

NO. 34341-0-11

COURT OF APPEALS, STATE OF WASHINGTON, DIVISION II

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LEE AND GINA HOLDER

Appellants,

v.

CITY OF VANCOUVER

Respondent,

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APPEAL FROM THE SUPERIOR COURT FOR  
CLARK COUNTY  
Hon. James E. Rulli, Judge  
Cause No. 05-2-04039-8

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APPELLANT'S OPENING BRIEF

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Pro Se Appellant  
Lee A. Holder  
1601 SE 97<sup>th</sup> Ave.  
Vancouver, WA 98664  
(360) 604 5895

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STATE OF WASHINGTON  
COURT OF APPEALS  
DIVISION II

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## **ASSIGNMENTS OF ERROR**

1. The trial court erred in not finding that storage was the use established on the property by prior litigation on the same subject matter.
2. The trial court erred in affirming the Hearing Examiner's decision that Appellant's violated Vancouver Municipal Code 17.14.290.a by parking on unimproved surfaces.
3. The trial court erred in not addressing **res judicata** as an issue.
4. The trial court erred in denying Appellant an opportunity to present his testimony on the City's allegation of an order compelling the submission of a nonconforming use application.

## **ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. Does the City's failure to acknowledge or even address the fact that prior litigation initiated by the City established Holder's use in his rear yard as storage constitute a valid exclusion while parking,

minimally referenced, was asserted as the only issue driving the allegation of a violation? (Assignment of Error 1)

2. On what basis did the City conclude that parking was the established use in Holder's rear yard? (Assignments of Error 1, 2).
3. How did the City conclude that Title 20 "triggered" Title 17 when there was no allegation of a violation of Title 20 in the examiner's Decision or elsewhere? (Assignments of error 1, 2)
4. Did Title 17 even address vehicle parking in a rear yard? (Assignment of Error 2)
5. Since the City asserts that Title 17 and Title 20 are unrelated how can they justify citing Title 20 as a trigger for Title 17 but not for **res judicata**? (Assignment of Error 2,3)
6. On what basis can the Court deny presentation of testimony when the issue in question was raised by the opposition? (Assignment of Error 4)
7. Is it equitable for a litigant to be subjected to enforcement of an alleged order when no evidence is presented and the allegation is denied? (Assignment of Error 4)

## **STATEMENT OF THE CASE**

Appellants and their four children moved to Vancouver, Washington in March of 1995 bringing five vehicles, three of them classics. Restoration of classics was a popular activity during long cold winters and a welcome diversion for teens from less desirable influences. A house on .4 acres was purchased and a six foot cedar fence installed on three sides. The east side was screen by a chain link fence enclosing an undeveloped area of dense trees and underbrush. The conditions met Clark County's requirement for storage of any material or vehicles (RP 5, 6,9, 12, 13, 15, 16, 18, 21, 23). Additional classic vehicles were purchased in anticipation of three new drivers in the family. Classics were only driven during the summer, each family member also had a later model vehicle for the other seasons. On January 1997 the property was annexed by Respondents ( City of Vancouver, hereinafter City) and all lawfully existing conditions were accepted as lawful under the City's annexation ordinance (RP 10, 12).

In 1998 the east neighbors tree damaged one of Appellant's (hereinafter Holder) vehicles stored in his rear yard. The neighbor claimed an act of nature and declined Holder's offer to assist in trimming his trees. In 1999 another tree damaged Holder's 1964 Falcon Sprint and 1964 Ranchero.

The neighbor again decline responsibility and Holder sued in small claims court collecting less than half the assessed damage. The neighbor then filed a complaint against Holder with the City of Vancouver. There was no allegation of any code violation by the neighbor against Holder.

On September 14, 1999 the City of Vancouver initially filed four citations against Holder. JUNK VEHICLE OPEN STORAGE, OPEN STORAGE, **PARKING ON UNIMPROVED AREAS**, SETBACKS DIMENSIONAL STANDARDS (emphasis added). On June 27, 2000 the City issued an amended citation correcting an earlier error. After several hearings a FINAL ORDER was issued on July 24, 2000, and FINAL ORDER ON REMAND was issued on August 10, 2001. Copies attached as "Ex 12" (CP 78-85) and "Ex 5" (CP 69-77) to RESPONDENT'S MEMORANDUM IN OPPOSITION TO PETITIONER'S OPENING BRIEF (CP 38-48) . Holder received a letter dated July 3, 2001 from his counsel, Attorney Jackson, in which he stated the City would consider Holder in compliance if he withdrew his appeal. No changes were required in any condition on Holder's property and the case was closed after the appeal was withdrawn.

On April 1, 2005 the City issued three citations: 1. "construction of

membrane structures”; 2. “**motor vehicles parked on unimproved surfaces**”; and 3. “construction of a structure without a permit” (emphasis added)(CP 63-65) . Number 1 was dismissed on a technicality but the hearing examiner stated that the action was illegal and detailed the procedure by which the City could sustain a subsequent citation (CP 56-58). The City re-filed the citation. A motion for change of examiner/ declaration of prejudice for prejudgement was filed. An examiner from a mediation service was substituted and the City’s order was vacated at a subsequent hearing. Number 2 is the matter currently under appeal. In citation number 3 the shed’s construction date could not be ascertained but the citation was affirmed as the structure had been moved after annexation. The proper permit was obtain before the correction date. No complainant other than the City was ever identified.

Citation no. 2, **MOTOR VEHICLES PARKED ON UNIMPROVED SURFACES** was appealed in Clark County Superior Court on December 20, 2005. Judge James E Rulli affirmed the hearing examiner’s findings that Holder violated VMC 17.14.290.a by failing the burden of proof that all of the existing gravel parking areas on the property were legally established prior to January 29, 2004, the effective date of VMC 17.14 (RP 25), (copy submitted with appeal).

The City filed a “motor vehicles parked on an unimproved surface” violation under VMC 17.14.290(a) on 4-1-2005. The same allegation, “parking vehicles on unimproved surfaces,” only under VMC 20.81.440D, was previously filed 9-14-1999. This previous charge of parking on unimproved surfaces was dismissed by the hearing examiner in a FINAL ORDER issued 7-24-2000 (CP 46). The City states that the previous hearing examiner dismissed the citation because the new parking requirement must be in response to new construction and no new construction was evident.

The City states that by contrast, the present case involves parking improvements (additional gravel) added after annexation. The City requires an improved surface for new parking areas - not gravel. Therefore, Petitioners could not have established a legal nonconforming use by adding gravel for parking after annexation and prior to the adoption of VMC 17.14 (CP 42-43).

## **ARGUMENT**

### **A . Prior litigation by the City established that vehicle storage was a permitted use under Clark County.**

In the previous hearings on the same subject matter, vehicles on

unimproved surfaces, it is clear that the parking citation was dismissed and the only remaining issue was related to storage. The City's "Ex 5 at 3, C.2.b (CP 71) references an argument by Holder's counsel, Attorney Jackson:

- b. He argued that the Appellants' storage of inoperable vehicles was a legal use prior to annexation. The County Code in effect on the date the City annexed the Property allowed storage of any number of inoperable vehicles, provided the vehicles were not visible from adjacent properties and public rights of way. The Appellants' vehicles were screened from view by solid wood fences on the north, south and west boundaries of the Property and dense vegetation on the abutting property to the south. Therefore the Appellants' storage of inoperable vehicles was a permitted use on the date of annexation and must be allowed to continue pursuant to VMC 20.93.320.

A review of Clark County Chapter 9.24, "Ex 1" (CP 108-109) of PETITIONER'S RESPONSE TO RESPONDENT'S MEMORANDUM IN OPPOSITION TO PETITIONER'S OPENING BRIEF, will show no requirements for storage other than visibility. It is noted that in each of the prior two hearings storage of vehicles was cited in Holder's rear yard. In the City's "Ex 5, at 6 D.1.a" (CP 74);

The examiner finds that the "use" in question consists of the storage of "inoperable" or "junk" vehicles on the Property. Contrary to the Assertion by Mr. Moore, the examiner finds that, if storage of those vehicles is permitted as a legal non-

conforming use, the right to continue that use is not specific to the vehicles listed in the Notice of Civil Violation. Therefore, if the Appellants sustain the burden of proof that they were legally storing a specific number of “inoperable” or “junk” vehicles on the Property at the time of annexation, the Appellant’s may continue to store that same number of “inoperable” or “junk” vehicles, although the specific vehicles may change over time, subject to whatever further restrictions applied to such use under the County Code when the Property was annexed.

In the City’s “Ex 12 at 6 D” (CP 83);

2. The examiner finds that the setbacks regulations of VMC 20.11.320 do not apply. Setbacks, by definition, only apply to “buildings and structures.” VMC 20.02.304. Stored vehicles and materials are not subject to setback requirements.

3. The examiner further finds that the parking improvements requirements do not apply.

4. The storage of junk vehicles will be addressed in the Final Order regarding Civil Violation 99-0456.

In this finding the examiner appears to differentiate between stored vehicles in para 2 and storage of junk vehicles in para 4. Holder’s counsel

Attorney Steven Self in the City’s “Ex 12 at 5.a.ii.iii” (CP 82);

He argued that the Appellants may be able to remedy the violation by licensing the vehicles stored on his Property. He argued that the Appellants’ storage of vehicles on the property is legal nonconforming use.

A reasonable person could conclude that the City accepted storage

of vehicles as legally established use in Holder's rear yard in part because the debate in the FINAL ORDER ON REMAND centered only on visibility requirements meeting the standards set in Clark County Codes for storage of inoperable vehicles. By omission it could be reasonably inferred that if inoperable vehicles can be conditionally stored then operational vehicles could be stored without conditions. Appearance was clearly the County's primary concern as noted by the descriptions of what constitutes a "junk" vehicle and how that appearance was screened. If appearance is the criteria then operable vehicles meeting the requirements could also be stored with or without screening. The City has offered no evidence or rationale to the contrary. A statement by Code Enforcement Officer Landis is a matter of record in the City's MEMORANDUM IN OPPOSITION at 7, line 5 (CP 44);

However, Mr. Landis testified that Petitioners **stored** vehicles outside of the pre-existing and recognized driveway (emphasis added).

**B. VMC 17.14.290.a is not applicable to Holder's use.**

The City asserts that Holder was parking vehicles in his rear yard, not storing, and not all vehicles were parked on established driveways. When

he added gravel, that addition constituted an unlawful expansion of his parking and he lost all nonconforming rights and now must meet the new requirements under the City's VMC 17.14.

In the current FINAL ORDER NOTICE OF CIVIL VIOLATION AND ORDER C05-000010 (Holder) at 10.4.i (CP 58) the examiner finds;

The Appellants are not allowed to park on areas of the Property that are not surfaced with gravel or better, because there is no substantial evidence that such a use was legally established prior to annexation. Prior to annexation CCC 18.407.020.F(4) required that vehicles must be parked on a "durable and dustless surface" (gravel or better). Current VMC 17.14.290.a requires that all motor vehicles must be parked on an improved all weather surface, defined as "asphalt, concrete, pavers or other surfaces approved by the planning official."

It has already been established that Holder's use in his rear yard was storage as defined by Clark County Chapter 9.20 and affirmed at the two hearings in 2001, well before the 2004 effective date of VMC 17.14.290(a). Thus Holder was under no burden to prove establishment of new parking under VMC 17.14.290(a) as no parking existed prior to or after the effective date of the code.

The City asserts than Holder admits expanding gravel parking areas after the City annexed his property. "Holder applied gravel at various

locations on his property, some prior to and some after annexation.” The City has failed to established a nexus between application of gravel and parking. Holder’s property is at the bottom of a long hill and subject to runoff during precipitation. A short street abuts Holder’s property and three residences with expansive driveways are across the street. All tend to collect precipitation on hard surfaces and funnel a sheet of water into Holder’s rear yard. A berm was constructed by prior owners diagonally across the northeast corner to funnel the water to the rear and then south into the south neighbors rear yard. The only level portions of Holders property are those few having been graded. The home is a split level with a daylight basement partially embedded into the sloping terrain. Holder constructed a berm along portions of the street and dug a ditch which funneled the runoff down to the cross-street. There is still running water along the berm, much reduced, from the house and several springs that materialize inside the rear yard during the rainy season.

Holder has graveled several areas of his side and rear yards over the years, particularly to establish pathways and entrance to the four storage buildings. A significant amount of cement has been pour to serve the same purpose. Gravel was applied to the upside of the berm prior to annexation both to control erosion and provide a stable surface for the only location

feasible for vehicle access to remove yard debris accumulated by prior owners and old shake shingles stored during re-roofing. Vehicle storage in that area was a secondary opportunistic use and does not constitute any expansion gravel parking areas. Adding gravel to existing graveled vehicle storage areas does not create parking because no condition of land use has been changed, it was storage prior to and after the addition. The City cannot cite any reference that indicates all graveled areas constitute parking. Gravel can be commonly observed in decorative landscaping. There are no requirements specified for storage nor any documentation that states the addition of gravel has any connotation. The City's prior allegation of parking on unimproved surfaces was dismissed by the hearing examiner despite knowledge that some areas used for storage were graveled. The City's Code Enforcement Supervisor Landis also recommended the allegation be dropped (City Ex 5 at 5.2.b)(CP 82).

VMC 17.14 was enacted in 2004 and addressed only parking in the front, side and RV parking in the rear yard. Holder's use was storage in his rear yard. Chapter 17 has no reference to annexation but rather cites nonconforming use and defers to compliance in Chapter 20 which does address annexation governing the status of Holder's use which was established long before enactment of Title 17. Chapter 17.14 MINIMUM

PROPERTY MAINTENANCE CODE reads in part:

a. Motor vehicles. Motor vehicles shall be parked on improved all weather surfaces. Motor vehicles, other than those in subsection (b) of this section, shall not be parked in the setbacks except in front yard or side street setbacks when in a driveway that provides access to an approved parking location and in conformance with VMC title 20, as that title currently exists or as it may be subsequently amended, that does not block access to required parking.

b. Recreational vehicles, boats, trailers. Recreational vehicles shall be parked, kept or stored on an improved all weather surface and shall not be parked, kept or stored in required front yard setbacks, except for a driveway. Recreational vehicle parking in the side or rear yard setbacks is allowed so long as not recreational vehicle is parked so as to prevent access by emergency responders to access all sides of a structure. Access to parking shall be via an approved driveway approach and an improved all weather surface.

**c. Properties that are legally non-conforming at the time of the adoption of this code and located in areas developed prior to the adoption of zoning, land use or building codes shall not be required to install improved all weather surface for parking.** (emphasis added).

VMC 20.140.010 Compliance:

B. Legality of pre-existing approvals. Any use of a structure or of land by the City prior to the effective date of this title, or by the County in annexed areas prior to annexation, may continue if consistent with such approvals.

As noted previously Holder's use was established in 1996 prior to

annexation under Clark County Chapter 9.24 "Ex 1" (CP 108-109).

This is consistent with VMC 20.03.120C which was in effect on the date of annexation.

Upon annexation, all prior land use agreements shall be considered to be binding agreements between the City and the parcel owner(s) unless otherwise modified by the City Council upon recommendation of the planning commission.

**C. The doctrine of res judicata should apply in this case.**

The original citation of parking violation was VMC 20.81.440D "by parking on unimproved surfaces"(CP 78). The current citation of parking violation is VMC 17.14.290 "motor vehicles parked on unimproved surfaces"(CP 63). The citations are almost identical in statement and although brought under different titles the purpose is identical as is the ultimate effect. More importantly VMC 17 appears to defer to VMC 20 in matters of compliance outside the limitations of VMC 17 which does not address annexation. It was under annexation that Holder acquired storage rights. Although admittedly somewhat ambiguous the language does include title 20. Assuming a nexus then the titles under which violations were alleged are one and the same.

Supporting this contention are statements by the City, where the

assistant City attorney notes:

Title 20 applies or is triggered if there is a change of use or change of condition on the property. That's under the 20.140.040, the compliance section of Title 20.

There does not appear to be a Title 20.140.040 but 20.140.010 does contain similar language. That title was added 01/26/2004 which was long after Holder's use was established thus making its use questionable in this instance. Similarly significant, the City appears to be alleging that a violation of Title 20 occurred as it was "triggered". There is no record of any allegation of such a violation much less an affirmation. Citing Title 20 in support of their current citation of violation the City has established a connection with Title 20 used in the prior citation of violation. Thus **res judicata** should apply.

If the City is asserting that addition of gravel changed a condition on the property would not adding bark dust or altering landscaping also fall within that nebulous definition. While there is a lengthy definition of "condition" the "make terms concerning" seems applicable. Thus the use and storage, both terms used before and after addition of gravel, did not change thus neither did any condition in effect at the time gravel was added. Gravel was a "condition" for parking but to assert that each

instance gravel is deposited “parking” is created is not supported by the record or any other documentation.

In his FINAL ORDER, NOTICE OF CIVIL VIOLATION the Hearing Examiner states (at 11.b)(CP 59):

The examiner assumes that the settlement agreement did not involve the issue of vehicles parked on unimproved surfaces, since it was dismissed by the city hearing examiner in that case and not subject to the subsequent appeal.

Clearly the statements on both citations were almost identical, parking on unimproved surfaces. Both addressed the issue of gravel surfaces thus it would seem to further support the doctrine of **res judicata**.

#### **D. Hearing Examiner’s Order for Nonconforming Use Application**

In their RESPONDENT’S MEMORANDUM IN OPPOSITION the City asserts (at 3, 10-13) (CP 40):

The Hearing Examiner also ordered the Petitioner’s to file a “technically complete application for nonconforming use determination” within thirty days as well.

The City repeats their assertion (at 7, 12, 13, 14)(CP 44):

As stated above, the Hearing Examiner ordered the Petitioners to file a technically complete application for a nonconforming use determination to specify all legally nonconforming parking areas.

On page 10 the City states that “they refuse to obey this court’s order by submitting an application for a nonconforming use determination....”(CP

47). The City fails to note that the same department that issued the Citations, Notice of Violation is also the same department tasked with determining the nonconforming use. Holder did approach the proper office and was informed there was no such application. Holder was later contacted the same day by the City and provided with information and the form desired by the City. After a review of the material it was clear that once the determination was completed Holder would lose all his nonconforming rights regardless of the final determination.

A review of the Hearing Examiner's Order clearly indicates that Holder could either park his vehicles on proper surfaces; or submit a technically complete nonconforming use determination (emphasis added)(CP 60). Holder moved the vehicles in question to commercial storage prior to the the thirty days allowed in the Order.

At the court hearing the City again asserts an order for nonconforming use (RP 27). Holder attempts to address the issue but is interrupted and not allowed to present his evidence refuting the City's statement. The judge eventually states he was "ordering it now" in response to Holder's statement that he was never ordered to file the use application (RP 28, 29, 30). In the Court Order provided by the city (attached to appeal) there is no order listed requiring the submission of the "use determination"

application. The Assistant City Attorney contacted Holder on several occasions regarding revisiting the issue. Holder contacted his consulting attorney who agreed with Holder and outlined the procedure for seeking clarification in court. Since the appeal was filed with the State Appeals Court the City has not re-addressed the issue.

### **CONCLUSION**

The City of Vancouver seeks to accomplish in the present action what they failed to accomplish in the prior action by changing the operative wording in their Citation from “storage” to “parking”. They have failed to introduced any mechanism under which storage established in the prior action became parking in the present. It seems apparent that the trial court, faced with an inarticulate pro se appellant in a relatively insignificant matter, opted for the version of facts advocated by a seasoned attorney. The prior complainant, the neighbor, acted in retaliation for having lost the small claims judgment. The City, having no complainant initiating the current action , is motivated by reasons unknown.

Appellants respectfully request that the Court reverse the decision of the trial court and the decision of the Hearing Examiner in finding that Appellants were in violation for parking on an unimproved surface.

Dated this 31<sup>ST</sup> day of March, 2006.

*Lee A. Holder*

Lee A. Holder

Pro Se

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STATE OF WASHINGTON

BY \_\_\_\_\_  
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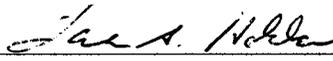
CERTIFICATE OF SERVICE

Case Name: Lee and Gina Holder v. City of Vancouver

Case No: Superior Court 05-2-04039-8  
State Appeals Division II 34341-0-11

I certify that a copy of APPELLANT'S OPENING BRIEF was hand delivered to the WASHINGTON STATE COURT OF APPEALS, Division II for a date stamp on Friday, March 31, 2006 and that copy was hand delivered to the person listed below on Monday, April 3, 2006.

Dated this 6<sup>th</sup> day of April, 2006.

  
\_\_\_\_\_  
Lee A. Holder

Charles A. Isely  
Assistant City Attorney  
210 E 13<sup>th</sup> St.  
Vancouver, WA 98660



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Official website of the  
City of Vancouver, Washington

City of Vancouver > City Government > Municipal Code > Title 17 > Chapter 14 > Section 290

## **Vancouver Municipal Code**

[< Return to Chapter 17.14 MINIMUM PROPERTY MAINTENANCE CODE \(Effective January 29, 2004\)](#)

### **Section 17.14.290 Limitations on the parking of motor vehicles, boats, trailers, commercial, and heavy commercial equipment.**

a. Motor vehicles. Motor vehicles shall be parked on improved all weather surfaces. Motor Vehicles, other than those in subsection (b) of this section, shall not be parked in the setbacks except in front yard or side street setbacks when in a driveway that provides access to an approved parking location and in conformance with VMC title 20. Parked motor vehicles shall not block access to required parking.

b. Recreational vehicles, boats, trailers. Recreational vehicles, boats, and trailers shall be parked, kept or stored on an improved all weather surface and shall not be parked, kept or stored in required front yard setbacks, except for a driveway. Recreational vehicle, boat, or trailer parking in the side or rear yard setbacks is allowed so long as emergency responders may access all sides of a structure. Access to parking shall be via an approved driveway approach and an improved all

weather surface.

c. Truck tractors and semi-trailers. Truck tractors, as defined in RCW 46.04.655, and semi-trailers, as defined in RCW 46.04.530, shall not be parked, kept or stored in residentially zoned areas, on residential property in other zones or on sites that have not been permitted, improved and approved for such use. This requirement shall not apply to the parking, keeping or storage of agricultural machinery on residential premises to be used for agricultural use allowed by VMC title 20 or when equipment is used in conjunction with a permitted or allowed project.

d. Heavy commercial equipment. Heavy commercial equipment shall not be parked, kept or stored in residentially zoned areas, on residential property in other zones or on sites that have not been permitted, improved and approved for such use. This requirement shall not apply to the parking, keeping or storage of agricultural machinery on residential premises to be used for agricultural use allowed by VMC title 20 or when equipment is used in conjunction with an ongoing permitted or allowed project.

(M-3702, Amended, 05/23/2005, Sec 7, Prior Text; M-3637, Added, 12/01/2003, Sec 1)