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NO. 87514-6

SUPREME COURT  
OF THE STATE OF WASHINGTON

NO. 66433-6--I

COURT OF APPEALS  
FOR THE STATE OF WASHINGTON  
DIVISION I

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KING COUNTY, a Washington municipal corporation, JEFFREY L.  
SPENCER, a single man, RONALD A. SHEAR, a single man,

Respondents,

v.

KING COUNTY DEPARTMENT OF DEVELOPMENT AND  
ENVIRONMENTAL SERVICES, an executive agency,

Petitioner.

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JEFFREY L. SPENCER AND RONALD A. SHEAR'S  
RESPONSE TO AMICUS CURIAE MEMORANDUM

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## I. IDENTITY OF AMICUS CURIAE RESPONDENT

Respondents Jeffrey L. Spencer (Spencer) and Ronald A. Shear (Shear) submit this response to Pierce County's Amicus Curiae Memorandum (the "Amicus Brief").

## II. RESPONSE TO ISSUE OF CONCERN OF AMICUS CURIAE

This Court should not consider Pierce County's argument that the grading violation was *per se* fatal to Respondents' nonconforming use because the argument is being raised for the first time. RAP 2.5(a); *First Pioneer Trading Company v. Pierce County*, 146 Wash.App. 606, 617, 191 P.3d 928 (Div. 2, 2008). *See also Ruff v. County of King*, 125 Wn. 2d 697, 703 n. 2, 887 P.2d 886 (1995) (Supreme Court would not consider issue raised exclusively by amicus curiae). In the event that this Court does consider such argument, the Amicus Brief relies on a deceptive hypothetical, a misreading of applicable case law, and a misreading of the Division One decision.

The Amicus Brief purports to support Issue Number Two as set forth in the Petition for Review as follows:

Should the Court grant review because Division One's reliance on illegal grading activities in support of its conclusion that appellants established a legal nonconforming use conflicts with *First Pioneer Trading Company v. Pierce County*, a Division Two decision?

Respondents' Answer to the Petition for Review (the "Answer") showed that Division One did not rely on illegal grading activities to find the

establishment of a legal nonconforming use, and that Division One's decision therefore did not conflict with *First Pioneer*. Answer at pp. 7-8.

Now, however, the Amicus Brief asserts that any illegality on the part of a party asserting a legal nonconforming use is *per se* fatal to a legal nonconforming use. No Washington court has so-held. As importantly, however, DDES never—not in its initial LUPA appeal, nor in its Response to Respondents' appeal to Division One—framed the legality of grading as an appealable issue, and as such Division One never addressed it. Rather, DDES's arguments regarding nonconforming use at all stages of this lengthy litigation focused on its claim that preparatory steps could not give rise to an established use, despite clear prospective language in the King County Code. *See King County v. King County Department of Development and Environmental Services*, 167 Wn.App. 561, 568, 273 P.3d 490 (2012) (hereafter "*DDES*"). DDES has previously cited *First Pioneer* for the sole, and uncontested, proposition that no party has appealed the Hearing Examiner's Findings of Fact and therefore they are verities on appeal. *See DDES Consolidated Response Brief to the Court of Appeals*, at p. 16. This Court should refuse to consider the novel arguments now advanced by Pierce County in the Amicus Brief.

### III. STATEMENT OF THE CASE

Respondents reassert their statement of the case from the Answer as though fully set forth herein. As the Petition states, from the very beginning Respondents believed that Shear's operation was not subject to

permit requirements. Petition at p. 4. Although Respondents disagreed with the Hearing Examiner's imposition of permitting requirements, Shear was and has always asserted that he remains willing to abide by the terms of the Decision. *See, e.g.*, Respondent's initial brief to the Court of Appeals at p. 2. But now the Amicus Brief claims that Respondents' failure to comply with exceptionally complex permitting requirements, at a time when they believed in good faith that the requirements did not apply, is itself *per se* fatal to a finding of a valid nonconforming use.

The Amicus Brief presents a hypothetical example wherein a property owner decides to open a retail nursery, but chooses to flout all manner of applicable (and obvious) permitting requirements, including for sewer, electrical power, stormwater drainage, and building construction. In that case, the Amicus Brief suggests, it would be inappropriate to find that the nursery "lawfully existed" as a valid nonconforming use before a zoning change. The Amicus Brief presents this argument as a species of unclean hands doctrine to show that the property owner's bad acts were so significant so as to preclude him from taking advantage of a favorable regulatory regime. The Amicus Brief then suggests that because the Hearing Examiner in the present case found the existence of unpermitted grading, that Respondents' valid nonconforming use should be similarly precluded.

Respondents, however, did not choose to ignore multiple, obvious permitting regimes like the property owner in the above example. Rather, whether or not a grading permit was indeed required for

Respondents' activities was far from straight forward, and indeed was the subject of significant controversy, though not in the context of whether a nonconforming use was established. DDES never argued in Superior Court or in Division One that possible grading infractions in site preparation precluded the establishment of a nonconforming use.

The Hearing Examiner devoted seven Conclusions of Law to his evaluation of whether grading and/or filling resulted from Respondents depositing of earth materials on the subject property. *See* COL Nos. 29-35, HE, CP 271-273. The Hearing Examiner finally concluded that, "notwithstanding the exotic and temporary nature of the storage piles of organic materials generated by Mr. Shear's processing operation and the absence of demonstrable grading in critical areas" a grading violation had occurred. COL No. 35, HE, CP 273. This conclusion was directed to a particular issue—the use of a grading permit as a vehicle for ongoing site management and review—not to nonconforming use status. COL 35, HE, CP 273. That the Hearing Examiner was required to engage in such extensive analysis of whether permits were required shows how different the present situation is from that presented in Pierce County's hypothetical.

#### IV. ARGUMENT

The Division One decision is not inconsistent with any prior decision in Washington, because no court in Washington has found that any illegality on the part of a land owner, regardless of the scale, intent, or

type of such illegality, precludes the finding of a valid nonconforming use on the subject property.

As a preliminary matter, and as Respondents asserted in the Answer, *First Pioneer* is distinguishable. In *First Pioneer*, the hearing examiner relied on evidence including testimony from neighbors and historical photographs to find that the steel fabrication business at issue did not vest before 1988, when the use became illegal without a permit. *First Pioneer Trading Company, Inc. v. Pierce County*, 146 Wash.App. 606, 615, 191 P.3d 928 (Div. 2, 2008). Therefore, Division 2 agreed with the hearing examiner that the company's failure to obtain correct permits after the 1988 date, and prior to 1998 when it claimed to have previously manufactured steel on the site, precluded it from claiming that its nonconforming use was "legal." *Id.* at 616. The very use itself required a conditional use permit after 1988, and it was the need for *that* permit, rather than for ancillary permits, for instance building permits, that was fatal to the legality of the use. *Id.* at 618.

In this case, although prior to the enactment of the ordinance at issue in 2004, items like roads and grading may indeed have required permits, Shear's operation on the Spencer property of an interim recycling facility and then a materials processing facility was itself lawful if indeed it was established. COL Nos. 11, 14, and 20, HE, CP 267-69. This case

presents no conflict with *First Pioneer*.

The Amicus Brief claims that Division One's decision in *McMillan v. King County*, 161 Wn.App. 581, 255 P.3d 739 (2011) holds that any and all illegalities preclude a nonconforming use. See Amicus Brief at p. 5 (claiming that under *McMillan*, "compliance with both land use legislation and general legislation is required to establish a 'lawfully existing' use." (Emphasis added.)) Division One in the present case considered the *McMillan* decision, even citing it in the decision. *DDES*, 167 Wn.App. at 566 (2012). In *McMillan*, the court considered whether a nonconforming use can be established even where the individual so-using the property is a trespasser, *i.e.*, necessarily acting illegally. *McMillan*, 161 Wn.App. at 595-96 (2011). Although the court acknowledged that *First Pioneer* stands for the rule that illegalities arising from laws other than land use laws can prevent the establishment of a valid nonconforming use, the court stated that "[h]ere, we need not decide whether *any* illegality prevents a nonconforming use from being lawfully established. Rather, we are presented with the specific question" regarding whether trespass precludes a nonconforming use by the trespasser. *Id.* at 595-96. (Emphasis in original.) If the rule in Washington were that any illegality precluded a non-conforming use, the court in *McMillan* would have had nothing to consider. Rather, the court in *McMillan* considered the trespasser's status

*vis a vis* the land, and stated that “[t]respassers have no constitutional property right in the land they are trespassing upon, and, thus, they have no right to due process concerning the land.” *Id.* at 599.

In the present case, Respondents are a land owner and his lawful tenant, who complied with laws as to the property as they understood them to apply. The gist of the Division One decision focuses on the interpretation of King County Code provision 21A.06.800 and the issue of prospective intent in establishing a nonconforming use. Neither *First Pioneer* nor *McMilian*, with their fact-specific and distinguishable holdings, applies, nor was Division One asked to resolve the issue raised by Pierce County. Rather, Division One, faced with the good faith conduct of Respondents, and the contested and complex nature of the applicable permitting requirements, found a valid nonconforming use. The Division One decision in *DDES* does not conflict with prior case law and should stand.

## V. CONCLUSION

For the foregoing reasons, this Court should refuse to consider the issues raised, for the first time, in the Amicus Brief, and should deny review. In the alternative, the Amicus Brief is not persuasive and this Court should deny review.

Respectfully submitted, this 10<sup>th</sup> day of September, 2012.

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**VI. CERTIFICATE OF SERVICE**

I certify that on the 10<sup>th</sup> day of September, 2012, I caused a true and correct copy of JEFFREY L. SPENCER AND RONALD A. SHEAR'S RESPONSE TO AMICUS CURIAE MEMORANDUM to be served on the following in the manner indicated below:

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Re: *King County v. King County Dept. of Development & Environmental Service*, Case No. 87514-6, Court of Appeals No. 66433-6-1

Please accept the attached pleading, "Jeffrey L. Spencer and Ronald A. Shear's Response to Amicus Curiae Memorandum" for filing with the Supreme Court.

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