their property are also at a significant disadvantage when compared with those that are without easements. [*KCC 9.56.020(17)*] The ordinance describes an easement as another point of “visible” entry into the property, again encumbering the landowner’s ability to comply with Ordinance 261 “screening” requirements [*KCC 9.56.020(17)*]

We consider the nature of the harm sought to be avoided, the availability of less drastic measures and the economic loss suffered by the property owner. [*Presbytery of Seattle v. King County*, 114 Wn.2d at 331]

Kitsap’s expanded criteria for “screened” storage, as defined and determined in the Nuisance Ordinance, is neither reasonable, tenable, nor even handed, thus violates the equal protection provisions of the state’s constitution and is an unreasonable exercise of police power.

Young, as well as all other citizens, and most all businesses in Washington State, are prohibited from selling more than four vehicles by Washington State law. RCW 46.70.021 (3)(a) makes it a misdemeanor to sell more than four vehicles in a 12 month period, subject to a \$5000 fine for each vehicle after the first permitted four.

When Kitsap enacted the Nuisance Ordinance, and within, newly defined a “Vehicle Lot” as any one parcel with more than 10 vehicles on it, and then declared a “Vehicle Lot” to be a public nuisance, Kitsap immediately forced many businesses, the car collector community, large families, rural farms, and other hobbyists into either a position of criminality or violation of the Nuisance Ordinance.

As owners of vehicles of “value” are forced to comply with the Nuisance Ordinance’s maximum 10 vehicle per parcel mandate, Kitsap County willfully forces

the sale of vehicles which, as in the instant case, too valuable or historic to crush. [*CP p 143*] When selling the first four vehicles of “value” does not bring the owners into compliance with the Nuisance Ordinance, the owners are then forced by Kitsap to violate RCW 46.70.021 (3)(a) in order to comply with the ordinance vehicle regulation provisions.

No provision exists in Kitsap County law to provide relief for the foregoing conflict, nor does this ordinance address the vested rights of businesses to have more than 10 vehicles on a single tax parcel⁶. Further, no guidelines exist for determining if the Nuisance Ordinance’s extensive vehicle regulation applies, or does not apply, to tractors, boats, trailers, RV’s, ATV’s, or other “vehicles” not described in Ordinance 261 at KCC 9.56.20(18).

Under the “Nuisance Ordinance” there exists no consideration for grandfathering previously existing tax parcels with more than 10 vehicles, nor is there any mechanism described for accounting parcels to which grandfathering may apply.

As with the appellant in the instant case, many vehicles harbored by collectors have historic value and cannot be replaced. Most collector project cars and parts cars have high monetary value. This value will not to be recognized by the county in an abatement action, until such time as an action for damages is brought by the owner against the county.

Draining of brake fluid from a vehicle is one of the conditions of the Environmental Mitigation Agreement. [*KCC 9.56.070(1)*] Should such a vehicle incidentally be moved or have occasion to begin to roll, little or nothing could be done

⁶ KCC 9.56.020 (19) “Vehicle Lot” means a single tax parcel where more that 10 vehicles are regularly stored without approved land use. (maximum of 10 includes motorcycles, trailers, ATV’s, RV’s, tractors, and boats)

to halt it, even by quick responding persons nearby. Quite simply, as there would be no fluid, there would be no brakes and therefore no way to stop the vehicle.

Unquestionably, this foolhardy practice of draining the brake fluid from a vehicle creates an extreme safety hazard that by far exceeds any evil that could come from a vehicle be stored in its normal state. Disabling a vehicle's brake system constitutes a irresponsible and unreasonable use of police power under the ordinance's Environmental Mitigation Agreement, an agreement to which Young and most Kitsap car collectors refuse to be a party.

Relating to the storage of vehicles, the specific RCW 7.48.150 c nature of the harm that is sought to be avoided by Ordinance 261 - "Public Nuisances" is not detailed or justified, and as such the ordinance is unduly oppressive and a further unreasonable exercise of police power.

Due Process

Kitsap's Nuisance Ordinance violates Washington State Constitution by establishing summary abatement process at KCC 9.56.060, which violates the citizens right to procedural due process.

Procedural due process constrains government decision making that deprives individuals of liberty or property interests within the meaning of the due process clause. [*Mathews v. Eldridge*, 96 S.Ct 893]

This ordinance, under KCC 9.56.020 (7) "Emergency" and KCC 9.56.060 (1(c)) and (2) "Summary Abatement" provisions, enables the county to remove property subjectively deemed a "nuisance" by an employee of the "department" without any due

process afforded the property owner. However, an “emergency” need not exist for “Summary Abatement” to take place.

KCC 9.56.060 Abatement by the county

The County may abate a condition which constitutes a nuisance under this chapter when:
(c) The condition is subject to summary abatement as provided for in KCC 9.56.060(2).

KCC 9.56.060(2) Summary Abatement. Whenever *any nuisance* (emphasis added) causes a condition, the continued existence of which constitutes an immediate threat to the public health, safety or welfare, the county may summarily and *without notice* (emphasis added) abate the condition.

The qualifying condition for summary abatement of a threat to “public health, safety, and welfare” is the same qualifier listed in the preamble of Ordinance 261 to justify enactment of the entire ordinance, and justify any public nuisance action.

Ordinance 261 - “Public Nuisances” preamble

WHEREAS, the public health, safety, and welfare require that the County establish procedures for the correction or removal of such conditions;

Clearly, the only difference between Summary Abatement, and other Abatement procedures is the arbitrary discretion of the “department employee” as to whether the property owner will receive notice and due process. If summary abatement is selected, procedural due process is violated. No other criteria or guidelines exist to ensure the protection of the property owner from this abuse of police power. In other words, as Ordinance 261 is written, summary abatement can, and likely will be used for abatement of any public nuisance, including an action against Young.

Property subject to summary abatement includes privately owned vehicles on privately owned land, and here the ordinance *conflicts* with existing state statutes including RCW 46.55 relating to the towing or impounding of vehicles from private property.

Under the Nuisance Ordinance, prior notification, either to the private landowner owner or legal owner of the property being removed and destroyed, is not made, nor required to be made, prior to summary abatement. Property in this context means, but is not limited to; cars, trucks, boats, trailers, motorcycles, tractors, antiques of all sorts, equipment, building materials, construction supplies, historical artifacts, and artwork, including sculptures and carvings⁷. Property subject to abatement in the context of this ordinance can be any “act” or “thing” that “anyone” finds offensive.

There is no hearing process identified under the ordinance’s “Summary Abatement” provisions that would preclude accidental destruction of property by mistake, or error in judgment, by code enforcement personnel, or other “department” employee.

Procedural due process is not served by the Nuisance Ordinance’s draconian regulatory framework where notification of loss of property comes after abatement. The loss of property through the Nuisance Ordinance’s summary abatement process is clearly an unconstitutional taking and an abuse of police power.

Kitsap’s Nuisance Ordinance violates Washington State Constitution by attempting to regulate and inhibit the ownership and storage of private vehicles on the pretense of environmental concerns, which violates the citizens right to substantive due process.

To determine whether an ordinance violates due process “1) there must be a public problem or ‘evil’ 2) the regulation must tend to solve this problem, and 3) the regulation must not be unduly oppressive upon the persons regulated.” [*Presbytery of Seattle v. King County*, 114 Wn.2d 320, 330-31]

⁷ In this aspect Ordinance 261 encroaches on First Amendment rights. Outdoor sculpture, which may seem unreasonably offensive to the senses of some, could conceivably result in a complaint and abatement. It is also a forgone conclusion that collectable automobiles are considered some of the finer works of art produced by modern culture, and arguably subject to first amendment protections.

Within or without Ordinance 261 there exists no reasoning to support the ordinance's purely implied pretense that stored vehicles are an environmental hazard, and therefore necessarily subject to regulation for the health, safety and welfare of the community. In fact, a substantial argument exists that the "in use" vehicles tend to pollute the environment much more, with escaping gas fumes, oil, and coolant, caused by the constant circulation of fluids against worn seals, while the vehicle is in operation and shortly after shut down.

Meanwhile, a stored vehicle does not work fluids against the seals, as each fluid remains undisturbed in its reservoir, while the vehicle is not running. It is therefore not the case that a stored or parked vehicle represents such an environmental evil, nor warrant such a costly and drastic invasion of private property and affairs, couched on an implied pretense of environment hazard without any substantiation.

Validity is to be determined not alone by caption and phraseology of the ordinance but also by its practical operation and effect.

[McQuillin Municipal Corporations 20.09]

In fact, if the purpose is to reduce the amount of oils and fluids that are going into the ground from automobiles, the county needs to turn its attention to those vehicles that are in use and leaking pollutants on a daily basis. Ordinance 261's Environment Mitigation Agreement makes little to no headway in reducing automotive pollution by attempting to regulate the storage of collector cars, like Young's.

Like the appellant, those subject to the Environment Mitigation Agreement must pay heavily and unevenly, to meet the vehicle screening requirements, and the same holds for storage of other potential public nuisance items. Economic harm of building fences and covered storage to meet screening requirement for low lying properties such as Young's, can be extreme and unduly burdensome, if not impossible to achieve.

It is therefor the case that Young’s substantive due process rights are violated by the screening requirements for stored vehicle and the mandated participation in the Environmental Mitigation Agreement.

Vagueness

Kitsap’s Public Nuisances ordinance is unconstitutionally vague and lack s sufficient procedural and administrative guidelines to safeguard the public from constitutional violations

Kitsap’s Public Nuisances ordinance is void for vagueness in that at 9.56.070 of the ordinance it is stated that the landowner “may” enter into an “Environmental Mitigation Agreement,” while at 9.56.020 (10) b(iii) (A) of this same ordinance, it is stated that the landowner “must” enter into an “Environmental Mitigation Agreement”

Kitsap’s Nuisance Ordinance is void for vagueness in that at KCC 9.56.020 (10) (a) the ordinance states that any “act,” which is “unreasonably offensive” to any of the senses, shall be considered a nuisance and subject to abatement. In this case “act” and “unreasonably offensive” are without further definition, and open to unpredictable and subjective interpretation.

Also at KCC 9.56.020 (10) (a), the ordinance states that any “act” which is “significantly affects” the “comfort” of another shall be considered a nuisance and subject to abatement. Here “significantly affects” and “comfort” are without further definition, also open to unpredictable and subjective interpretation, and literally opens the door to anything being declared a nuisance.

At 9.56.020 (9), Ordinance 261 is vague in its description of vehicles or parts that are stored “entirely” within a building in a “lawful manner.” The term “lawful manner” is without meaning, and the landowner is required to guess about the windows, doors, and carports allowing “visible” entry from the street or adjoining property.

The Nuisance Ordinance does not differentiate between parked, stored, running, and occasional use vehicles. Nor does it identify, or reasonably justify, the “environmental” concerns relating to each that would rationally, and reasonably, produce differing classification and treatment for each.

Based on the foregoing, Ordinance 261 - “Public Nuisances” is void for vagueness, and is an unreasonable exercise of police power.

Vested Rights

State deprivation of protected interests of life, liberty, or property is unconstitutional, unless accompanied by adequate safeguards. Kitsap’s Public Nuisances ordinance violates by the provisions of Article I Section 3 Washington State Constitution in that the ordinance does not contain sufficient administrative guidelines to protect the citizens from governmental harm.

No place in Kitsap County’s statutes or administration does there exist sufficient guidelines to accurately determine value, collectibility, or condition of; vehicles, motorcycles, boats, antiques, and other property subject to classification, regulation, or abatement under the Nuisance Ordinance’s definitions.

Without administrative and procedural guidelines, the Public Nuisances ordinance cannot operate harmoniously with the pre-existing general laws, including RCW 46.04.125, and interferes with a variety of landowner vested rights.

Nonconforming uses are vested property rights which are protected. *Missouri Rock, Inc. v. Winholtz*, 614 S.W.2d 734, 739 (Mo. Ct. App. 1981); *Martin v. Beehan*, 689 S.W.2d 29, 31 (Ky. Ct. App. 1985). Protected property rights cannot be lost or voided easily. [VAN SANT v. EVERETT 69 Wn. App. 641, 849 P.2d 1276 (1993)]

Like most rural properties in Kitsap County, the Young's farm has continuously had numerous vehicles of all sorts and equipment stored on the open land since before 1960. [CP p. 186] This constitutes a valid lawful non-conforming use for the subject property like it does for most of the acreage in Kitsap county, regardless of how the land use laws change over time. Without a detailed amortization period or grandfathering provisions, ordinances grossly affecting land use such as the Public Nuisances ordinance does, should be held unconstitutional.

Kitsap's Nuisance Ordinance interferes with vested rights by declaring 10 or more vehicles on any one parcel of land in Kitsap an unlawful "vehicle lot" without permitted land use.

Unless specifically zoned as a "vehicle lot," any private or commercial parcel is subject to Nuisance Ordinance abatement if found to contain 10 or more vehicles.

Private land owners with large families and many driver/owners, or simply a landowner with collection of 10 or more vehicles, which could include motorcycles, trailers, ATVs and tractors, are unreasonably burdened with constructing indoor storage for vehicles to comply with this ordinance..

When a law or ordinance is assailed upon the ground that it offends against some other paramount law, the question ordinarily not limited to what is being done, but goes to the extent of what may be done under the law. According, the constitutionality of an ordinance is to be determined by its operative effect and not by its enforcement.

[McQuillin Municipal Corporations 20.09]

The right to own property, including the ownership and keeping of vehicles, is a vested right that cannot limited by the overbreadth of the Nuisance Ordinance.

The Nuisance Ordinance excludes only two specific types of businesses from the strict regulations of storing vehicles, and the abatement of “Junk Motor Vehicles”; a “licensed dismantler” or “licensed vehicle dealer,” and only then if they are properly fenced.⁸

As nearly all vehicle related businesses will have vehicles that meet the definition of “Junk Motor Vehicles,” the ordinance’s narrow exclusion from the regulation of “Junk Motor Vehicles” clearly leaves every car dealer⁹, automotive repair facility, storage facility, towing yard, auction lot, bodyshop, motorcycle shop, and boat yard, operating in Kitsap County, in violation of the Nuisance Ordinance, and subject to abatement for storage of defined “Junk Motor Vehicles.”¹⁰

⁸ KCC 9.56.020 (9) “Junk Motor Vehicle” mandates that even licensed vehicle dealers must be unduly burdened with fencing their location in accordance with RCW 46.80.130; which in part states “All premises containing vehicles or parts thereof shall be enclosed by a wall or fence of such height as to obscure the nature of the business carried on therein.”

⁹ No car dealer in Kitsap County meets the fencing requirements of RCW 46.80.130, nor is it reasonable to sustain laws such as the Nuisance Ordinance which maintain such an expectation .

¹⁰ The strict language of the Nuisance Ordinance requires that most, if not all, vehicle related businesses enter into an Environmental Mitigation Agreement for each vehicle fitting 9.56.020(9) “Junk Motor Vehicle” (a maximum of 6 allowed by the Nuisance Ordinance) providing said vehicles are properly screened as per 9.56.020 (10)(b)(iii)(A), and the threshold of 10 vehicles is not breached, a breach which causes an additional abatement action for a “vehicle lot without approved land use.” “Vehicle Lot” is not to be found in the land use zoning tables, while “approved land use” remains a vague and subjectively defined concept in Kitsap.

Uniform application of the Nuisance Ordinance against all Kitsap landowners violates these non-excluded business owners' vested right to freely practice their businesses, and burdens them with wholly unreasonable requirements which are clearly and abuse of police power.

Impairment of Contracts.

Kitsap's Nuisance Ordinance violates the provisions of Article I Section 23 of Washington State Constitution by declaring an unlawful condition where Kitsap's commercial storage facilities have lawfully contracted to provide storage for vehicles, trailers, boats, and any other manner of material that outdoor storage is provided for, yet such storage is defined as a nuisance under Ordinance 261 and subject to abatement.

The strict language of Ordinance 261 clearly does not limit screening requirements or preclude abatement action by Kitsap against commercial storage facilities that presently and habitually provide outdoor storage under contract for those items defined as a nuisance under KCC 9.56.020.

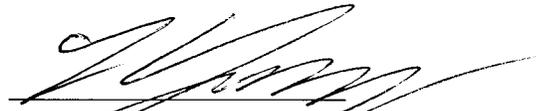
Although meeting screening requirements would only unnecessarily burden the commercial storage facility, an abatement action or threat of abatement action would result in a breach of contract by the facility, and thus Ordinance 261 violates Article I Section 23 of the State Constitution.

CONCLUSION

The appellant, Colin Young, requests that the court declare Ordinance 261 [KCC chapter 9.56] invalid as a whole and that Kitsap county and the Department of Community Development be permanently enjoined from utilizing the ordinance without delay.

As the appellant, Colin Young, underwent reasonable and necessary expenses in this action, attorney's fees are requested

DATED this 22nd day of June, 2006



Colin F. Young - Appellant pro se
1785 Spirit Ridge Dr.
Silverdale WA, 98383 360-697-4966

Respondent's Attorney
Philip Bacus Dep Dist Attn.
Kitsap County Pros. Office - Civil Div.
614 Division St.
Port Orchard Washington

FILED
COURT OF APPEALS

06 JUN 22 PM 4:48

STATE OF WASHINGTON

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

COLIN F. YOUNG
Appellant

Court of Appeals #34050-0-II

v.

KITSAP COUNTY, a
municipal corporation in
the State of Washington,
Respondent

CERTIFICATE OF SERVICE

I, Colin F. Young, certify and declares under penalty of perjury of the laws of the State of Washington the following:

1) That I a resident of Kitsap County in the State of Washington, over the age of 21 years, and competent to be a witness herein.

2) That on the 22th of June 2006, I personally served the Kitsap County Prosecutor, at 601 Division St., Port Orchard, WA the following document:

a) APPELLANT'S BRIEF (2nd amended)

DATED at Silverdale, Washington, this 22 day of June, 2006


COLIN F. YOUNG, Appellant pro se
1785 Spirit Ridge Dr.
Silverdale WA 98383 360-697-4966