

FILED

JAN 28 2013

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 309967

(Kittitas County Superior Court
No. 11-2-00228-7)

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

VERN THOMPSON,

Appellant,

vs.

KITTITAS COUNTY, subdivision of the
State of Washington,

Respondent.

BRIEF OF APPELLANT

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INTRODUCTION

Appellant Vern Thompson's ("Thompson") lifelong hobby and current past time is collecting and performing minor restoration on at his property in Cle Elum, Washington. CP 6-7. Thompson has been enjoying this hobby on his property for over thirty years—since 1981. CP 7. In fact, it was not until 1983 that Respondent Kittitas County ("County") adopted its zoning code, potentially rendering Thompson's collection a nonconforming use.

However, all of that changed when the County issued a Notice of Violation and Abatement to Thompson, alleging that he was operating an unapproved junkyard, in violation of the Kittitas County Code ("KCC" or "Code") and the International Property Management Code ("IPMC"). The County based this Notice of Violation primarily on its construction of the phrase "inoperable vehicle" under its Code's nuisance provisions. In spite of the fact that Thompson's vehicles were in perfect working order so long as a battery was installed,¹ the County deemed them as "inoperable" and therefore "junk"—unilaterally transforming Thompson's lifelong car collection, and the property containing this collection, into a "junkyard" with the stroke of a pen.

¹ CP 6.

Even after appearing in front of both a Hearing Examiner and Kittitas Superior Court, the County's erroneous construction and interpretation of "inoperable vehicle" persisted. Thompson thus appeals the trial court's decision to this Court, imploring it to recognize the tenuous, and frankly absurd, nature of the County's construction of this crucial phrase. If nothing else, Thompson asks the Court to review and consider his un rebutted testimony clearly demonstrating his ownership of a legal nonconforming, as well as consider the Hearing Examiner's violation of his procedural due process rights.

**ASSIGNMENTS OF ERROR AND ISSUES RELATING TO
ASSIGNMENTS OF ERROR**

Assignment of Error No. 1: The Trial Court Erred in Affirming the January 7, 2011 Notice of Violation and Abatement.

Issues:

1. Are Thompson's vehicles considered "junk vehicles" under KCC 18.01.010 where they only require a fully charged battery to operate?
2. Are Thompson's vehicles considered "junk," thus rendering his Property a "junkyard," under KCCs 17.08.329 and 17.08.330 where they only require a fully charged battery to operate?

3. Are eight of Thompson's vehicles "farm exempt" both under the Code and under RCW 46.16A.080?

4. Does Thompson have a legal nonconforming use right allowing him to keep collecting cars, given the fact that he had been using his property to collect and restore cars at least two years prior to the adoption of the zoning or nuisance code?

5. Did the Hearing Examiner violate Thompson's constitutional due process rights by prohibiting him from cross examining the code enforcement officer who issued the Notice of Violation and Abatement?

STATEMENT OF THE CASE

In early 2011, the County issued a Notice of Violation and Abatement pursuant to the nuisance provision, KCC 18.02.030. It alleged that Thompson violated the Code by operating an unapproved junkyard on his property in unincorporated Kittitas County, Washington ("Property"). Soon afterwards, Thompson timely appealed this violation notice. Although the County wanted a hearing within weeks, due to a series of continuances wherein Thompson attempted to employ legal counsel, the hearing on his appeal was held approximately two months later.

At the hearing, the County made two allegations: first, that the Property was a "junkyard" as defined by the County Code and therefore a

public nuisance; and second, that the Property was not maintained in a “clean, safe, secure and sanitary condition” due to the presence of “unlicensed, inoperable motor vehicles on the property.” CP 4-5. In response, Thompson, appearing *pro se*, testified under oath that his Property is not a junkyard and that, as a hobby, he has been collecting cars for restoration purposes for over thirty years. CP 6-7. Indeed, Thompson stated that all of the cars on the Property are operable, with some only needing a battery. *Id.* Thompson further testified that most of his vehicles are licensed as well. CP 6. Finally, Thompson testified that he does not strip cars or perform any major mechanical work on them on his Property. *Id.* Rather, Thompson performs only minor restoration work and has them painted and reupholstered off site. *Id.* at 6-7. In addition to restoring vehicles, Thompson also testified that he owns several trucks and flatbed trailers which he uses to transport and store feed for animals he raises and tends. CP 7.

During the hearing, no witness appeared for the County testifying of Thompson’s alleged violations. *See* CP 4-5. Rather, the County merely gave an oral argument and presented a written declaration from a code enforcement officer. *Id.* Hence, Thompson was unable to cross-examine anyone who asserted facts on behalf of the County.

Once Thompson concluded his testimony, the Hearing Examiner concluded the proceeding by opening it up to public comment. Two individuals, Gary Wivag and Rick Spence, testified in support of Thompson. Mr. Wivag testified that, over the course of 20 years, he sold Thompson older cars as he knew Thompson was a car collector. CP 8-9. Mr. Spence also testified that Thompson was a car collector and that, in his opinion as a Land Use Consultant, the Property was not used as a “junkyard.” CP 9-10.

On May 6, 2011, the Hearing Examiner issued a Final Order affirming the Notice of Violation and Abatement and ordered the removal of any inoperable or unlicensed vehicles. Thompson subsequently appealed this determination to Superior Court which affirmed the Hearing Examiner’s ruling on June 11, 2012.

ARGUMENT

I.

STANDARD OF REVIEW

This Court conducts a *de novo* review of “a trial court’s legal conclusions, including its statutory interpretation(s).” *Vance v. XXXL Dev., LLC*, 150 Wn. App. 39, 41 (2009) (citing *Am. Legion Post No. 32 v. City of Walla Walla*, 116 Wn.2d 1, 5 (1991)). Additionally, this Court reviews an “agency's factual findings under the substantial evidence

standard.” *Wenatchee Sportsmen Ass'n v. Chelan County*, 141 Wn.2d 169, 176 (2000). “Under the substantial evidence standard, there must be a sufficient quantum of evidence in the record to persuade a reasonable person that the declared premise is true.” *Id.* (citations omitted).

Here, this case primarily concerns questions of law suited for *de novo* review, with only one improper factual finding unsupported by substantial evidence by the Hearing Examiner pertaining to Thompson’s nonconforming use. Specifically, the questions of law are as follows: 1) Is the mere lack of a car battery in an otherwise fully operational vehicle enough to render it a “junk vehicle” under KCC 18.01.010; or “junk” and/or “inoperable” under KCC 17.08.329? 2) Does the presence of more than five of these vehicles render the Property a “junkyard” under KCC 17.08.330? 3) Are vehicles licensed as “farm exempt” under State statute and used for agricultural purposes exempt as “agricultural equipment” under KCCs 17.08.329-.330? 4) Did the Hearing Examiner violate Thompson’s due process rights by not allowing him to cross examine the County’s code enforcement officer?

II.

THOMPSON'S VEHICLES ARE NOT A PUBLIC NUISANCE UNDER KCC 18.01.010

The main thrust of the County's argument is best summarized by the County itself within its briefing to the trial court:

There are two public nuisance violations that are both alleged by the January 7, 2011 Notice of Violation and Abatement, and found to be nuisance violations by the Hearing Examiner. The two violations are: 1) the existence of a junkyard is not a permitted or conditional use in an AG-3 zone, and 2) failure to maintain property in a clean, safe, secure and sanitary condition, including the presence of unlicensed and/or inoperative motor vehicles on the property in violation of the International Property Maintenance Code [IPMC].

CP 28. However, to support this argument, the County relies **not** upon language within its nuisance codes—KCC 18.01.010—but rather the definitions portion of its **zoning** codes—Chapter 17.28 KCC. *Id.* at 28-30. This was, and is, an improper starting point, as the County has alleged that Thompson's Property is in violation of the **nuisance** provisions of the Code, not the ones pertaining to its zoning. It might have well been a calculated move by the County to make this subtle switch, realizing that it could not meet all the requirements needed to designate Thompson's cars as "junk vehicles." Whatever the case may be, Thompson will provide the proper frame work and language as prescribed under the Code which determines what constitutes a "junk vehicle" for purposes of a nuisance

violation. Furthermore, the sanitary conditions of Thompson's were no at issue. Rather, the IPMC was simply another code provision the County contended was violated by having inoperable vehicles.

1. Thompson's Vehicles are Not "Junk Vehicles" Under KCC 18.01.010.

KCC 18.01.10 contains the County's nuisance provisions. A copy of this provision is appended hereto as Appendix A. Specifically, KCC 18.01.10(2)(18) contains several requirements which must be met before a vehicle can be deemed "junk." However, the County failed to both address this provision and provide any evidence that Thompsons's vehicles meet these requirements. *See generally*, CP 25-36. Nevertheless, as addressed below, this code provision demonstrates why Thompson's car collection does not meet the requirements for a "junk vehicle" designation and, consequently, a nuisance designation.

KCC 18.01.10(2)(18) lists "Junk Vehicle(s)" as a public nuisance which it defines as follows:

"Junk Vehicle"

1. Means a vehicle intended to be self-propelled and used for the transport of people, goods, and/or services **that meets at least three of the following** requirements:
 - i. Is three years old or older;
 - ii. Is extensively damaged, such damage including, but not limited to, any of the following: A broken window or windshield or missing wheels, tires, motor, or transmission;

- iii. Is without a valid, current license plate or certificate of registration;
- iv. Is apparently inoperable;
- v. Has an approximate fair market value equal only to the approximate value of the scrap in it.

KCC 18.01.010(2)(18) (emphasis added). Again, in order for a vehicle to be considered “junk”—and therefore a nuisance under this code provision— it must satisfy **at least** three of the five requirements above.

Id. However, the County provided no evidence that Thompson’s vehicles meet three of the above requirements as required by the code.

Thompson readily concedes that at least one of the requirements of KCC 18.01.010(2)(18) is satisfied—that being that many, if not all, of his vehicles are more than three years old. After all, his collection focuses primarily on older cars. However, this is the **only** factor within KCC 18.01.010(2)(18) that is present in this case, with the remaining four being inapplicable. These remaining factors are inapplicable for the following reasons: First, his vehicles cannot be considered to be “extensively damaged” as many either were missing a battery or had a flat tire—as opposed to lacking entire engines or transmissions. CP 6-7.² Second, cars that were required to be registered (*i.e.* those not exempt as farm equipment) had valid, current license plates and registration. *Id.* Third, none of the vehicles are inoperable to a point that they could not be

² Only one vehicles needed extensive repair.

reasonable rendered operable through minimal effort by inflating a tire or inserting a battery. *Id.* Fourth, and finally, the County presented no evidence that Thompson's vehicles only had scrap value.

Altogether, the facts and evidence in this case simply do not support the County's argument that Thompson's vehicles were "junk vehicles," and thus a nuisance, under KCC 18.01.010(2)(18). Rather, Thompson's testimony,³ and the testimony of others,⁴ clearly establishes that Thompson was performing minor restoration work on otherwise perfectly viable vehicles as part of his hobby of car collecting. Nothing within the Code provisions cited by the County prohibits this fact.

2. The Notice of Violation and Abatement Contained No Citation or Allegation of Unsanitary Conditions on Thompson's Property

The County argued that Thompson was in violation of the IPMC for "failure to maintain property in a clean, safe, secure and sanitary condition." CP 28-30. However, nowhere within Thompson's Notice of Violation and Abatement was this allegation ever made. Rather, this violation seems to be an afterthought of the County, bought up after the Notice of Violation and Abatement was issued.

In addition to not being in the original Notice of Violation, the County provided no evidence of unsanitary conditions on Thompson's

³ CP 6-7

⁴ CP 8-10

Property. Moreover, the trial court never rendered a finding that Thompson's Property was unsanitary, unclean etc. *See* CP 140. Rather, the trial court merely found that Thompson violated the IPMC without qualification. *Id.* Given the fact that the only violation of the IPMC contained within the Notice of Violation pertained to inoperable motor vehicles,⁵ this is the only provision that the trial court could have been referring to.

Ultimately, the County's allegation of unsanitary conditions on Thompson's property should have never been considered by either the Hearing Examiner or the trial court in the first place. Accordingly, this Court should reverse the trial court and find that no issues of sanitation were ever claimed in the Notice of Violation and Abatement or, in the alternative, that a conclusion of unsanitary conditions would not be supported by substantial evidence.

III.

THOMPSON'S VEHICLES ARE NOT "JUNK" NOR IS THOMPSON'S PROPERTY A "JUNKYARD" UNDER KCCs 17.08.329 AND 17.08.330, RESPECTIVELY

In addition to failing to meet all of the requirements for a "junk vehicle" designation under the Code's nuisance provisions, the County's

⁵ The IPMC's motor vehicle provision is addressed *supra* at pp. 17-18.

designation of Thompson's property as a "junkyard" fails as well. This is because

[S]tatutes which stand in pari materia are to be read together as constituting a unified whole, to the end that a harmonious, total statutory scheme evolves which maintains the integrity of the respective statutes.

State v. Wright, 84 Wn.2d 645, 650 (1974) (citations omitted). Given this rule and the language defining "junk vehicles" nuisance discussed *infra*, the County's interpretation of the phrase "inoperable vehicle" in KCCs 17.08.329-.330 are incorrect. Indeed, the County's interpretation, if strictly applied, would designate all vehicles which have flat tires, dead batteries, or out of gas as "inoperable" and therefore "junk." Because this interpretation invites and allows for completely absurd results, it should not stand. Accordingly this Court should find that Thompson's vehicles are not "junk" or parked on a "junkyard" simply because they do not have a charged battery.

1. None of Thompson's Vehicles are "Inoperable" under the Code.

The Code contains only two definitions that pertain to the designation of a property as a "junkyard" in Kittitas County. First, KCC 17.08.329 generally defines "Junk" as follows:

Junk means storage or accumulation of inoperable motor vehicles or equipment, vehicle or equipment parts, used

lumber and building materials, pipe, appliances,
demolition waste, or any used material.

Second, the following provision, KCC 17.08.330, defines “Junkyard” as

[A]ny lot, parcel, building, structure or portion thereof,
used for the storage, collection, processing, purchase, sale,
exchange, salvage or disposal of scrap materials,
unlicensed or inoperable vehicles, vehicle parts, used
appliances, machinery or parts thereof.

These Code provisions are attached herewith as Appendix B.

Additionally, both of these ordinances contain the same exception that
they “shall not be interpreted to include the normal storage or
accumulation of viable and/or operable agricultural equipment.”⁶ KCCs
17.08.329-.330.

Thompson’s case hinges on the construction and meaning of these
code provisions—particularly the phrase “inoperable motor vehicle,”
which is found in both definitions. However, nowhere within the Code is
this phrase, or the term “inoperable,” interpreted or defined. In such
situations, the Court gives “undefined terms their plain and ordinary
meaning, which may be found in dictionary definitions. *Peter Schroeder
Architects, AIA v. City of Bellevue*, 83 Wn. App. 188, 192 (1996).

⁶ Because the County’s alleged violations as to all vehicles completely depend on the
legal interpretation of the word “junkyard,” Thompson addresses all vehicles in this
section. However, in the alternative, Thompson contends that some of his vehicles on the
Property are specifically licensed as agricultural equipment, and thus fit within this
exemption in the code. *See supra* at pp. 18-21.

Turning to Black's Law Dictionary, the word "inoperative" is defined as "[h]aving no force or effect; not operative" or being in a "condition of not being capable of functioning as described in [a] patent application." Black's Law Dictionary (9th ed. 2009). A car without a battery is capable of functioning by simply installing said battery. Strict application of the KCC provisions by concluding that a vehicle is inoperable without this simple remedy would lead to unreasonable results. For example, if this definition strictly applied to the Code provisions defining "junk," **every vehicle** that is out of fuel, a dead battery, or has a blown out tire would be rendered "inoperative" as it would be in a "condition not capable of functioning." Though these would be extreme examples, this is the exact code construction that the County is seeking to impose upon Thompson.

Although each of Thompson's vehicles have been licensed and **capable** of functioning (primarily by simply installing a battery),⁷ the County deemed such vehicles to be "junk" under the Code, claiming they are "inoperable." At face value, the County's logic adopts the extreme construction described above—leading to one's car to be deemed technically "junk" under the Code if it is out of fuel or has a flat tire. Reason demands that there must be a certain level of inoperability which

⁷ CP 6-7.

triggers the applicability of the ordinance. Indeed, the court in *State v. Smelter*, 36 Wn. App. 439, 445-446 (1983) arrived at a similar conclusion, albeit in different circumstances.

In *Smelter*, the defendant was found intoxicated behind the wheel of an automobile which was stopped on the shoulder of a freeway, with its engine off and out of gas, near several exits and gas stations. *Id.* at 440. The defendant argued, among other things, that his vehicle was “inoperable” in under Washington’s DUI statute because it was out of gas, rendering it unable to move. *Id.* After consulting numerous cases, both within Washington and without, the Division I Court of Appeals voiced its support of the trial court’s test for an operable vehicle as one that is “reasonably capable of being rendered operable.” *Id.* at 444 (“[This] standard employed by the trial court here distinguishes a car that runs out of gas on a major freeway near several exits and gas stations from a car with a cracked block which renders it ‘totally inoperable.’”). Stated another way, so long as a vehicle is only in need of minor repairs that could be done by a layperson, such as changing a flat tire, adding fuel, or inserting a battery, said vehicle is deemed operable and viable. *See id.*

However, even with this standard, the *Smelter* court nevertheless was wary of “attempting to formulate a unitary standard of operability” as such would require “setting out the *degree* of inoperability which will

preclude prosecution.” *Id.* (emphasis in original). Thus, the *Smelter* court looked to the intent of the statute in order to complete its analysis.

Here, two principles of statutory construction apply to determining the correct construction of the word “inoperable.” First, “[s]tatutes in derogation of the common law are *strictly construed* and no intent to change that law will be found unless it appears with clarity.” *Matthews v. Elk Pioneer Days*, 64 Wn. App. 433, 437 (1992) (citing *McNeal v. Allen*, 95 Wn.2d 265, 269 (1980)) (emphasis in original).

Second, “[a] statute must be given a reasonable construction to avoid absurd consequences.” *Bellevue Fire Fighters Local 1604, Int'l Ass'n of Fire Fighters, AFL-CIO, CLC v. City of Bellevue*, 100 Wn.2d 748, 754 (1984). Considering these fundamental rules of statutory construction, the County’s interpretation of “inoperable vehicle” cannot stand. Simply, a collection of cars in good repair, missing only a battery is no more commonly thought of as a junkyard than is a car museum. Likewise, a car is “operable” under DUI laws, even when it is out of gas. *Smelter*, 36 Wn. App. at 444.

Ultimately Thompson’s vehicles are “reasonably capable of being rendered operable” through minimal effort.⁸ CP 6-7. In fact, Thompson

⁸ The County emphasized below that the Code Enforcement officer observed the same vehicles that were allegedly “inoperable on several different occasions. However, this fact holds no bearing on whether or not Thompson’s vehicles could be deemed

testified that since the violation he has bought 15 new car batteries for his vehicles, but was not given the opportunity to demonstrate all of his cars were clearly operable, regardless of how strict one defines the term. CP 45; CP 6. Accordingly, the County should not be allowed to broadly tailor the language of the code to designate Thompson's vehicles as "junk" and the property on which they are located as a "junkyard."

2. Thompson Did Not Violate Section 302.8 of the International Property Management Code

To support its argument that Thompson's property is a nuisance "Junkyard," the County also pointed to a provision within the 2009 International Property Management Code (IPMC) as adopted by KCC 14.04.010(7). CP 29-30. Specifically, the County alleged that Thompson violated IPMC 302.8 which states:

Motor Vehicles. Except as provided for in other regulations, no inoperative or unlicensed motor vehicle shall be parked, kept or stored on any *premises*, and no vehicle shall at any time be in a state of major disassembly, disrepair, or in the process of being stripped or dismantled.

Id. However, just like the County's Code provisions defining "junk" and "junk vehicles," the term "inoperative" is similarly left undefined within the IPMC.

"inoperable" in the first place.

Accordingly, Thompson reiterates his argument above that the mere fact that a vehicle is missing a battery is not enough to render an otherwise functional vehicle as inoperative—just as being out of fuel or having a flat tire. Indeed, IPMC 302.8 adds nothing to the County’s claim except to provide them with another violation against Thompson, in spite of it being redundant when compared with KCC 17.08.329-330 (“junk” and “junkyard” definitions). Ultimately, Thompson’s vehicles are not “junk” regardless of which Code provision controls or for both for that matter.

3. Some of Thompson’s Vehicles Are Exempt Under the Code as Agricultural Equipment

While the majority of Thompson’s vehicles are not “junk” under the Code or IPMC, several of his vehicles are also exempt as “agricultural equipment” under the Code. Specifically, Thompson owns eight vehicles which operate to transport and store farming materials such as animal feed. CP 7. Furthermore, these vehicles have farm-exempt licenses issued by the state. *Id.* Altogether, these facts conclusively determine that these eight vehicles are exempt as agricultural equipment under the Code.

As stated above, both KCC 17.08.329 and 17.08.330 contain an agricultural equipment exception: “[KCC 17.08.329 and 17.08.330] **shall not** be interpreted to include the normal storage or accumulation of viable

and/or operable agricultural equipment.” *Id.* (emphasis added). However, the Code provides no further definition of “agricultural equipment.” The Legislature, on the other hand, does have a specific statutory definition which lends itself to the construction and interpretation of this exception—RCW 46.04.181.

RCW 46.04.181 provides the following definition of a “Farm Vehicle:”

"Farm vehicle" means any vehicle other than a farm tractor or farm implement which is: (1) Designed and/or used primarily in agricultural pursuits on farms for the purpose of transporting machinery, equipment, implements, farm products, supplies and/or farm labor thereon and is only incidentally operated on or moved along public highways for the purpose of going from one farm to another; or (2) for purposes of RCW 46.25.050,⁹ used to transport agricultural products, farm machinery, farm supplies, or any combination of these materials to or from a farm.

Applying this definition to the exceptions under KCC 17.08.329 and 17.08.330, Thompson clearly owns eight farm vehicles which are exempt from the County’s nuisance provisions. CP 7. Thompson uses these vehicles to transport and store farming materials and animal feed. *Id.* Indeed, currently these vehicles contain winter oats and hay for the feeding of Thompson’s animals during the winter. These undisputed facts

⁹ RCW 46.25.050 is a further farm vehicle exemption pertaining to a commercial driver’s license.

clearly demonstrate that these vehicles are exempt from KCC 17.08.329 and 17.08.330 as they are used in agricultural pursuits on a farm.

In spite of the reasons above, the County nevertheless made the argument below that “the existence or non-existence of a farm-exempt license has nothing to do with how the vehicles are stored.” 31 (emphasis in original). However, this argument fails on two accounts. First, the County’s argument is refuted by the plain language of the Code as it specifically states that KCCs 17.08.329-.330 “**shall not** be interpreted to include the **normal storage or accumulation** of viable and/or operable agricultural equipment.” (emphasis added). This code provision is entirely about the storage of vehicles.

In addition to controverting the plain language of the Code, the County posits a red-herring which seeks to read language and conditions into the statute which are clearly not there. That is to say, the County’s argument implies that only those vehicles which are frequently moving are exempt as farming vehicles. CP 31. However, nothing within RCW 46.04.181 speaks to the **frequency** of transportation of farming materials required for the agricultural exemption. Indeed, the statute’s main requirement is that the farming vehicle travel no more than 15 miles in any one direction when traveling on public highways. RCW 46.04.181. In the

end, the County's argument is based on language that is simply not within the statute.

Altogether, when reviewing both the applicable Code provisions and RCW 46.04.181, Thompson's vehicles are except from the County's nuisance provisions. These vehicles are viable and operable agricultural equipment which transport and store farming material and feed. Furthermore, the fact that all of these vehicles are licensed farm vehicles only further demonstrates the applicability of the Code's farming/agricultural exemption. Given these facts, the trial court improperly found that Thompson's eight vehicles were not exempt under the County's Code. CP 140.

IV.

THOMPSON HAS A VALID NONCONFORMING USE WHICH HAS NEITHER BEEN DISCONTINUED NOR ABANDONED

Assuming, for sake of argument, that the Court does find that Thompson's car collection is a collection of "junk" under the Code, and thus the Property is a "Junkyard," Thompson nevertheless has operated his Property this way since 1981, two years prior to the County's adoption of a zoning code in 1983. CP 6-7. Under Washington law, Thompson has a protected nonconforming use, which he neither abandoned nor

discontinued. Therefore, the trial court erred in finding that no nonconforming use was present.

1. Nonconforming Uses In Washington

A “nonconforming use is a use which lawfully existed prior to the enactment of a zoning ordinance, and which is maintained after the effective date of the ordinance, although it does not comply with the zoning restrictions applicable to the district in which it is situated.” *Rhod-A-Zalea & 35th, Inc. v. Snohomish County*, 136 Wn.2d 1, 6 (1998). This right to continue a nonconforming use is sometimes referred to as a “protected or a “vested” right. *Id.* (citing *Van Sant v. City of Everett*, 69 Wn. App. 641, 649 (1993). However, because nonconforming uses can limit the apparent effectiveness of land use controls, these “vested” rights can be phased out over time but **only through enactments by local governments** (*i.e.*, the adoption of time limit ordinances on nonconforming uses). *Id.* at 7-8.

2. Thompson Has a Valid and Legal Nonconforming Use.

Applying the rules above to the case at hand, Thompson satisfied his burden of proof in demonstrating his nonconforming use of collecting and restoring cars on his Property by merit of his unrebutted testimony both in front of the Hearing Examiner and the trial court. CP 6-8; *Verbatim report of Proceedings*, pp. 3-5. Specifically, Thompson testified

that he has owned and operated his Property in the same manner since 1981 when he obtained a state licenses to collect and restore cars. *Id.* This fact was corroborated by Gary Wivag who also testified to selling Mr. Thompson cars over this period of time for restoration and collecting purposes. CP 9.

While Thompson provided requisite evidence to satisfy his burden of proof, the County, on the other hand, failed to produce any evidence to rebut the testimonies of Thompson and Mr. Wivag. Furthermore, the County made no argument that Thompson abandoned or discontinued his nonconforming use. Instead, the County quickly dismissed Thompson's argument claiming that it lacked evidentiary support pertaining to the existence of a nonconforming use since 1981. CP 32. However, this is false, as clearly demonstrated by Thompson's testimony under oath in front of the Hearing Examiner. CP 6.

Ultimately, Thompson had the burden to establish that he had a nonconforming use since 1981, which he satisfied through sworn testimony. The County failed to rebut this testimony and failed to provide any evidence that Thompson abandoned or terminated his use since 1981.

3. The Code Does Not Phase Out Nonconforming Uses

Within a single sentence, the County made the argument below that, even if Thompson has a nonconforming use, this use did not apply to

the “health and safety police powers of the county” as dictated by the Code and the IPMC. CP 32. However, this argument completely misapprehends Washington’s rules pertaining to nonconforming uses as the allowance of a nonconforming use is very common.

As stated within *Rhod-A-Zalea*, the only way a nonconforming use can be terminated, or altered, is through the local legislative process:

While some states' authority to terminate, alter, or extend nonconforming uses is expressly granted or withheld in zoning enabling acts, Washington's enabling acts are silent regarding the regulation of nonconforming uses. **Instead, the state Legislature has deferred to local governments to seek solutions to the nonconforming use problem according to local circumstances.**

Rhod-A-Zalea, 136 Wn.2d at 7 (emphasis added) (internal citations omitted). The Kittitas County Code has only a small section on nonconforming uses located within Chapter 17.80 KCC. The language of the Code contemplates that **the only way** a nonconforming use can cease is via abandonment or discontinuance: “If a nonconforming use is discontinued for any reason for more than three years, it shall not be reestablished.” KCC 17.80.030.

Turning to the case at hand, KCC 17.80.030 states that Thompson’s nonconforming use, which predates the County’s zoning and nuisance code, cannot be divested absent abandonment or discontinuance for more than three years. *See id.* This code provision was adopted by the

County as its prescribed treatment of nonconforming uses. Furthermore, any change to such treatment must go through the local legislative process. Thus, the County's argument that it can somehow circumvent the legislative process via a code enforcement action is completely contrary to established case law and the County Code itself. Because of this fact, the Hearing Examiner lacked substantial evidence demonstrating that Thompson did not have a legal nonconforming use on his Property, which may continue under KCC 17.80.030.

V.

**THE CODE DEFINITIONS OF "JUNK VEHICLE" AND
"JUNKYARD" TOGETHER RENDER THE CODE
UNCONSTITUTIONALLY VAGUE**

"The due process clause of the Fourteenth Amendment requires that citizens be afforded fair warning of proscribed conduct." *City of Spokane v. Douglass*, 115 Wn.2d 171, 178 (1990). "A statute is void for vagueness under the Fourteenth Amendment if it is framed in terms so vague that persons of common intelligence must necessarily guess at its meaning and differ as to its application." *Myrick v. Bd. of Pierce County Com'rs*, 102 Wn.2d 698, 707, *amended*, 102 Wn.2d 698 (1984).

Here, KCCs 17.08.329-.330, and KCC 18.01.010 are ordinances that "forbid[] conduct in terms so vague that persons of common intelligence must guess at its meaning and differ as to its

application.” *Burien Bark Supply v. King County*, 106 Wn.2d 868, 871 (1986). Specifically, these ordinances do not define the following terms: “inoperable vehicle,” “apparently inoperable,” or “unlicensed.” See KCCs 17.08.329-.330, and KCC 18.01.010. As demonstrated *infra*, the terms “inoperable vehicle” could encompass anything from a completely totaled vehicle to a brand new vehicle which is simply out of gas. The word “apparently” only further muddies the water as to what exactly is prohibited within these ordinances. Finally, the term “unlicensed” is also left undefined. Does it mean a car that does not have a license plate? Or does it mean its registration with the State Department of Motor Vehicles enabling one to drive on public roads is not current? These are fundamental questions which are left unanswered by the code and the non-lawyer should not be left to guess at its meaning.

Finally, the Code’s vagueness is only compounded by the specific definition of “junk vehicle” in KCC 18.01.010—the nuisance provision. It specifically requires that three of the five listed elements be met before a vehicle can be designated a “junk vehicle.” KCCs 17.08.329-.330, on the other hand, state that a vehicle can be merely “inoperable” or “unlicensed” in order to be deemed “junk.” Together, the ordinary person is left without guidance as to which definition, if any, controls.

Ultimately, because the Fourteenth Amendment prohibits such vagueness in ordinances,¹⁰ KCCs 17.08.329-.330, and KCC 18.01.010 should be found to be “void for vagueness.” Accordingly, the Court should find that Thompson’s Property is not a “junkyard” and his vehicles, not “junk vehicles” under the Code.

VI.

THE HEARING EXAMINER VIOLATED THOMPSON’S PROCEDURAL DUE PROCESS RIGHTS BY PROHIBITING HIM FROM CROSS EXAMINING THE COUNTY’S CODE ENFORCEMENT OFFICER

“Procedural due process imposes constraints on governmental decisions which deprive individuals of “liberty” or “property” interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment.” *Nguyen v. Dep’t of Health Med. Quality Assurance Comm’n.*, 144 Wn.2d 516, 522–23 (2001). In determining what process is due, a court weighs the following:

First, the private interest affected by the official action; second, the risk of an erroneous deprivation of that interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

¹⁰ *Douglass*, 115 Wn.2d at 178.

Mathews v. Eldridge, 424 U.S. 319, 335 (1976). “Due process essentially requires the opportunity to be heard ‘at a meaningful time and in a meaningful manner.’” *Mansour v. King County*, 131 Wn. App. 255, 264 (2006) (citations omitted). The process followed meets minimum constitutional requirements when it provides a citizen with sufficient safeguards. *Id.*

In the present case, Thompson’s due process rights were violated at his initial hearing on the Notice of Violation and Abatement. There Hearing Examiner violated Thompson’s procedural due process rights in two ways: First, the Hearing Examiner prohibited Thompson from calling any expert witnesses and prohibited him from cross-examining the County’s code enforcement officer. CP 45; *Verbatim Transcript*, at p. 4. Second, the hearing Examiner improperly considered hearsay evidence in the form of a declaration submitted by the County’s code enforcement officer. *Id.* Both of these facts deprived Thompson of his constitutional due process rights.

Applying these facts to the *Mathews*’ balancing test, the result is the same. First, the “private interest affected by official action” would be Thompson’s interest in the use and enjoyment of his property. *Mission Springs, Inc. v. City of Spokane*, 134 Wn.2d 947, 962 (1998) (“The right to use and enjoy land is [constitutionally protected] a property right”).

Second, there is clearly a high risk of an erroneous deprivation of this interest when the property owner affected—Thompson—is unable to cross examine the prosecution’s only witness to the alleged violations. Third, the probable value of affording Thompson the opportunity to call his own experts and cross examine the County’s expert is high as “[e]ven a person disputing a minor civil infraction like a parking ticket has the right to subpoena witnesses.” *Mansour v. King County*, 131 Wn. App. 255, 269 (2006). Fourth, and finally, no government interest would be abrogated or negatively affected as the additional safeguards requested by Thompson represent the bare minimum for due process. *See Id.*

Altogether, Thompson’s procedural due process rights were violated when the Hearing Examiner refused to allow Thompson to call his own experts or cross examine the County’s expert. This fact is especially important as the County relied completely on the declaration from their expert in arguing their case. CP 4-5. On this basis, coupled with the reasons above, this Court should vacate the trial court’s ruling as well as the Hearing Examiner’s ruling, as Thompson was deprived of his due process rights from the first instance.

CONCLUSION

Thompson has been collecting and restoring vehicles for over 30 years. Because this is his hobby, Thompson’s restoration efforts are minor

and never involve major disassembly or complex repairs. Because of this, each one of his vehicles can properly operate so long as they have a charged battery. Nevertheless, the County designated Thompson's decades long car collection as "junk" simply because they were missing a battery and thus, in the County's opinion, inoperable. However, the County came to this designation without providing any evidence that Thompson's cars met the minimum requirements to be designated a "junk vehicle" under the Code's nuisance provisions.

Ultimately, to accept the County's construction of the definition of "junk vehicles" is to accept that any car that is out of fuel, has a flat tire, or a dead battery, is similarly inoperable and "junk" under the County's Code. Equity and reason dictates that such should not be the case. Accordingly, this Court should find that Thompson's cars are not "junk vehicles" under the Code; that Thompson's Property is not a "junk yard" and that eight of Thompson's vehicles are farm exempt under the Code.

Nevertheless, even if the Court accepts the County's erroneous determination, Thompson still provided unrebutted evidence that he has restored and collected cars on his Property several years before the County's Code was adopted. Thus, Thompson has a legal nonconforming use in the Property to continue to engage in his collecting and restorative practices. This nonconforming use, under the Code, can only be set aside

by discontinuance or abandonment for three years. Thus, this Court should find that the Hearing Examiner lacked substantial evidence to support his finding that Thompson does not own a nonconforming use.

Finally, the Court should find that Thompson's constitutional due process rights were violated from the first instance, thus tarnishing the entire procedural history. As such, the hearing examiner's rulings should be vacated.

RESPECTFULLY submitted this 25th day of January, 2013.

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DECLARATION OF SERVICE

I, Linda Hall, declare:

I am a citizen of the United States, a resident of the State of Washington, and an employee of Groen Stephens & Klinge LLP. I am over twenty-one years of age, not a party to this action, and am competent to be a witness herein.

On January 25, 2013, I caused a true and correct copy of the foregoing document to be served on the following person via the following means:

Neil A. Caulkins	<input type="checkbox"/> Hand Delivery via Legal Messenger
Deputy Prosecuting Attorney	<input checked="" type="checkbox"/> First Class U.S. Mail
Kittitas County Courthouse	<input type="checkbox"/> Federal Express Overnight
205 W 5th Ave., Ste. 213	<input type="checkbox"/> Electronic Mail
Ellensburg, WA 98926-2887	<input type="checkbox"/> Other _____

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

Executed this 25^h day of January, 2013 at Bellevue, Washington.



Linda Hall

Appendix A

Vern Thompson v. Kittitas County—No. 309967

January 25, 2013

KCC 18.01.010 Applicability.

1. ...
2. This title shall also apply to the following additional public nuisances:

1....

18. "Junk Vehicle"

1. Means a vehicle intended to be self-propelled and used for the transport of people, goods, and/or services that meets at least three of the following requirements:
 - i. Is three years old or older;
 - ii. Is extensively damaged, such damage including, but not limited to, any of the following: A broken window or windshield or missing wheels, tires, motor, or transmission;
 - iii. Is without a valid, current license plate or certificate of registration;
 - iv. Is apparently inoperable;
 - v. Has an approximate fair market value equal only to the approximate value of the scrap in it.
2. This definition of a "junk vehicle" shall not apply to:
 - vi. A vehicle or part thereof that is completely enclosed within a building in a lawful manner where it is not visible from the road or other public or private property; or
 - vii. 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 RCW 46.80.130; or
 - viii. One vehicle only, which is actively being restored, repaired, or reconditioned. If this project is not completed within two years, the vehicle must be removed as provided for herein...

Appendix B

Vern Thompson v. Kittitas County—No. 309967

January 25, 2013

KCC 17.08.329 Junk.

Junk means storage or accumulation of inoperable motor vehicles or equipment, vehicle or equipment parts, used lumber and building materials, pipe, appliances, demolition waste, or any used material. This shall not be interpreted to include the normal storage or accumulation of viable and/or operable agricultural equipment. (Ord. 2007-22, 2007)

KCC 17.08.330 Junkyard.

"Junkyard" means any lot, parcel, building, structure or portion thereof, used for the storage, collection, processing, purchase, sale, exchange, salvage or disposal of scrap materials, unlicensed or inoperable vehicles, vehicle parts, used appliances, machinery or parts thereof. This shall not be interpreted to include the normal storage or accumulation of viable and/or operable agricultural equipment. (Ord. 2007-22, 2007; Res. 83-10, 1983)