

NO. 34050-0-II

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

COLIN F. YOUNG,

Petitioner,

vs.

KITSAP COUNTY,

Respondent.

BRIEF OF RESPONDENT

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I. COUNTER-STATEMENT OF THE ISSUES

- A. Whether the Petitioner can collaterally attack provisions of the ordinance that have not been applied against him and were not at issue before the Hearing Examiner?
- B. Whether the Petitioner properly raises constitutional challenges to an ordinance without providing any reasoned argument to support those challenges?
- C. Whether the Petitioner proved, beyond a reasonable doubt, that:
 - i. The Nuisance Ordinance violates the single subject or subject in title requirements of the Washington State Constitution?
 - ii. The Nuisance Ordinance's \$10 fee imposed on junk vehicles is a tax?
 - iii. The Nuisance Ordinance violates equal protection?
 - iv. The Nuisance Ordinance violates the requirements of substantive due process?
 - v. The Nuisance Ordinance violates the requirements of procedural due process?
 - vi. The Nuisance Ordinance is pre-empted by state law or is not a proper exercise of police powers?
 - vii. The Nuisance Ordinance is unconstitutionally vague?
 - viii. The Nuisance Ordinance is unconstitutionally overbroad?
 - ix. The Nuisance Ordinance interferes with any vested rights he possesses?
 - x. The Nuisance Ordinance unconstitutionally interferes with a contract?

II. COUNTER-STATEMENT OF THE FACTS

The Petitioner substantially failed to set forth the substantive facts underlying this case despite the fact that it is in appeal an administrative decision. Respondent believes that the history of this case is of paramount importance as Petitioner's arguments ignore that the activities occurring on his property have long be found to be illegal as well as the issues that are relevant to this appeal. Indeed, in ignoring the factual history, the Petitioner attempts to appeal actions that were never taken by the County. Therefore, the factually history is relevant to this appeal.

The Petitioner has caused nuisance conditions to exist on the property at issue in this case since at least 1996 when his mother, Lorna Young, owned the property. On April 17, 1996, Mark Grimm, the then Kitsap County Code Enforcement Administrator, sent Ms Young an "Order to Correct Violation" letter advising her, as the current owner of the property at issue in this case, the "Big Valley" property, that numerous damaged, inoperable or obsolete vehicles were being stored on-site in violation of the Kitsap County Code. CP 260. Mr. Grimm sent a second letter on May 16, 1996, correcting the Kitsap County Code section cited for the violation. CP 261. The Petitioner responded to these letters on behalf of his mother stating that he and his brother were working "to prepare to remove" the vehicles. CP 262-263.

Citation #970024314 was issued on December 18, 1997, to Lorna Young for operating a business and storing damaged, inoperable, obsolete vehicles on the Big Valley property. CP 264. In April 1998, Ms. Young was issued citation #980024352 for the continued storage of damaged, inoperable or obsolete vehicles on the Big Valley property. CP 265. On January 24, 1999, the Kitsap County District Court found both the 1997 and 1998 citations committed. CP 266-276. In its decision, the District Court found that Ms. Young allowed her son, the Petitioner, to use the property to store the vehicles that were the basis of the citation. CP 266-276. Ms. Young's subsequent appeals to the Kitsap County Superior Court, the Court of Appeals and the Supreme Court were denied. CP 279-280, 281-284, 285-287.

Ms. Young was issued additional citations in 1999 for the continued presence of damaged, inoperable or obsolete vehicles on the Big Valley property. Citation No. 990024447 was issued on April 9, 1999, for the storage of damaged, inoperable or obsolete vehicles. CP 288. Citation No. 980044930 was issued on May 13, 1999, for the continued storage of damaged, inoperable or obsolete vehicles. CP 289. Also on May 13, 1999, citation No. 990044931 was issued for the storage of refuse in a creek buffer. CP 290. On August 18, 1999, the Petitioner filed a motion to intervene and declared that the property on Big Valley Road, and the

vehicles stored on it, were his responsibility. CP 291-295. This Motion was heard and rejected by the District Court on November 4, 1999. CP 296-304. On December 2, 1999, an agreed order was entered in the District Court whereby Ms. Young admitted that all three infractions were committed. CP 305-306. As part of the Agreed Order, all fines were suspended pending the property being cleared. On February 11, 2000, a Stipulated Judgment was entered in the District Court whereby Ms. Young admitted that she did not comply with the December 2, 1999 order and the Court imposed the full fines. CP 307. Ms. Young's subsequent appeals to the Kitsap County Superior Court, the Washington State Court of Appeals, and the Washington State Supreme Court were rejected. CP 308-309, 310-315, 316-318.

On February 1, 2000, the Petitioner purchased the Big Valley property via a Real Estate Contract. CP 319-320. On July 7, 2000, the Petitioner, was issued citation #0045059 for the storage of vehicles on the Big Valley Property, as an accessory use without a primary residence having first been legally established. CP 321. On September 6, 2001, the District Court found the infraction was committed. CP 322-328. The Petitioner's subsequent appeals to the Kitsap County Superior Court and the Washington State Court of Appeals were denied. CP 329-336, 337-340.

On December 11, 2003, Eric Baker, the Code Enforcement Supervisor at the time, sent the Petitioner a request to enter into a Voluntary Correction Agreement pursuant to Section 9.56 of the Kitsap County Code. (hereafter "Nuisance Ordinance"). CP 342. On January 13, 2004, the Petitioner replied to Mr. Baker's request in an e-mail stating that the County did not follow procedure and that he was not properly notified of the violation. CP 343. On April 21, 2004, Stephen Mount, Kitsap County Code Enforcement Officer, posted the Big Valley Property with a Notice of Abatement of Public Nuisance. CP 344-345. On that day, Mr. Mount took pictures of the condition of the property. CP 346-356. Also on that day, the Notice of Abatement was mailed to the Petitioner via regular and certified mail.

An Abatement hearing was scheduled for July 22, 2004. On July 14, 2004, the County filed its Staff Report recommending that the Hearing Examiner find that the conditions on the Petitioner's property constituted a nuisance and allow the abatement of said nuisance. CP 179-184. On July 21, 2004, the Petitioner provided his response to the Staff Report. CP 185-207.

On September 2, 2004, the Hearing Examiner reissued his decision, previously issued on August 26, 2004, finding that Nuisance Conditions existed on the Petitioner's property. CP 208-220. The only

change to the opinion was the inclusion of language regarding the appeal of the decision. CP 208, 220. Specifically, the Hearing Examiner held that “Colin Young has created a vehicle storage lot by having more than ten vehicles stored on the site and has accumulated junk vehicles and vehicle parts which are unscreened and in plain view. CP 214, 216, 219. As Lorna Young maintains a possessory interest in the property the decision was also issued against her. CP 217, 219.

The Petitioner subsequently appealed, pursuant to the Land Use Petition Act, the decision of the Hearing Examiner to the Mason County Superior Court. The Mason County Superior Court affirmed the decision of the Hearing Examiner. CP 12-15.

III. SUMMARY OF ARGUMENT

It appears that Petitioners appeal of the decision at issue in this case is based solely on constitutional challenges to the Kitsap County Nuisance Ordinance. This claims fail for several reasons. First, a majority of the Petitioner’s constitutional arguments are based upon regulations that are not at issue in this case and that were not used against the Petitioner.¹ Furthermore, the Petitioner fails to adequately set forth any reasoned

¹ The Petitioners tax v. fee argument, substantive due process, procedural due process, vagueness and overbreadth arguments are all based primarily upon regulations not applied against the Petitioner. The Petitioner Vested Rights and Contract Impairment arguments fail because the Petitioner does not even allege that he has any vested interests or contracts.

argument in support of his constitutional arguments. Finally, even if the Petitioner properly argued the constitutional challenges to the Nuisance Ordinance, the ordinance meets the requirements of the Constitution and is therefore valid.

IV. ARGUMENT

The Petitioner is appealing a decision reached by the Mason County Superior Court's in a Land Use Petition Act (LUPA) challenge to a hearing examiner decision. With certain exceptions that do not apply here, the Land Use Petition Act (LUPA) is the exclusive means for review of land use decisions. RCW 36.70C.030. Review is on the record below, because "[a]n appeal from an administrative tribunal invokes the appellate, rather than the general jurisdiction of the superior court." *Skagit Surveyors and Engineers, LLC v. Friends of Skagit County*, 135 Wn.2d 542, 555, 958 P.2d 962 (1998). The Court may grant relief only if the Petitioner carries his burden of establishing that one of the LUPA standards is met. *Schofield v. Spokane County*, 96 Wn. App. 581, 586, 980 P.2d 277 (1999). These standards are stated in RCW 36.70C.130(1) as follows:

- (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 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 the 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.

Here, the Petitioner appears to argue only that the land use decision violates his constitutional rights. Issues raised with regard to this standard are reviewed *de novo*. *Schofield*, 96 Wn. App. at 586. However, Courts give “substantial deference to both legal and factual determinations of local jurisdictions with expertise in land use regulations.” *Timberlake Christian Fellowship v. King County*, 114 Wn. App. 174, 180, 61 P.3d 332 (2002). Furthermore, a court must view “the evidence and any reasonable inferences in the light most favorable to the party that prevailed in the highest forum exercising fact finding authority.” *Schofield*, at 586. The Petitioner fails to establish that any of these standards have been met. Therefore, the Court should deny his appeal.

A. THE PETITION LACKS REPRESENTATIVE STANDING TO RAISE ISSUES OUTSIDE THE SCOPE OF THE DECISION APPEALED

The Petitioner asserts that he should have representative standing to challenge the decision of the Hearing Examiner. It appears that the Petitioner does this to make collateral attacks against the Nuisance Ordinance that are not germane to this appeal. However, the Petitioner fails to provide any legal authority for representative standing. Indeed, RCW 36.70C.060 expressly limits standing to:

- (1) The applicant and the owner of property to which the land use decision is directed;
- (2) Another person aggrieved or adversely affected by the land use decision, or who would be aggrieved or adversely affected by a reversal or modification of the land use decision. A person is aggrieved or adversely affected within the meaning of this section only when all of the following conditions are present:
 - (a) The land use decision has prejudiced or is likely to prejudice that person;
 - (b) That person's asserted interests are among those that the local jurisdiction was required to consider when it made the land use decision;
 - (c) A judgment in favor of that person would substantially eliminate or redress the prejudice to that person caused or likely to be caused by the land use decision; and
 - (d) The petitioner has exhausted his or her administrative remedies to the extent required by law.

Therefore, as RCW 36.70C.060 does not allow for representative standing, the Petitioner is limited to his personal standing. Plaintiff attempts to gain representative standing in order to challenge section of the Nuisance Ordinance that are not relevant to this appeal and that were not applied against him (i.e. Summary Abatements, \$10 mitigation fee). Even if Plaintiff succeeded in his challenges to these provision of the ordinance, it would not affect the validity of the Hearing Examiner decision. Furthermore, the Petitioner is challenging this additional provision as part of a declaratory action filed in the Mason County Superior Court. Ex. A – Mason County Petition.

B. CONSTITUTIONAL CHALLENGES

1. The Petitioner Fails to Properly Raise Constitutional Challenges.

In an attempt to have the Hearing Examiner’s decision reversed, the Petitioner raises several constitutional challenges to the validity of the Nuisance Ordinance. An ordinance is presumed constitutional. *Amalgamated Transit Union Local 587 v. Washington*, 142 Wn.2d 183, 205, 11 P.3d 762 (2000). As the party challenging the Nuisance Ordinance, the Petitioner bears the burden of proving it unconstitutional beyond a reasonable doubt. *Amalgamated*, 142 Wn.2d at 205. “This standard is met if argument and research show that there is no reasonable

doubt that the [ordinance] violates the constitution.” *Amalgamated*, at 205 (emphasis added). In other words, to be invalidated, “it must be clear that the legislation cannot reasonably be construed in a manner that comports with constitutional imperatives.” *Samis Land Co. v. City of Soap Lake*, 143 Wn.2d 798, 804, 23 P.3d 477 (2001). “Passing treatment of a constitutional issue or lack of reasoned argument is insufficient to merit judicial consideration.” *State v. Johnson*, 119 Wn.2d 167, 171, 829 P.2d 1082 (1992); *see also Des Moines Marina Ass’n v. City of Des Moines*, 124 Wn. App. 282, 100 P.3d 310 (2004).

Here, the Petitioner raises several constitutional challenges to the Nuisance Ordinance that are not properly before the Court. Namely, the Petitioner was not charged the \$10 per vehicle fee that he claims is a tax; was not subject to summary abatement; does not have a “vehicle related business” with an allegedly vested right to maintain; and possesses no contracts that are affected by the Nuisance Ordinance. Furthermore, the Petitioner provides only “passing treatment” of his constitutional challenges and those challenges are not supported by any reasoned argument. The Petitioner also fails to properly state or analyze any of the constitutional tests for his challenges. Therefore, Petitioner’s constitutional arguments are insufficient to merit judicial consideration and should therefore be dismissed. *Johnson*, 119 Wn.2d 167.

2. The Ordinance Meets the “Single Subject” and “Subject in Title” Requirements of the Constitution.

The Petitioner claims that the Nuisance Ordinance violates the “Single Subject” and “Subject in Title” requirements of the Washington State Constitution. Article II, Section 19 of the Washington State Constitution provides “No bill shall embrace more than one subject and that shall be expressed in the title.” Courts have held that this requirement “is to be liberally construed in favor of the legislation.” *Amalgamated*, 142 Wn.2d at 206.

The first requirement of Article II, Section 19 is that a bill embraces a single subject. The requirement that an ordinance embraces a single subject does not:

Contemplate a metaphysical singleness of idea or thing, but rather there must be some rational unity between the matters embraced in the act, the unity being found in the general purpose of the act and the practical problems of efficient administration. It is hardly necessary to suggest that matters which ordinarily would not be thought to have any common features or characteristics might, for purposes of legislative treatment, be grouped together and treated as one subject. For purposes of legislation, ‘subjects’ are not absolute existences to be discovered by some *a priori* reasoning, but are the result of classification for convenience of treatment and for greater effectiveness in attaining the general purpose of the particular legislative act...

Amalgamated at 209-210. Therefore, “a single subject may include a large number of sub-subjects.” *City of Seattle v. Barto*, 31 Wn. 141, 71 P 735 (1903); *Washington Ass’n of Neighborhood Stores v. State*, 149 Wn.2d 359, 368, 70 P.3d 920 (2003).

The determination of whether an ordinance violates the “single subject” requirement varies based on whether an ordinance’s title is general or restrictive. “A general title is broad, comprehensive, and generic ...” *Ass’n of Neighborhood*, 149 Wn.2d 359, 368 quoting *City of Burien v. Kiga*, 144 Wn.2d 819, 825, 31 P.3d 659 (2001). In determining whether a title is general, “it is not necessary that the title contain a general statement of the subject of an act; a few well-chosen words, suggestive of the general subject stated, is all that is necessary.” *Ass’n of Neighborhood*, 149 Wn.2d 359, 368 (internal citation omitted). “A restrictive title, in contrast to a general title, is one where a particular part or branch of a subject is carved out and selected as the subject of the legislation.” *Amalgamated* 142 Wn.2d at 210. The Ordinance at issue in this case was titled “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.” Ex. B – Nuisance Ordinance. As the ordinance’s title is broad and generic and does not carve out a particular part of a subject, it is a general title.

Where a court reviews an ordinance that uses a general title “great liberality will be indulged to hold that any subject reasonably germane to such title may be embraced within the body of the bill.” *Amalgamated* at 207. “General [ordinance] titles are constitutional as long as, when read in entirety, the title broadly encompasses the topic of the enactment.” *Ass’n of Neighborhood*, 149 Wn.2d 359, 369. A general subject can “contain several incidental subjects or subdivisions.” *Amalgamated* at 207. There need only be rational unity between the general subject and the incidental subjects. *Id.*

Under the true rule of construction, the scope of the general title should be held to embrace any provision of the act, directly or indirectly related to the subject expressed in the title and having a natural connection thereto, and not foreign thereto. Or, the rule may be stated as follows: Where the title of a legislative act expresses a general subject or purpose which is single, all matters which are naturally and reasonably connected with it, and all measures which will , or may, facilitate the accomplishment of the purpose so stated, are properly included in the act and are germane to its title.

Id. at 209 quoting *Kueckelhan v. Fed. Old Lines Ins. Co.*, 69 Wn.2d 392, 403, 418 P.2d 443 (1966) *superseded on other grounds State v. WWJ Corp.*, 138 Wn.2d 595, 980 P.2d 1257 (1999).

Here, the Nuisance Ordinance contains a single subject, namely nuisance abatement. Furthermore, all of the subparts of the Nuisance Ordinance are rationally related to “nuisance abatement.” In challenging the ordinance, the Petitioner points to the subdivisions dealing with environmental mitigation agreements, KCC 9.56.070, and removal of personal property from public right of ways, KCC 9.56.090. However, both of these provisions clearly deal with nuisance abatement. KCC 9.56.070 essentially provides the requirements for a property to avoid being abated as a nuisance. In other words, a property that could meet the requirements of KCC 9.56.070 will be deemed an abatable nuisance under the Nuisance Ordinance if they do not comply with the requirements of KCC 9.56.070. Similarly, KCC 9.56.090 provides a limited grace period under the Nuisance Ordinance. The Nuisance Ordinance makes the accumulation of personal property and/or solid waste an abatable nuisance. KCC 9.56.090 simply provides a 24-hour grace period to landlords so that they can meet the requirements regarding Court ordered evictions, Title 59 RCW, will also ensure that the nuisance conditions do not persist. Therefore, as all of the subparts of the Nuisance Ordinance are reasonably related to its title, the Ordinance contains only one subject.

The Petitioner also asserts that the subject matter of the Nuisance Ordinance is not expressed in its title. An ordinance's title complies with this requirement "if it gives notice that would lead to an inquiry into the body of the act, or indicate to an inquiring mind the scope or purpose of the law." *Ass'n of Neighborhoods*, 149 Wn.2d at 71. This does not require that the title be an index to the contents of ordinance or that it provide the details of the ordinance. *Ass'n of Neighborhoods*, at 371; *Amalgamated*, at 217. Here, the title of the Ordinance is "Relating to the Abatement of Conditions Which Constitute a Public Nuisance ..." This title clearly provides notice that the Nuisance Ordinance is going to detail public nuisances and how those nuisances are to be abated. Therefore, the Ordinance's subject is contained in its title.

3. The Ordinance Contains a Fee Provision, Not a Tax Provision.

The Petitioner challenges the \$10 fee imposed by Kitsap County Code 9.56.070, claiming that the fee actually constitutes a tax. Although the Petitioner was never charged or required to pay this \$10 fee, he asserts that this Court should consider it because he basically had to choose between the fee and the taking his case to the hearing examiner. In reality, the Petitioner was never presented with this choice. As his property contains more vehicles than would even be allowed if he paid the fee, the

County initiated the abatement action before the hearing examiner. CP 342. The abatement action was instituted based upon the number of cars on the property as opposed to the Petitioners failure to pay a fee he was never charged. Therefore, as this issue was irrelevant to the Hearing Examiner's decision, the Petitioner has never been charged the fee, it should not be addressed by this Court on appeal.

Even if the Petitioner could properly challenge the \$10 fee, the Petitioner has failed to establish that the charge is a tax. In general, a "fee" is a charge that is primarily used as a tool of regulation in contrast to a tax, which is intended to raise money. *Teeter v. Clark County*, 104 Wn.2d 227, 239, 704 P.2d 1171 (1985). In order to be a fee, it is not required that the amount charged be directly related to a service provided to the person paying the charge. Rather, the proceeds can also be used to alleviate a burden to which the payer contributes. Here, the fee is charged to persons attempting to receive the benefit of an exception to the Nuisance Ordinance. The very reason why these persons have to follow the requirements of the exception is that they are contributing to the problem of nuisance properties in the County. Therefore, the \$10 charge constitutes a fee and is not a tax.

4. The Ordinance Meets the Requirements of the Equal Protection Clause.

The Petitioner fails to establish that the Nuisance Ordinance violates the Equal Protection clause of the Washington State Constitution. “Because the equal protection clause of the federal constitution and the privileges and immunities clause of the Washington Constitution are substantially identical, they are considered under the same analysis.” *State v. Osman*, 108 P.3d 1287, 1290 [FN 6], 126 Wn. App. 575 (2005). A court only engages in equal protection analysis where “the legislature creates a classification based on certain characteristics” of those it governs. *Osman*. Furthermore, the equal protection clause does not require “‘that all persons be dealt with identically’ or that the impact from similar treatment be identical.” *Id. quoting In re Detention of Thorell*, 149 Wn.2d 724, 745, 72 P.3d 708 (2003).

Where an ordinance does not involve a suspect class or a fundamental right it is subject to minimal scrutiny under the rational basis test. *Margolla Associates v. City of Seattle*, 121 Wn.2d 625, 650, 854 P.2d 23 (1993). Under this test, “a statutory classification violates the equal protection clause only if it fails to rationally further a legitimate state interest.” *Morgolla*, 121 Wn.2d at 651 *qtg Foley v. Dept. of Fisheries*, 119 Wn.2d 783, 789, 837 P.2d 14 (1992).

The Court will uphold a legislative classification so long as “the relationship of the classification to its [legislative purpose] is not so attenuated as to render the distinction arbitrary or irrational ... Under this test, the challenging party can overcome the strong presumption of constitutionality only by showing the classification is “purely arbitrary.”

Morgolla at 651 (internal citations omitted). Review under the rational basis test is highly deferential to the enacting body. *Schuchman v. Hoehn*, 119 Wn. App. 61, 67, 79 P.3d 6 (2003).

Here, the Petitioner has failed to establish that the Nuisance Ordinance violates the requirements of “equal protection.” Initially, as the Nuisance ordinance does not regulate based upon classifications, an equal protection analysis does not apply. *Osman*, 108 P.3d 128. The Petitioner claims that the Nuisance Ordinance treats owners of low lying and high lying land differently. However, the Nuisance Ordinance does not regulate based upon this classification. The fact that owners of low-lying land may be impacted to a greater extent does not cause the Nuisance Ordinance to run afoul of equal protection clause. *Osman*, 149 Wn.2d at 145. Therefore, the Petitioner has failed to establish that the Ordinance violates the equal protection clause.

5. The Ordinance Meets the Requirements of Substantive Due Process.

The Petitioner claims that the Nuisance Ordinance violates his substantive due process rights based upon his claim that having a large number of cars parked on his property for long periods of time is not detrimental to the environment. In determining whether an ordinance violates the requirements of substantive due process courts ask:

Whether the regulation is aimed at addressing a legitimate public purpose; (2) whether it uses means that are reasonably necessary to advance that purpose and (3) whether it is unduly oppressive on the landowner.

Margolla, 121 Wn.2d 625, 649. In determining whether an ordinance is unduly oppressive on a landowner, courts consider “(a) the nature of the harm to be avoided; (b) the availability and effectiveness of less drastic measures and (c) the economic loss suffered by the property owner.” *Isla Verde Intern. Holdings, Inc. v. City of Camas*, 146 Wn.2d 740, 768, 49 P.3d 867 (2002).

Here, the public clearly has a significant interest in abating conditions that constitute a nuisance. *see e.g. Edmonds Shopping Center Association v. City of Edmonds*, 117 Wn.App 344, 364, 71 P.3d 233 (2003); RCW 36.32.120(10). The Petitioner points to no requirement that a condition actually be proven to be adverse to the physical environment

to be a nuisance. However, common sense dictates that the accumulation and storage of vehicles is harmful to the environment. Furthermore, as the Nuisance Ordinance is only used after other less intrusive measures have been utilized, there are no less drastic measures available. See KCC 9.56.035. Most importantly, as the Nuisance Ordinance only impacts those that create the nuisances that are being abated “it defies logic to suggest” that the ordinance is unduly oppressive. *Edmonds*, at 366.

6. The Ordinance Meets the Requirements of Procedural Due Process.

The Petitioner claims that the “Summary Abatement” Provision of the Ordinance violates the requirements of procedural due process. Initially, because the Petitioner has not been subject to “Summary Abatement” his challenge to this section of the Ordinance should not be entertained by the Court. However, even if the Petitioner could properly challenge the Summary Abatement provision of the Nuisance Ordinance, he has failed to establish that the Ordinance violates procedural due process. “Procedural due process constrains governmental decision making that deprives individuals of liberty or property interests within the meaning of the due process clause.” *Rhoades v. City of Battle Ground*, 115 Wn. App. 752, 765, 63 P.3d 142 (2002). In determining whether procedural due process has been violated, court’s consider three factors:

(1) The private interest affected by an official action;

(2) the risk of erroneous deprivations of such interest through the procedures used and the value of additional procedural safeguards, and

(3) the governmental interest, including the cost and administrative burden of additional procedures.

Guardianship Estate of Keffeler v. State of Washington, 151 Wn.2d 331, 345, 88 P.3d 949 (2004). While due process normally requires a pre-deprivation hearing, it does not always require as such. *Guardianship at 343 citing McGrath vs. Weinberger*, 541 F.2d 249, 253-254 (10th Cir. 1976).

Here, the Petitioner has failed to establish a due process violation and indeed fails to even properly analyze his claim. The private interests affected by the Nuisance Ordinance are minimal. The Ordinance only allows the County to abate conditions which constitute a nuisance. In addition, the County can only summarily abate a nuisance where that nuisance “constitutes an immediate threat to the public health, safety or welfare of the environment.” KCC 9.56.060(2). As the Ordinance clearly defines what constitutes a nuisance and severely limits the circumstances where a summary abatement can occur, the risk for an erroneous deprivation is minimal. Lastly, the governmental interest in abating these

nuisances is great. By definition, their continued existence would constitute an ongoing and “immediate threat to the public health, safety or welfare of the environment.” KCC 9.56.060(2). Therefore, the Petitioner has failed to establish that the summary abatement provision of the ordinance violates due process.

7. The Ordinance is Not Preempted by State Law and is a Proper Exercise of the County’s Police Powers.

The Petitioner claims that the Nuisance Ordinance is preempted by Washington State Law and was beyond the County’s police powers to enact. Petitioner’s arguments have ignored RCW 36.32.120(7) and (10). RCW 36.32.120(7) provides County’s the authority to “make and enforce, by appropriate resolutions or ordinances, all such police and sanitary regulations as are not in conflict with state law.” RCW 36.32.120(10) further provides that counties:

Have power to declare by ordinance what shall be deemed a nuisance within the county, including but not limited to “litter” and “potentially dangerous litter” as defined in RCW 70.93.030; to prevent, remove, and abate a nuisance at the expense of the parties creating, causing, or committing the nuisance; and to levy a special assessment on the land or premises on which the nuisance is situated to defray the cost, or to reimburse the county for the cost of abating it. This assessment shall constitute a lien against the property which shall be of equal rank with state, county and municipal taxes.

The Nuisance Ordinance specifically governs the abatement of nuisances. Therefore, pursuant to RCW 36.32.120(10) the County clearly possessed the power to enact the ordinance.

“Preemption occurs when the legislature expressly or by necessary implications states its intention to preempt the field, or when a state statute and local ordinance are in such direct conflict that they cannot be reconciled.” *Margolla*, 121 Wn.2d 625, 652. The Petitioner cites a legislative finding in support of RCW 46.04.125 for the proposition that the activities of an automotive hobbyist in this state are recognized as a “most important” activity. The Petitioner essentially takes this finding to mean that any person who claims to be an automotive hobbyist can do anything on their property relating to cars. However, the Petitioner has failed to provide any evidence, other than his blanket claim, that he is a car collector. Therefore, the Court should refuse to entertain this argument.

Even if the Petitioner were an automotive hobbyist, Kitsap County zoning and nuisance laws would apply to him. Article XI Section 11 of the Washington Constitution provides “[a]ny county, city, town or township may make and enforce within its limits all such local police, sanitary and other regulations as are not in conflict with general laws.” *See also* RCW 36.32.120 (similar language). The Washington Supreme Court has held that:

This is a direct delegation of the police power as *ample within its limits as that possessed by the legislature itself*. It requires no legislative sanction for its exercise so long as the subject-matter is local and the regulation reasonable and consistent with the general laws.

Hass v. City of Kirkland, 78 Wn.2d 929, 932, 481 P.2d 9 (1971) (emphasis added) quoting *Deltamore v. Hindley*, 83 Wn. 322, 326, 145 P. 462 (1915). Therefore, the County had the inherent police power to enact the Nuisance Ordinance. Furthermore, RCW 36.32.120(10) expressly provides the County with the authority to enact the Nuisance Ordinance. The Petitioner claims that RCW 46.04.125 preempts the nuisance ordinance. However, RCW 46.04.125 does not expressly preempt the Nuisance Ordinance. Furthermore, no conflict exists between the State statute and the Nuisance Ordinance. RCW 46.04.125 simply defines a Collector *without providing any rights or benefits* that attach to such designation. The Petitioner has failed to establish that the Nuisance Ordinance conflicts with any rights or benefits conferred upon him by State law. Therefore, State law does not preempt the Nuisance Ordinance.

8. The Ordinance is not Unconstitutionally Vague.

The Petitioner claims that the Nuisance Ordinance is unconstitutionally vague. Because the Petitioner's challenge to the Nuisance Ordinance does not involve any First Amendment rights, it is to

be evaluated in light of the particular facts of this case. *City of Spokane v. Douglass*, 115 Wn.2d 171, 178, 795 P.2d 693 (1990). In other words “the ordinance is tested for unconstitutional vagueness by inspecting the actual conduct of the party who challenges the ordinance and not by examining hypothetical situations at the periphery of the ordinance’s scope.” *Douglass*, at 182-83. An ordinance “is unconstitutionally vague if it does not provide fair notice, measured by common practice and understanding of the conduct that is prohibited.” *State v. Mather*, 28 Wn. App. 700, 702, 626 P.2d 44 (1981). This does not require “impossible standards of specificity or absolute agreement.” *Douglass*, 115 Wn.2d at 179. Furthermore, a court should not invalidate an ordinance because the court believes that the ordinance could have been written with greater precision. In addition, “the fact that an ordinance may require a subjective evaluation by an [enforcement] officer to determine whether the enactment has been violated does not mean that the ordinance is unconstitutional.” *Id.* Rather, the ordinance is unconstitutional “only if it invites an inordinate amount of police discretion.” *Id.*

The Petitioner’s vagueness challenge to the Nuisance Ordinance ignores his conduct that gave rise to the County’s action in this case. Instead, the Petitioner merely, and improperly, attempts to examine specific terms listed in the ordinance that were not applied against him, in

a vacuum. *Douglass* at 180. KCC 9.56.020(10) clearly defines what is considered a nuisance for purposes of the Nuisance Ordinance. The Petitioner argues that the ordinance is unconstitutionally vague based upon KCC 9.56.020(10)(a). However, the abatement action was brought, and the Hearing Examiner's decision was based upon KCC 9.56.020(10)(b)(iii) for the presence of junk motor vehicles and 9.56.020(10)(b)(iv) having a vehicle lot without approved land use. KCC 9.56.020(9) provides defines a junk motor vehicle as a motor vehicle meeting at least three of the following requirements:

- (a) Is three years old or older;
- (b) Is extensively damaged, such damage including, but not limited to, any of the following: a buildup of debris that obstructs use, broken window or windshield; missing wheels, tires, tail/headlights, or bumpers; missing or nonfunctional motor or transmission; or body damage;
- (c) Is apparently inoperable; or
- (d) Has an approximate fair market value equal only to the approximate value of the scrap in it.

KCC 9.56.020(19) defines a vehicle lot as “a single tax parcel where more than ten vehicles are regularly stored without approved land use by the department.” Here, the uncontested facts establish that the Petitioner's property contains numerous junk motor vehicles and that the property

regularly stores more than ten vehicles without approved land use. Therefore, because the Petitioner's conduct is clearly proscribed by the Ordinance, his vagueness challenge fails.

9. The Ordinance is Not Unconstitutionally Overbroad.

The Petitioner appears to assert that the Nuisance is unconstitutionally overbroad. "The overbreadth doctrine involves substantive due process and asks whether a statute not only prohibits unprotected conduct but also reaches constitutionally protected conduct." *Rhoades*, 115 Wn. App. at 768. Unless an ordinance is alleged to infringe on First Amendment protected activity, the Petitioner "cannot rely on hypothetical conduct to demonstrate that a statute is unconstitutional." *Id.*

It appears that the Petitioner alleges that the Nuisance Ordinance is overbroad because it allegedly infringes on the vested rights of other property owners. This argument fails for several reasons. First, the Petitioner has failed to establish that "vested rights" are considered constitutionally protected rights for purposes of the overbreadth doctrine. Furthermore, as discussed below, the Petitioner has failed to establish that he has any vested rights that are interfered with by the ordinance. Indeed, the Petitioner's use of this property has long been held to be illegal. Lastly, even if the Petitioner could challenge the Nuisance Ordinance

based upon the vested rights of others, he has failed to establish that any vested rights have, in fact, been impacted by the Ordinance. The Petitioner's hypothetical examples of conduct do not suffice in meeting his burden of showing that the Ordinance is overbroad.

10. The Ordinance Does Not Interfere With Any of the Petitioner's "Vested Rights."

The Petitioner claims that he has a vested right to have a car lot on his property. The vested rights doctrine provides that a land use application vests on the date it is submitted. *East County Reclamation Co. v. Bjorsen*, 125 Wn. App. 432, 105 P.3d 94, 98 (2005). The Petitioner has no vested rights that have been impacted by this ordinance. As the history in this case clearly establishes, the Petitioner's use of his property in this case has long been held to be an illegal use. The Petitioner cannot rely on the hypothetical vested rights of others, to which he provides no evidence, to invalidate the ordinance's application against him.

11. The Ordinance Does Not Interfere With Any Contracts of the Petitioner.

The Petitioner claims that the Nuisance Ordinance is an unconstitutional impairment of contracts because it allegedly makes illegal commercial storage facilities that have contracted to provide storage services. In challenging an ordinance as an unconstitutional impairment of contracts, "the threshold question is 'whether the state law has, in fact,

operated as a substantial impairment of a contractual relationship.”
Margolla, 121 Wn.2d 625, 653. For the impairment to be substantial, the
Petitioner must have “relied on the supplanted part of the contract.” Id.
Furthermore, “a party who enters into a contract regarding an activity
‘already regulated in the particular to which he now objects’ is deemed to
have contracted ‘subject to further legislation upon the same topic.’” *Id.*
quoting Veix v. Sixth Ward Bldg & Loan Ass’n, 310 U.S. 32, 38, 60 S.Ct.
792, 794, 84 L.Ed. 1061 (1940).

The Petitioner has failed to establish that the Nuisance Ordinance
unconstitutionally impaired a contract. Initially, the Petitioner has failed
to allege, and indeed does not, possess any contracts that have been
affected by the Nuisance Ordinance. The Petitioner has no contract upon
which he has relied. Furthermore, the Petitioner has failed to establish that
he has standing to challenge the Nuisance Ordinance because it allegedly
may impact the contracts of others. Even if the Petitioner had standing, he
has failed to establish that the Nuisance Ordinance has, in fact, impaired
any contracts between any parties. Therefore, the Nuisance Ordinance
does not represent an unconstitutional impairment of contracts.

12. Severability.

The Petitioner's constitutional challenges primarily rely upon the Nuisance Ordinance's "Summary Abatement" process and imposition of a \$10.00 fee for the storage of junk motor vehicles. As discussed above, the Petitioner failed to establish the invalidity of these provisions. However, even if he did, the Hearing Examiner's decision should be affirmed, as the decision was not based upon the challenged provisions.

A legislative act is not unconstitutional in its entirety unless invalid provisions are unseverable and it cannot reasonably be believed that the legislative body would have passed one without the other, or unless elimination of the invalid part would render the remaining part useless to accomplish the legislative purpose.

Amalgamated, 142 Wn.2d 183, 228. "A severability clause may provide the assurance that the legislative body would have enacted the remaining sections even if other are found invalid." *Id.* Here, section 2 of the Ordinance contains a severability clause. Furthermore, the removal of the Summary Abatement or \$10 fee provisions would not render the remainder of the ordinance invalid. Even without those provisions the Ordinance would further the County's interest in abating nuisances. Thus, even if the Court invalidated the provisions, the decision of the Hearing Examiner, which was not based on the provisions, should be affirmed.

V. CONCLUSION

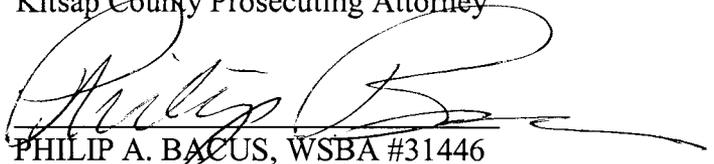
For the foregoing reasons, the Respondent respectfully requests that the Court deny the Petitioner's appeal and uphold the decision of the Hearing Examiner.

VI. ATTORNEY FEES

Pursuant to RAP 18.1, Kitsap County respectfully requests that this Court grant the county reasonable attorney fees associated with responding to this appeal.

RESPECTFULLY SUBMITTED, this 17 day of July 2006.

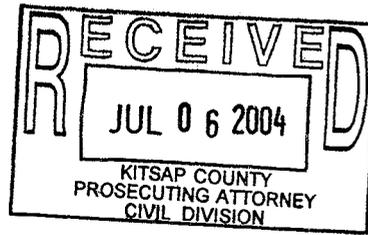
RUSSELL D. HAUGE
Kitsap County Prosecuting Attorney



PHILIP A. BACUS, WSBA #31446
Deputy Prosecuting Attorney
Attorney for Respondent Kitsap
County

RESPONDENT'S APPENDIX

**A1 – COMPLAINT FOR
DECLARATORY JUDGMENT**



IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF MASON

COLIN F. YOUNG
Plaintiff

v.

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

No.

COMPLAINT FOR DECLARATORY
JUDGMENT AND INJUNCTIVE RELIEF

COMES NOW the Plaintiff for complaint against the Defendant alleges and states
as follows:

I. IDENTITY OF PARTIES

1.1 Colin F. Young, the plaintiff herein, is a resident of the County of Kitsap,
State of Washington. Plaintiff is the owner of tax parcel 26701-4-010-2004 in the
County of Kitsap, State of Washington.

1.2 The defendant, County of Kitsap, is a municipal corporation in the State of
Washington.

II. JURISDICTION AND VENUE

2.1 That all acts and omissions alleged herein occurred in the County of Kitsap, State of Washington.

2.2 That the court has jurisdiction over the parties and the subject matter of this action, in that Mason County adjoins Kitsap County and is empowered to hear this action.

III. FACTS OF THE CASE

3.1 Plaintiff, Colin Young, owns a 14 acre parcel (tax parcel 26701-4-010-2004), which is principally a low lying property with hills on 2 sides, located 5 miles north of Poulsbo, in a rural farming area know as Big Valley.

3.2 The Young family has owned this property for nearly 40 years and has continuously stored vehicles and farm equipment on it, while harvesting hay nearly every year.

3.3 The plaintiff's Big Valley property is an irregular shaped parcel with no two intersecting lines of measurement exceeding 500 feet in length. Plaintiff practices automotive collector hobbyist activities on a small portion of the property and farms the remainder.

3.4 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.

3.5 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.

3.6 Ultimately, Commissioners Botkin and Endreason voted in favor of the Nuisance Ordinance, passing it on October 22, 2001, while the 3rd Commissioner, Jan Angel was not present.

3.7 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.

3.8 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.

IV. STANDING

4.1 On April 19, 2004 Kitsap County posted a Notice of Abatement, as authorized under the Nuisance Ordinance, on Plaintiff Colin Young's 14 acre Big Valley property (tax parcel 26701-4-010-2004), a low lying parcel with adjacent parcels overlooking to the East and West.

4.2 The abatement posting on the Young's property is the first attempt by the county to use the "Nuisance Ordinance" (Ordinance 261) to actually abate an alleged "Public Nuisance" in Kitsap County

4.3 Kitsap's Ordinance 261, "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, is constitutionally violative in numerous regards.

4.4 Under the Uniform Declaratory Judgments Act (RCW 7.24), the Plaintiff, Colin Young, has personal standing to challenge the constitutionality of Ordinance 261, commonly known as the "Nuisance Ordinance," as passed by the commissioners October 22, 2001, and then adopted into the Kitsap County Code (KCC) at Chapter 9.56 "Public Nuisances."

4.5 The plaintiff further claims representative standing to challenge the Nuisance Ordinance. While the position of personal standing is obvious, the issue of representative standing hinges on the importance of the "public issues" related or raised.

4.6 Because of the poor construction of Ordinance 261, and general overbreadth woven therein, nearly every land owner in Kitsap county can conceivably

be victimized in some fashion by one of it's many unconstitutional provisions. Any landowner can easily be party to the Nuisance Ordinance's unequal application through lot size, shape, elevation, or use. Once one of the Nuisance Ordinance's abatement processes are initiated, other serious constitutional violations are presented as detailed below. Additionally, the ordinance's "Environmental Mitigation Agreement" constitutes an unlawful tax on all those who "store" vehicles. On the forgoing basis, all citizens of Kitsap County are entitled to relief from Ordinance 261.

4.7 Historically, any expansion of county regulations applying to rural land use in Kitsap is a "Hot Button" issue among landowners. Proposed legislation affecting Kitsap property rights typically causes public meetings to be heavily attended, and produces a proliferation of editorials to the local newspapers. 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 will command significant attention by the public.

**V. FIRST CAUSE OF ACTION - KITSAP'S NUISANCE ORDINANCE
INCORPORATES MORE THAN ONE SUBJECT, AND NOT ALL SUBJECTS
ARE REFLECTED IN THE TITLE**

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

5.2 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.

5.3 The second purpose incorporated in the ordinance is the regulation of vehicles on private and public land, including “junk vehicles,” through an “Environmental Mitigation Agreement” [KCC 9.56.070]. This second purpose extensively defines numerous parameters and requirements relating to storage of vehicles, even defining a *new type of unlawful land use* (emphasis added); that being 10 or more vehicles stored on any single tax parcel [KCC 9.56.020 (19) “Vehicle Lot”], which applies without limitation to all apartment complexes, private and community storage locations, and all government facilities within Kitsap county.

5.4 The third purpose incorporated in this 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.

5.5 The overwhelming resistance to the proposed “Nuisance Ordinance” starting 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.

5.6 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 a segment of the voters and to encourage any undecided commissioners.

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

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

5.9 The three above detailed purposes of the Nuisance Ordinance are neither necessarily, nor rationally related to each other, yet they must be for this ordinance to be valid. The regulation of vehicles and the “Environmental Mitigation Agreement” clearly are not related to either abating commonly defined nuisances or a landlord’s disposal of a tenant’s personal effects

VI. SECOND CAUSE OF ACTION - KITSAP’S NUISANCE ORDINANCE UNCONSTITUTIONALLY ESTABLISHES A \$10 TAX ON ALL “JUNK VEHICLES”

6.1 Kitsap’s Nuisance Ordinance violates provisions of Article XI Section 11 of the Washington State Constitution by establishing a \$10 tax per each “junk vehicle,” to stored by the landowner [KCC 9.56.070].

6.2 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 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].

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

6.4 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.

6.5 Kitsap County is using a \$10 fee, only charged to those who store alleged "junk vehicles," 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." 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 action.

6.6 Any regulatory fee that does not exclusively benefit those that pay the fee is actually a tax and not a fee. It is constitutionally violative for Kitsap County to levy any tax.

6.7 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]

**VII. THIRD CAUSE OF ACTION - KITSAP'S NUISANCE ORDINANCE
VIOLATES EQUAL PROTECTION**

7.1 Kitsap's Nuisance Ordinance violates Washington State Constitution's equal protection provisions by violating Article I Section 12, which provides the citizens of the state of Washington broader equal protection than the federal constitution's 14th amendment. (Gunwall 106.Wa.2d at 61).

7.2 Kitsap's Nuisance Ordinance come to bear unevenly on different "classes" of land owners.

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

7.4 "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 plaintiff's property, are at a clear disadvantage in their ability to comply with the ordinance.

7.5 The Nuisance Ordinance's criteria for "Screened" storage can not realistically be meet on a low lying property . It will always be possible to look down from a high property into an adjoining low property such that screening is not possible Relating such limiting criteria lawful storage of vehicles constitutes an equal protection violation under the Washington's State Constitution.

7.6 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.

7.7 All property owners with irregular shaped properties, such as the plaintiff’s property, are at a clear disadvantage over those with regular shaped, or square lot, of equal size.

7.8 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. The ordinance describes an easement as another point of “visible entry” into the property, again encumbering the landowner’s ability to comply with “screening” requirements

7.8 Kitsap’s expanded criteria for “screened” storage, as defined and determined in the Nuisance Ordinance, is neither reasonable, nor even handed.

**VIII. FOURTH CAUSE OF ACTION - KITSAP’S NUISANCE
ORDINANCE’S PROVISIONS CONSTITUTE DUE PROCESS VIOLATIONS
AND CONFLICTS WITH EXISTING STATE LAW.**

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

8.2 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.

8.2 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 impounding of vehicles from private property.

8.3 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 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 carvings. Property subject to abatement in the context of this ordinance can be any “thing” that “anyone” finds offensive.

8.4 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.

8.5 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.

IX. FIFTH CAUSE OF ACTION - KITSAP'S NUISANCE ORDINANCE LACKS SUFFICIENT ADMINISTRATIVE GUIDELINES, IS OVERBROAD AND INTERFERES WITH VESTED RIGHTS, VIOLATING THE PROVISIONS OF ARTICLE I SECTION 3 AND ARTICLE XI SECTION 11 OF THE WASHINGTON STATE CONSTITUTION

9.1 State deprivation of protected interests of life, liberty, or property is unconstitutional, unless accompanied by adequate safeguards. Kitsap's Nuisance 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.

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

9.3 Without administrative guidelines, of which none exist, the Nuisance Ordinance cannot operate harmoniously with the pre-existing general law RCW 46.04.125, and interferes with a variety of landowners vested rights.

RCW 46.04.125. "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 preserve, restore, and maintain the vehicle for hobby or historical purposes.[1996 c225 2.]

***Finding 1996 225:** “The legislature finds and declares that constructive leisure pursuit 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 c225 1.]*

9.4 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.

9.5 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.

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

9.7 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.

9.8 The Nuisance Ordinance excludes only two specific types of businesses from the strict regulations of storing vehicles and the abatement of “junk vehicles”. The only two types of businesses exempted from regulation are “licensed dismantler” and “licensed vehicle dealer”, providing that they are properly fenced.

9.9 The Nuisance Ordinance's narrow exclusion from the regulation of "junk vehicles" and storage, leaves every automotive repair facility, storage facility, towing yard, auction lot, bodyshop, and boat yard, operating in Kitsap County in violation of the Nuisance Ordinance, relating to storage of defined "junk vehicles," and thus, these businesses are clearly subject to abatement. Uniform application of the Nuisance Ordinance against all Kitsap landowners violates these non-excluded business owners' vested right to freely practice their businesses.

X. SIXTH CAUSE OF ACTION - KITSAP'S NUISANCE ORDINANCE IS VOID FOR VAGUENESS AND AN UNREASONABLE EXERCISE OF POLICE POWER.

10.1 Kitsap's Nuisance 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"

10.2 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.

10.3 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.

10.4 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 “lawfulmanner” 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.

10.5 The Nuisance Ordinance does not differentiate between stored, running, and occasional use vehicles, nor does it identify, or reasonably justify, the “environmental” concerns relating to each that produce differing classification and treatment. Relating to the storage of vehicles, the specific nature of the harm that is sought to be avoided is not detailed or justified, and as such the ordinance is unduly oppressive and an unreasonable exercise of police power.

X. SEVENTH CAUSE OF ACTION - KITSAP’S NUISANCE

ORDINANCE CAUSES IMPAIRMENT OF EXISTING CONTRACTS

11.1 Kitsap’s Nuisance Ordinance violates the provisions of article 1 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..

X. DEMANDS

12.1 The plaintiff, Colin Young, requests that the court declare Ordinance 261 [KCC chapter 9.56] invalid and that Kitsap county and the Department of Community Development be permanently enjoined from utilizing the ordinance. It is further requested that a temporary injunction against Kitsap County using the ordinance be issued without delay, and be in place until a judgment on the merits of this case can be determined and any related appeal process is completed.

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

DATED this 2nd day of July, 2004



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

RESPONDENT'S APPENDIX

A2 – KITSAP COUNTY CODE
9.56
“NUISANCE ORDINANCE”


Kitsap County Code

Chapter 9.56
PUBLIC NUISANCES

Sections:

<u>9.56.010</u>	Purpose.
<u>9.56.020</u>	Definitions.
<u>9.56.030</u>	Voluntary correction.
<u>9.56.035</u>	Prerequisite to notice of abatement.
<u>9.56.040</u>	Notice of abatement.
<u>9.56.050</u>	Hearing before the violations hearing examiner.
<u>9.56.060</u>	Abatement by the county.
<u>9.56.070</u>	Environmental mitigation agreement for outdoor storage of junk motor vehicles on private property.
<u>9.56.080</u>	Additional enforcement procedures.
<u>9.56.090</u>	Removal of personal property and/or solid waste placed onto public access.
<u>9.56.100</u>	Conflicts.
<u>9.56.110</u>	Representation by attorney.

9.56.010 Purpose.

This chapter provides for the abatement of conditions which constitute a public nuisance where premises, structures, vehicles, or portions thereof are found to be unfit for human habitation, or unfit for other uses, due to dilapidation, disrepair, structural defects, defects increasing the hazards of fire, accidents or other calamities, inadequate ventilation and uncleanliness, inadequate light or sanitary facilities, inadequate drainage, or due to other conditions which are inimical to the health and welfare of the residents of Kitsap County.

(Ord. 261 (2001) § 1 (part), 2001)

9.56.020 Definitions.

As used in this chapter, unless a different meaning is plainly required:

- (1) "Abate" means to repair, replace, remove, destroy or otherwise remedy a condition which constitutes a nuisance under this chapter by such means, in such a manner, and to such an extent as the director determines is necessary in the interest of the general health, safety and welfare of the community.
- (2) "Act" means doing or performing something.
- (3) "Building" means any legally constructed structure consisting of a minimum of three sides and a roof.
- (4) "Director" means the director of the department of community development, or the director of the department of public works, or their authorized designee, or any designee of the board of county commissioners, empowered to enforce a county ordinance or regulation.
- (5) "Department" means the department of community development (DCD).
- (6) "Development" means the erection, alteration, enlargement, demolition, maintenance or use of any structure or the alteration or use of any land above, at or below ground or water level, and all acts

authorized by a county regulation.

(7) "Emergency" means a situation which, in the opinion of the director, requires immediate action to prevent or eliminate an immediate threat to the health or safety of persons or property.

(8) "Hulk hauler" means any person who deals in vehicles for the sole purpose of transporting and/or selling them to a licensed motor vehicle wrecker or scrap processor in substantially the same form in which they are obtained. A hulk hauler may not sell second-hand vehicle parts to anyone other than a licensed vehicle wrecker or scrap processor, except for those parts specifically enumerated in RCW 46.79.020(2), which may be sold to a licensed motor vehicle wrecker or disposed of at a public facility for waste disposal.

(9) "Junk motor vehicle" means a motor vehicle meeting at least three of the following requirements:

(a) Is three years old or older;

(b) Is extensively damaged, such damage including, but not limited to, any of the following: a buildup of debris that obstructs use, broken window or windshield; missing wheels, tires, tail/headlights, or bumpers; missing or nonfunctional motor or transmission; or body damage;

(c) Is apparently inoperable; or

(d) Has an approximate fair market value equal only to the approximate value of the scrap in it.

"Junk motor vehicle" does not include a vehicle or part thereof that is stored entirely within a building in a lawful manner where it is not visible from the street or other public or private property, or a vehicle or part thereof that is stored or parked in a lawful manner on private property in connection with the business of a licensed dismantler or licensed vehicle dealer and is fenced according to the requirements of RCW 46.80.130;

(10) "Nuisance," "violation" or "nuisance violation" means:

(a) Doing an act, omitting to perform any act or duty, or permitting or allowing any act or omission, which significantly affects, injures, or endangers the comfort, repose, health or safety of others, is unreasonably offensive to the senses, or obstructs or interferes with the free use of property so as to interfere with or disrupt the free use of that property by any lawful owner or occupant; or

(b) The existence of any of the following conditions:

(i) Premises containing visible accumulations of trash, junk, litter, boxes, discarded lumber, ashes, bottles, boxes, building materials which are not properly stored or neatly piled, cans, concrete, crates, empty barrels, dead animals or animal waste, glass, tires, mattresses or bedding, white goods, numerous pieces of broken or discarded furniture and furnishings, old appliances or equipment or any parts thereof, iron or other scrap metal, packing cases or material, plaster, plastic, rags, wire, yard waste or debris, salvage materials or other similar materials, except that kept in garbage cans or containers maintained for regular collection. Nothing in this subsection shall prevent the temporary retention of waste in approved, covered receptacles;

(ii) Dangerous structures including, but not limited to, any dangerous, decaying, unkempt, falling or damaged dwelling, or other structure;

(iii) Any junk motor vehicle including, but not limited to, any junk motor vehicle, vehicle hulk or any part thereof which is wrecked, inoperable or abandoned, or any disassembled trailer, house trailer, or part thereof, with one exception:

(A) A property may store up to six junk motor vehicles on private property outside of a permitted building, **only if** the vehicles are: (i) completely screened (as defined in Section 9.56.020(17)) by sight-obscuring fence or natural vegetation to the satisfaction of the director (a covering such as a tarp over the vehicles will not constitute an acceptable visual barrier); or (ii) more than two-hundred and fifty feet away from all property lines. The owner of any such screened junk motor vehicle(s) must successfully enter into an environmental mitigation agreement with the department regarding the property where such vehicle(s) will be located or stored, as set forth in Section 9.56.070. Any junk motor vehicle that is stored outside on private property without an approved environmental mitigation agreement with the department shall be considered a nuisance in accordance with this chapter;

(iv) Vehicle lots without approved land use;

(v) Attractive Nuisances. Any nuisance defined in this subsection which is detrimental to children, whether in or on a building, on the premises of a building, or upon an unoccupied lot, which is left in any place exposed or accessible to children including, but not limited to, unused or abandoned refrigerators, freezers, or other large appliances or equipment or any parts thereof; abandoned motor vehicles; any structurally unsound or unsafe fence or edifice; any unsecured or abandoned excavation, pit, well, cistern, storage tank or shaft; and any lumber, trash, debris or vegetation which may prove a hazard for minors;

(vi) Obstructions to the public right-of-way including, but not limited to, use of property abutting a public street or sidewalk or use of a public street or sidewalk which causes any obstruction to traffic or to open access to the streets or sidewalks. This subsection shall not apply to events, parades, or the use of the streets or public rights-of-way when authorized by the county. This section includes the existence of drainage onto or over any sidewalk, street or public right-of-way, and the existence of any debris or plant growth on sidewalks adjacent to any property, and any personal property and/or solid waste that has been placed onto a public right-of-way pursuant to a court-ordered eviction per Title 59 RCW which has not been removed after twenty-four hours;

(vii) Illegal dumping including, but not limited to, dumping of any type by any person on public or private property not designated as a legal dump site; and

(viii) Dumping in waterways including, but not limited to, dumping, depositing, placing or leaving of any garbage, ashes, debris, gravel, earth, rock, stone or other material upon the banks, channels, beds or bars of any navigable water, or the felling of any tree or trees, so that the same shall in whole or in part project within the high water bank of any navigable watercourse, or the casting, placing, depositing or leaving of any logs, roots, snags, stumps or brush upon the banks or in the bed or channel of any navigable watercourse, unless otherwise approved by the appropriate governmental agency.

(11) "Omission" means a failure to act.

(12) "Person" means any individual, firm, association, partnership, corporation or any entity, public or private.

(13) "Person responsible for the violation" means any person who has an interest in or resides on the property where the alleged violation is occurring, whether as owner, tenant, occupant, or otherwise.

(14) "Repeat violation" means a violation of the same regulation in any location by the same person, for which voluntary compliance previously has been sought or a notice of abatement has been issued, within the immediately preceding twelve consecutive month period.

(15) "Scrap" means any manufactured metal or vehicle parts useful only as material for reprocessing.

(16) "Scrap processor" means a licensed establishment that maintains a hydraulic baler and shears, or a shredder for recycling salvage.

(17) "Screened" means not visible from any portion or elevation of any neighboring or adjacent public or private property, easement or right-of-way.

(18) "Vehicle" means every device capable of being moved upon a highway and in, upon, or by which any person or property is or may be transported or drawn upon a highway. Motorcycles shall be considered vehicles for the purposes of this chapter. Mopeds and bicycles shall not be considered vehicles for the purposes of this chapter.

(19) "Vehicle lot" means a single tax parcel where more than ten vehicles are regularly stored without approved land use by the department.

(20) "Violation" means a violation that constitutes a nuisance under this chapter for which a monetary penalty may be imposed as specified in this chapter. Each day or portion of a day during which a violation occurs or exists is a separate violation.

(21) "Violations hearing examiner" means a hearing examiner employed by the Board of County Commissioners and authorized to enforce the provisions of this chapter.

(Ord. 261 (2001) § 1 (part), 2001)

9.56.030 Voluntary correction.

(1) Issuance.

(a) When the director determines that a violation has occurred or is occurring, he or she shall attempt to secure voluntary correction by contacting the person responsible for the alleged violation and, where possible, explaining the violation and requesting correction.

(b) Voluntary Correction Agreement. The person responsible for the alleged violation may enter into a voluntary correction agreement with the county, acting through the director.

(i) Content. The voluntary correction agreement is a contract between the county and the person responsible for the violation in which such person agrees to abate the alleged violation within a specified time and according to specified conditions. The voluntary correction agreement shall include the following:

(A) The name and address of the person responsible for the alleged violation;

(B) The street address or other description sufficient for identification of the building, structure, premises, or land upon or within which the alleged violation has occurred or is occurring;

(C) A description of the alleged violation and a reference to the regulation which has been violated;

(D) The necessary corrective action to be taken, and a date or time by which correction must be completed;

(E) An agreement by the person responsible for the alleged violation that the county may enter the property and inspect the premises as may be necessary to determine compliance with the voluntary correction agreement;

(F) An agreement by the person responsible for the alleged violation that the county may abate the violation and recover its costs and expenses (including administrative, hearing and removal costs) and/or a monetary penalty pursuant to this chapter from the person responsible for the alleged violation if the terms of the voluntary correction agreement are not satisfied; and

(G) An agreement that by entering into the voluntary correction agreement, the person responsible for the alleged violation waives the right to a hearing before the violations hearing examiner under this chapter or otherwise, regarding the matter of the alleged violation and/or the required corrective action.

(ii) Right to a Hearing Waived. By entering into a voluntary correction agreement, the person responsible for the alleged violation waives the right to a hearing before the violations hearing examiner under this chapter or otherwise, regarding the matter of the violation and/or the required corrective action.

(iii) Extension and Modification. The director may grant an extension of the time limit for correction or a modification of the required corrective action if the person responsible for the alleged violation has shown due diligence and/or substantial progress in correcting the violation, but unforeseen circumstances have delayed correction under the original conditions.

(iv) Abatement by the County. The county may abate the alleged violation in accordance with Section 9.56.060 if all terms of the voluntary correction agreement are not met.

(v) Collection of Costs. If all terms of the voluntary correction agreement are not met, the person responsible for the alleged violation shall be assessed a monetary penalty commencing on the date set for correction and thereafter, in accordance with Section 9.56.040(5), plus all costs and expenses of abatement, as set forth in Section 9.56.060(4) and allowed by RCW 35.80.030.

(Ord. 261 (2001) § 1 (part), 2001)

9.56.035 Prerequisite to notice of abatement.

Absent conditions which pose an immediate threat to the public health, safety or welfare of the environment, the procedures for abatement of conditions constituting a nuisance pursuant to this chapter should be utilized by the county only after correction of such conditions has been attempted through use of the civil infraction process, as specified in Title 17 and Chapter 2.116 of the Kitsap County Code.

Once it has been determined by the county that correction of such conditions has not been adequately achieved through use of the civil infraction process, then the county shall proceed with abatement of such conditions pursuant to the provisions of this chapter.
(Ord. 261 (2001) § 1 (part), 2001)

9.56.040 Notice of abatement.

(1) Issuance.

(a) When the director determines that a violation has occurred or is occurring, and is unable to secure voluntary correction pursuant to Section 9.56.030, he or she may issue a notice of abatement to the person responsible for the alleged violation.

(b) Under the following circumstances the director may issue a notice of abatement without having attempted to secure voluntary correction as provided in Section 9.56.030:

(i) When an emergency exists;

(ii) When a repeat violation occurs;

(iii) When the violation creates a situation or condition which cannot be corrected;

(iv) When the person responsible for the violation knew or reasonably should have known that the action was in violation of a county regulation; or

(v) When the person responsible for the violation cannot be contacted when reasonable attempts to contact the person have failed, or the person refuses to communicate or cooperate with the county in correcting the alleged violation.

(2) Content. The notice of abatement shall include the following:

(a) The name and address of the person responsible for the alleged violation;

(b) The street address or description sufficient for identification of the building, structure, premises, or land upon or within which the alleged violation has occurred or is occurring;

(c) A description of the violation and a reference to the provision(s) of the county regulation(s) which has been allegedly violated;

(d) The required corrective action and a date and time by which the correction must be completed and, after which, the county may abate the unlawful condition in accordance with Section 9.56.060;

(e) The date, time and location of an appeal hearing before the violations hearing examiner which will be at least twenty, but no more than sixty days from the date of the notice of abatement, unless such date is continued by the violations hearing examiner for good cause shown;

(f) A statement indicating that the hearing will be canceled and no monetary penalty will be assessed, if the director approves the completed, required corrective action prior to the hearing; and

(g) A statement that the costs and expenses of abatement incurred by the county pursuant to Section 9.56.060(4), and a monetary penalty in an amount per day for each violation as specified in subsection (5) of this section, may be assessed against the person to whom the notice of abatement is directed as specified and ordered by the violations hearing examiner.

(3) Service of Notice. The director shall serve the notice of abatement upon the person responsible for the alleged violation, either personally or by mailing a copy of the notice by certified or registered mail, with a five-day return receipt requested, to such person at their last known address. If the person responsible for the violation cannot be personally served within Kitsap County, and if an address for mailed service cannot be ascertained, notice shall be served by posting a copy of the notice of abatement conspicuously on the affected property or structure. Proof of service shall be made by a written declaration under penalty of perjury executed by the person effecting the service, declaring the time and date of service, the manner by which the service was made and, if by posting, the facts showing the attempts to serve the person personally or by mail. If the person responsible for the alleged violation is a tenant, a copy of the notice of abatement shall also be mailed to the landlord or owner of the property where the alleged violation is occurring. If the alleged violation involves a junk motor vehicle, notice shall be provided to the last registered and legal owner of record of said vehicle (unless the

vehicle is in such condition that identification numbers are not available to determine ownership), as well as to the property owner of record, as shown on the last equalized assessment roll.

(4) Extension. Extensions of the time specified in the notice of abatement for correction of the alleged violation may be granted at the discretion of the director or by order of the violations hearing examiner.

(5) Monetary Penalty. The monetary penalty for each violation of this chapter is \$250.00 per day or portion thereof.

(6) Continuing Duty to Correct. Payment of a monetary penalty pursuant to this chapter does not relieve the person to whom the notice of abatement was issued of the duty to correct the alleged violation.

(7) Collection of Monetary Penalty.

(a) A monetary penalty imposed pursuant to subsection (5) of this section constitutes a personal obligation of the person to whom the notice of abatement is directed. The monetary penalty must be paid to the county within ten calendar days from either the date of mailing of the violations hearing examiner's decision following a hearing, or the date of mailing the violations hearing examiner's default order if the person responsible for the violation failed to appear for the hearing. Any such monetary penalty also constitutes a lien against the affected real property, in the manner set forth in Section 9.56.060(6).

(b) The prosecuting attorney is authorized to take appropriate action to collect the monetary penalty.

(Ord. 261 (2001) § 1 (part), 2001)

9.56.050 Hearing before the violations hearing examiner.

(1) Notice. A person to whom a notice of abatement is issued will be scheduled to appear before the violations hearing examiner not less than twenty, nor more than sixty calendar days after the notice of abatement is issued. Continuances may be granted at the discretion of the director, or by the violations hearing examiner for good cause.

(2) Prior Correction of Violation. The hearing will be canceled and no monetary penalty will be assessed, if the director approves the completed required corrective action prior to the scheduled hearing.

(3) Procedure. The violations hearing examiner shall conduct a hearing on the notice of abatement and alleged violation pursuant to hearing examiner procedures approved by the board of county commissioners.

(a) Junk Motor Vehicles Placed or Abandoned on Private Property. If a junk motor vehicle is placed or abandoned on private property without the consent of the property owner, the owner of the property on which the vehicle is located may appear in person at the hearing or present a written statement in time for consideration at the hearing, and deny responsibility for the presence of the vehicle on the property with his/her reasons for denial. If it is determined by the violations hearing examiner that the vehicle was placed on the property without the consent of the property owner and that he/she has not subsequently acquiesced in its presence, then the costs of administration or removal of the vehicle shall not be assessed against the property upon which the vehicle is located, or otherwise collected from the property owner.

(4) Hearing Decision. At the conclusion of the hearing on the violation, the violations hearing examiner shall either: (i) affirm the issuance of the notice of abatement if he or she determines by a preponderance of the evidence that the violation exists substantially as stated in the notice of abatement; (ii) dismiss the notice of abatement and grant the appeal if he or she determines that the violation does not exist substantially as stated in the notice of abatement; or (iii) modify the abatement depending on the specifics of the violation. A copy of the violations hearing examiner's ruling shall be mailed to the person found responsible for the violation, the county, and if the person responsible for the violation is a tenant, to the landlord or owner of the property where the violation is occurring.

(5) **Monetary Penalties.** The violations hearing examiner may assess monetary penalties in accordance with Section 9.56.040(5).

(a) The violations hearing examiner has the following options in assessing monetary penalties:

(i) Assess monetary penalties beginning on the date the notice of abatement was issued and thereafter;

(ii) Assess monetary penalties beginning on the correction date set by the director, or an alternate correction date set by the violations hearing examiner and thereafter;

(iii) Assess less than the established monetary penalty set forth in Section 9.56.040(5), based on the criteria of subdivision (5)(b), below, of this section; or

(iv) Assess no monetary penalties.

(b) In determining the monetary penalty assessment, the violations hearing examiner shall consider the following factors:

(i) Whether the person to whom the notice of abatement was issued responded to attempts to contact the person, and cooperated to correct the violation;

(ii) Whether the person failed to appear at the hearing;

(iii) Whether the violation was a repeat violation;

(iv) Whether the person showed due diligence and/or substantial progress in correcting the violation; and

(v) Any other relevant factors.

(c) The violations hearing examiner may double the monetary penalty schedule if the violation was a repeat violation. In determining the amount of the monetary penalty for repeat violations, the violations hearing examiner shall consider the factors set forth in subdivision (5)(b), above, of this section.

(6) **Failure to Appear.** If the person to whom the notice of abatement was issued fails to appear at the scheduled hearing, the violations hearing examiner will enter an order of default with findings pursuant to subsection (4) of this section and assess the appropriate monetary penalty pursuant to subsection (5) of this section. The county may enforce the violations hearing examiner's order and recover all related expenses, including attorney fees, plus the costs of the hearing and any monetary penalty from the person to whom the notice of abatement was issued. A copy of the order of default shall be mailed to the person to whom the notice of abatement was issued and against whom the default order was entered, the county, and if the person found responsible for the violation is a tenant, to the landlord or owner of the property where the violation is occurring.

(7) **Time Period for Correction.** If a notice of abatement is affirmed by the violations hearing examiner, the person responsible for the violation shall have thirty days to abate the violation and bring the property into compliance with the terms of this chapter or the county may perform the abatement required therein, and shall bill the costs in the manner provided in Section 9.56.060 of this chapter.

(8) **Judicial Review.** Any person with standing to bring a land use petition under Chapter 36.70C RCW, including the county, may seek review of the violations hearing examiner's decision by filing a land use petition in superior court and complying with all requirements of Chapter 36.70C RCW.

(Ord. 261 (2001) § 1 (part), 2001)

9.56.060 Abatement by the county.

(1) The county may abate a condition which constitutes a nuisance under this chapter when:

(a) The terms of the voluntary correction agreement pursuant to Section 9.56.030 of this chapter have not been met;

(b) A notice of abatement has been issued pursuant to Section 9.56.040, a hearing has been held pursuant to Section 9.56.050, and the required correction has not been completed by the date specified in the violations hearing examiner's order; or

(c) The condition is subject to summary abatement as provided for in subsection (2) of this

section.

(2) **Summary Abatement.** Whenever any nuisance causes a condition, the continued existence of which constitutes an immediate threat to the public health, safety or welfare or to the environment, the county may summarily and without prior notice abate the condition. Notice of such abatement, including the reason for it, shall be given to the person responsible for the violation as soon as reasonably possible after the abatement. If the person responsible for the violation is a tenant, notice of such abatement shall also be given to the landlord or owner of the property where the violation is occurring. No right of action shall lie against the county or its agents, officers, or employees for actions reasonably taken to prevent or cure any such immediate threats, but neither shall the county be entitled to recover any costs incurred for summary abatement, prior to the time that actual notice of same is provided to the person responsible for the violation.

(3) **Authorized Action by the County.** Using any lawful means, the county may enter upon the subject property and may remove or correct the condition that is subject to abatement. The county may seek such judicial process as it deems necessary to effect the removal or correction of such condition.

(a) **Removal of Junk Motor Vehicles, Vehicle Hulk or Parts Thereof.** If the owner or person found responsible for a nuisance involving a junk motor vehicle, vehicle hulk or any parts thereof fails to correct his/her nuisance within the date specified in the violations hearing examiner's order or notice of summary abatement, the county, upon notification from the director, may enter the subject property to inspect and certify that a vehicle meets the criteria of a junk motor vehicle as defined in this chapter. The law enforcement officer or county agent making the certification shall record the make and vehicle identification number or license number of the vehicle if available and/or legible, and shall also document in detail the damage or missing equipment to verify whether the approximate value of the vehicle is equivalent only to the approximate value of the scrap in it (only if that is one of the definitional criteria that was alleged in the notice of abatement issued by the county). The vehicle shall then be photographed by the officer or county agent, removed from the property by the county, and disposed of by a licensed vehicle wrecker, hulk hauler, or scrap processor with notice to the Washington State Patrol and the Washington State Department of Licensing that the vehicle has been wrecked. The vehicle shall only be disposed of as scrap.

(b) **Photographic Record.** The county shall maintain a photographic record of all abated junk motor vehicles for a period of two years following abatement. At the conclusion of the two-year period, a written report, along with copies of the photographs, shall be forwarded to the board of county commissioners.

(4) **Recovery of Costs and Expenses.** The costs of correcting a condition which constitutes a nuisance under this chapter, including all incidental expenses, shall be billed to the person responsible for the nuisance and/or the owner, lessor, tenant or any other person entitled to control the subject property, and shall become due and payable to the county within fifteen calendar days of the date of mailing the billing for abatement. The term "incidental expenses" includes, but is not limited to, personnel costs, both direct and indirect and including attorney's fees; costs incurred in documenting the violation; towing/hauling, storage and removal/disposal expenses; and actual expenses and costs of the county in preparing notices, specifications and contracts associated with the abatement, and in accomplishing and/or contracting and inspecting the work; and the costs of any required printing and mailing. All such costs and expenses shall constitute a lien against the affected property, as set forth in subsection (6) of this section.

(5) **Interference.** Any person who knowingly hinders, delays or obstructs any county employee acting on direction of the director in the discharge of the county employee's official powers or duties in abating a nuisance under this chapter, shall be guilty of a misdemeanor punishable by imprisonment not exceeding ninety days and/or a fine not exceeding \$1,000.00.

(6) **Lien - Authorized.** The county shall have a lien for any monetary penalty imposed, the cost of any abatement proceedings under this chapter, and all other related costs against the real property on which the monetary penalty was imposed or any of the work of abatement was performed. The lien shall run with the land, but shall be subordinate to all previously existing special assessment liens imposed on

the same property and shall be superior to all other liens, except for state and county taxes, with which it shall be on a parity.

(a) The director shall cause a claim for lien to be filed for record within ninety days from the later of the date that the monetary penalty is due, the work is completed, or the nuisance abated.

(b) The claim of lien shall contain sufficient information regarding the notice of abatement, as determined by the director, a description of the property to be charged with the lien and the owner of record, and the total amount of the lien.

(c) Any such claim of lien shall be verified by the director, and may be amended to reflect changed conditions.

(Ord. 261 (2001) § 1 (part), 2001)

9.56.070 Environmental mitigation agreement for outdoor storage of junk motor vehicles on private property.

Pursuant to subdivision (10)(b)(iii)(A) of Section 9.56.020 of this chapter, an environmental mitigation agreement between a property owner and the department is required before the outdoor storage of up to six screened junk motor vehicles will be approved. A property owner may enter into such agreement with the department for a one-time fee of \$10.00 per vehicle, the proceeds from which shall be used to assist with clean up costs associated with this chapter. In order to mitigate any potential environmental impact from the storage of these junk motor vehicles, the property owner must agree to institute one of the following two preventative measures:

(1) Each junk motor vehicle must be drained of all oil and other fluids including, but not limited to, engine crankcase oil, transmission fluid, brake fluid and radiator coolant or antifreeze prior to placing the vehicle on site; or

(2) Drip pans or pads must be placed and maintained underneath the radiator, engine block, transmission and differentials of each junk motor vehicle to collect residual fluids.

Either preventative measure shall require that the owner of such vehicle(s) clean up and properly dispose of any visible contamination resulting from the storage of junk motor vehicles. The agreement will require the property owner to select one of the two preventative measures and to allow for an initial inspection of the property by the department to assure that the preventative measure has been implemented to the satisfaction of the department. By entering into the agreement, the property owner further agrees to allow the department entry onto the property on an annual basis for re-inspection to assure compliance with the approved agreement. If a property is found to be in compliance with the terms of the agreement for two consecutive inspections, the department may waive the annual inspection requirement. A property owner found to be in violation of the agreement may be fined a monetary penalty in accordance with Section 9.56.040(5), and the property may be deemed a nuisance in accordance with the provisions of this chapter.

(Ord. 261 (2001) § 1 (part), 2001)

9.56.080 Additional enforcement procedures.

The provisions of this chapter are not exclusive, and may be used in addition to other enforcement provisions authorized by this code.

(Ord. 261 (2001) § 1 (part), 2001)

9.56.090 Removal of personal property and/or solid waste placed onto public access.

(1) Once personal property and/or solid waste belonging to an evicted tenant has been placed onto public right-of-way pursuant to a court-ordered eviction per Title 59 RCW, the evicted tenant/owner of the personal property and/or solid waste or his/her designee shall have twenty-four hours to remove said personal property and/or solid waste from the public right-of-way. Notice of such removal after twenty-four hours shall be given to the evicted tenant/owner of the personal property

and/or solid waste or his/her designee. If, after twenty-four hours, the evicted tenant/owner or his/her designee has not removed the personal property and/or solid waste from the public right-of-way, the property shall be deemed a nuisance, and the landlord/property owner or his/her designee shall remove the personal property and/or solid waste for proper disposal within forty-eight hours or the county shall seek to abate the nuisance, pursuant to Section 9.56.060, to be billed to the landlord/property owner or his/her designee.

(Ord. 261 (2001) § 1 (part), 2001)

9.56.100 Conflicts.

In the event of a conflict between this chapter and any other provision of the Kitsap County Code or other county ordinance providing for a civil penalty, this chapter shall control.

(Ord. 261 (2001) § 1 (part), 2001)

9.56.110 Representation by attorney.

(1) A person subject to proceedings under this chapter may appear on his or her own behalf or be represented by counsel.

(2) The prosecuting attorney representing the county may, but need not, appear in any proceedings under this chapter.

(Ord. 261 (2001) § 1 (part), 2001)

FILED
COURT OF APPEALS
08 JUL 26 PM 1:09
STATE OF WASHINGTON
BY _____
DEPUTY

PROOF OF SERVICE

I declare under penalty of perjury under the laws of the State of Washington that the following is true and correct:

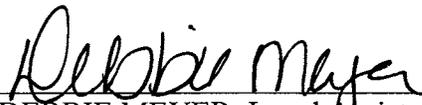
That I am a citizen of the United States, a resident of the State of Washington, over the age of eighteen years, not a party to the above-entitled action and competent to be a witness therein;

That on the 17th day of July, 2006, arrangements were made with ABC Legal Messengers for the filing of the original Brief of Respondent with the Clerk of the Court, Court of Appeals, Division II, 950 Broadway, Suite 300, Tacoma, Washington, 98402.

Further, that on the 17th day of July, 2006, a copy of the same was placed in the United States mail, postage prepaid, to the following:

Colin F. Young
1785 Spirit Ridge Drive
Silverdale, WA 98383

Respectfully submitted this 25 day of July, 2006, at Port Orchard, Washington.


DEBBIE MEYER, Legal Assistant