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NO. 87514-6

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SUPREME COURT
OF THE STATE OF WASHINGTON

NO. 66433-6--I

COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION I

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.

JEFFREY L. SPENCER AND RONALD A. SHEAR'S
ANSWER TO PETITION FOR REVIEW

Brian E. Lawler, WSBA #8149
Denise M. Hamel, WSBA #20996
Lucy R. Bisognano, WSBA #37064
SOCIUS LAW GROUP, PLLC
Attorneys for Ronald A. Shear

Two Union Square
601 Union Street, Suite 4950
Seattle, WA 98101.3951
206.838.9100

Robert E. West, Jr., WSBA #6054
WEST LAW OFFICES, P.S.
Attorney for Appellant Spencer

332 First Street Northeast
Auburn, WA 98002
253-351-9000

ORIGINAL

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I. IDENTITY OF RESPONDENT

Respondents Jeffrey L. Spencer (Spencer) and Ronald A. Shear (Shear) submits this answer to petitioner King County Department of Development and Environmental Services, an executive agency (“DDES”)’s petition for review pursuant to RAP 13.4 (1), (2), and (4).

II. COURT OF APPEALS’ DECISION

The Court of Appeals decision reversed the Superior Court, reinstated the Hearing Examiner’s decision, and remanded to the Hearing Examiner for further proceedings. *King County v. King County Department of Development and Environmental Services*, ___ Wash.App. ___, 273 P.3d 490 (2012) (Hereinafter *DDES*). DDES filed a Motion for Reconsideration or Clarification, which was denied on May 2, 2012.

III. RESTATEMENT OF THE CASE

DDES’ Petition for Review is fundamentally its request for unchecked enforcement powers that would allow it pursue its years-long vendetta against Respondents. This case arose as a code enforcement action brought by King County, through DDES, against Shear as the operator of an organic materials processing business, and Jeff Spencer, the owner of the farmland on which the business that Shear works for, Buckley Recycle Center, Inc. (“BRC”), has operated for more than six

years. The County claimed Shear was operating, a “materials processing facility,” a new County term that came into existence in the fall of 2004 without permits. DDES Notice of Code Violation (“Notice of Violation”), Exhibits before the Hearing Examiner (“EHE”), Sub. No. 18, Ex. 7. The County also alleged that Shear’s use of Spencer’s farm field was an unauthorized activity within a protected wetland and flood plain. *Id.*

Faced with these serious charges, Shear and Spencer appealed the County’s Notice of Violation. EHE, Sub No. 18, Ex. P-1 and P-2. An extended appeal process ensued, at the end of which, the King County Hearing Examiner issued a detailed report and decision (the “Decision”, cited herein as “HE”) which vindicated Shear and Spencer, in part, and vindicated, in part, the County’s regulatory oversight for operations such as Shear’s business. HE, CP 275. The Hearing Examiner determined that even though BRC established that Shear’s operation was a prior nonconforming use, first as an interim recycling facility and later as a materials processing facility, a CUP was nonetheless required due to the significant expansion of the use since Ord. No. 15032 was adopted. Conclusion of Law (“COL”) No. 38, HE, CP 274. Although not in full agreement with the Hearing Examiner, Shear was and remains willing to abide by the terms of the Decision. However, the County (DDES) took

exception to their own Hearing Examiner's Decision, and appealed to the Superior Court. LUPA Petition, CP 1-46.

In their response to the LUPA Petition, Shear and Spencer argued that the Hearing Examiner's factual findings were supported by substantial evidence, the Hearing Examiner's conclusions were proper interpretations of law, and the Hearing Examiner's decision to fashion a remedy that respects County codes while appropriately curbing blatant and obvious County acrimony towards Shear and Spencer, so that they may enjoy the fruits of their success in the code enforcement process, was entirely appropriate. However, the trial court found for DDES on all of the above three issues, reversed the Decision, and remanded to the Hearing Examiner with instructions to (1) set a reasonable timeline for grading permit review procedures; (2) not impose any conditions on DDES' code-delegated permit review process; and (3) remove the previously ordered Conditional Use Permit requirement that was no longer required pursuant to the trial court's order. CP 664.

Throughout the many stages of this proceeding—including pre-litigation contact by DDES with Shear and Spencer, the hearing before the Hearing Examiner, DDES's subsequent LUPA petition before the Superior Court, and the appeal in which Division One reversed the Superior Court and reinstated the Hearing Examiner's decision—the

County has made clear that it regards Shear as a bad actor for engaging in BRC's business, and Spencer is an equally a bad actor for allowing Shear to use his farm property for what Spencer thought was a valid, permissible agriculturally-related purpose. Division One's decision rejected DDES's legal positions—which the Hearing Examiner had astutely called the “innumerable bites at the apple doctrine” (COL No. 39, HE, CP 274)—and wholly supported Shear's operation within the reasonable, and lawful, parameters set by the Hearing Examiner.

IV. ARGUMENT WHY REVIEW SHOULD NOT BE ACCEPTED

This Court should deny DDES' Petition for Review because Division One's decision does not conflict with any of the decisions cited by Petitioner. Moreover, Division One's decision does not authorize a violation of State Environmental Protection Act (SEPA) regulations, and DDES therefore fails to articulate an issue of substantial public interest warranting this Court's review.

1. DIVISION ONE'S DECISION THAT RESPONDENT'S PROSPECTIVE INTENT ESTABLISHED A LEGAL NONCONFORMING USE DOES NOT CONFLICT WITH *ANDERSON V. ISLAND COUNTY*

This case can be distinguished from *Anderson v. Island County*, 81 Wash.2d 312, 501 P.2d 594 (1972). The published *Anderson* decision,

which DDES did not cite before Division One, evidences no statement of prospective intent in the zoning code at issue, nor does Petitioner cite to one. The King County Code that directed DDES' regulatory behavior in this case, by contrast, contained an express statement of prospective intent as follows:

Establishment of uses. The use of a property is defined by the activity for which the building or lot is intended, designed, arranged, occupied or maintained. The use is considered permanently established when that use will or has been in continuous operation for a period exceeding sixty days.

KKC § 21A:08.010. (Emphasis added.) DDES would have this Court, and those below, wholly ignore this critical language.

Before Division One, DDES entirely ignored the fact that the Hearing Examiner's determination that the establishment of a nonconforming use under the King County Code has a prospective component to it, and that BRC's activities satisfied the establishment criteria, is entitled to deference. *Lanzce G. Douglass, Inc. v. City of Spokane Valley*, 154 Wn. App. 408, 415, 225 P.3d 448 (2010), *reconsideration denied, citing City of Medina v. T-Mobile USA, Inc.*, 123 Wn. App. 19, 24, 95 P.3d 377 (2004). As the Hearing Examiner acknowledged, photographs of the Spencer property taken at different times show different levels of activity. Finding of Fact ("FOF") Nos. 17-22, HE,

CP 255-56. Like many businesses, BRC's operations did not start all at once. Operations began in a phased manner over time, but there is no doubt that the intent was to fully operate at this location. TR, Sub No. 16A, Shear Testimony 6/26/09, 1156. TR, Sub No. 16A, Spencer Testimony 6/30/09, 1735-1737. The testimony of the neighbor, Mr. Hang, corroborates the fact that materials were being brought on site and that operations began in 2004. EHE, Sub No. 18, Ex. 56, p. 2, ¶5. TR, Sub No. 16A, Hang Testimony 6/23/09, 184. In addition, this is a business in which the activities vary seasonably and depending upon economic circumstances. TR, Sub No. 16A, Shear Testimony 11/12/09, 2589-2590. At any particular moment, a photograph could show no activity and no equipment or full activity with a lot of equipment. Certain pieces of equipment were mobile and sometimes brought to the site of the material. TR, Sub No. 16A, Spencer Testimony 6/30/09, 1738-1739. TR, Sub No. 16A, Shear Testimony 6/26/09, 1176.

In the Petition, DDES says, citing *DDES*, that "Appellant Shear leased Appellant Spencer's land, intended to use it, and was stockpiling materials, but had not yet begun the materials processing operation prior to the zoning change." Pet. At 11 (citing *DDES*, 273 P.3d at 494). This is an inaccurate and misleading citation to the Division One decision, and in the next section of its argument before this Court, DDES conveniently recalls other indicia of establishment, including grading and access driveways. Pet.

at 12. In fact, Shear's operation showed significantly more activity than the business in *Anderson*, which was merely "storing material" at the time of the zoning action. *Anderson*, 81 Wash. 2d at 322.

Most importantly, however, the King County Code expresses a clear intent that preparatory activities like those Shear undertook could contribute towards establishing a use. Indeed, the record before the Hearing Examiner contained substantial evidence of BRC's intent to relocate its facility to the current site and that the use was planned to be in continuous operation for more than 60 days prior to September 2004, thereby establishing the existing use pursuant to KCC 21A.08.010 and KCC 21A.06.800. FOF Nos. 15,16, 19, 20, 21, COL Nos. 14, 15, HE, CP 254-56, 267-67. District One was correct to give due deference to the Hearing Examiner's interpretation of the code with respect to establishing nonconforming use.

2. **NEITHER RESPONDENTS NOR THE HEARING EXAMINER HAVE ARGUED THAT GRADING WAS THE ESSENTIAL ACTIVITY FOR PURPOSES OF ESTABLISHING A NON-CONFORMING USE. DIVISION ONE'S DECISION DOES NOT CONFLICT WITH *FIRST PIONEER TRADING COMPANY, INC. V. PIERCE COUNTY*.**

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 First Pioneer's failure to obtain correct permits after that date precluded it from claiming that its nonconforming use was "legal." *Id.* at 616. The very use itself required a conditional use permit after 1988. *Id.* at 609.

This case is distinguishable, however, because prior to the enactment of the ordinance at issue in 2004, although 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. In addition, the fact that Division One in this case referenced the existence of unpermitted grading and driveways does not indicate that the court relied on those structures to show the establishment of a nonconforming use. Other activities that Shear alleges, and Division One confirmed, like equipment assembly and storage and stockpiling of materials, would require no permitting during the relevant period by virtue of the interim recycling facility and materials processing facility, lawful uses that existed prior to the 2004 ordinance's enactment. *See DDES*, 273 P. 3d at 494. This case presents no conflict with *First Pioneer*.

3. **DIVISION ONE'S DECISION THAT THE KING COUNTY CODE CONTAINS AN UNENFORCEABLE STANDARD DOES NOT CONFLICT WITH *YOUNG V. PIERCE COUNTY*.**

As a preliminary matter, DDES misleadingly states that “[t]he Examiner found that all area FEMA maps and the County’s most current flood hazard map show Shear’s operation to be in the flood hazard area.” Pet. at 14. In fact, BRC’s operations exist only in the eastern third of the Spencer property. As the Hearing Examiner noted in the uncontroverted Findings of Fact Nos. 50-51, the best evidence at the time of the purported violation was Exhibit 54a which shows only the western third of the Spencer property in the flood plain. FOF Nos. 50-51, HE, CP 263, referencing EHE, Sub. No. 18, Ex. 54a.

This case can be distinguished from *Young v. Pierce County*, 120 Wash.App. 175, 178, 84 P.3d 927 (Wash.App. Div. 2, 2004). *Young* involved landowners clearing of trees and vegetation on or near a wetland, and the denial of an agricultural exemption. *Id.* at 179. In this case, the Hearing Examiner’s Decision articulates a specific and detailed finding on why the determination of the existence of a flood hazard area is different than the determination of a wetland.

Unlike a wetland determination, for example, where one can walk onto a piece or property, dig a bunch of holes and

perform soils testing and vegetation identification, there is no way to assess whether a parcel lies within or without the floodplain based on a site visit. Rather it all comes down to questions of regional mapping and modeling, and the data assumptions that underlie the exercise.

FOF No. 42, HE, CP 261. The Decision further notes that the County recognizes that the existence and quality of data for floodplain analysis are shifting and dynamic, and that County codes establish numerous sources of data that can be relied upon for flood hazard determinations. FOF No. 44, HE, CP 261. But the critical error in DDES's analysis, which the Hearing Examiner aptly noted and which DDES has conveniently glossed before Division One and in the Petition, is that here, County staff unilaterally established a priority for the use of data, and no such priority is found within the County code. *Id.* In *Young*, Division Two rejected the landowners' claim that the word "area" was unconstitutionally vague as applied to them. *Young*, 129 Wash.App. at 183-84. In this case, the issue is not the language of King County Code but rather DDES' arbitrary position in which it tries to have things both ways: on the one hand DDES argues that BRC operates within a floodplain on older FEMA maps, but the County acknowledges that those maps are flawed (as corroborated by independent data that was before the Hearing Examiner, *see, e.g.*, FOF Nos. 50-51, HE, CP 263, referencing EHE, Sub. No. 18, Ex. 54a) and has appealed them.

The Decision noted that the available data for the Spencer property in 2006 was “poor and generally outdated.” FOF No. 45, HE, CP 261-262. This factual determination gave credence and support to Conclusion of Law No. 2 which provides that there is no clear and intelligible flood hazard standard. COL No. 2, HE, CP 265. What the County has consistently argued is that its code and regulations can be outdated, illogical, arbitrary, and unintelligible—and that it does not matter because what it, DDES, says is the law is the law. This position does not comport with either the Hearing Examiner’s duties under HE Rule X1.B.8.b, common law notions of procedural due process, or the *Young* case. *See, e.g., Burien Bark Supply v. King County*, 106 Wn.2d 868, 871, 725 P.2d 994 (1986). *Anderson v. City of Issaquah*, 70 Wn.App. 64, 75, 851 P.2d 744 (1993).

4. **NOTHING IN THE HEARING EXAMINER’S
DECISION AS UPHELD BY DIVISION ONE
REQUIRES A VIOLATION OF SEPA OR IS
INCONSISTENT WITH WAC 197-11-070**

Division One correctly found that the Hearing Examiner’s findings do “not prevent application of SEPA or any other regulatory scheme” and that “nothing in the [Hearing Examiner’s] conditions indicates Shear and Spencer are exempt from SEPA or any other regulatory scheme.” *DDES*, 273 P.3d at 498. Division One wholly rejected DDES’s claim that the

Decision in any way abrogated DDES's duty to implement the State Environmental Review Act ("SEPA") process with respect to the prospective review of Shear's permit application contemplated by the Decision. DDES now, and in its denied Motion for Reconsideration or Clarification, claims specific violation of WAC 197-11-070, which provides that a governmental agency shall not take actions that would "limit the choice of reasonable alternatives" in the SEPA process. WAC 197-11-070. DDES is incorrect to suggest that the Decision limited contemplation of reasonable alternatives.

First, nothing in the Decision explicitly directs DDES to suspend the SEPA review process. The gist of the Decision is simply to allow (1) Shear and Spencer to enjoy the fruits of their appeal and (2) avoid a relitigation of issues already adjudicated. After extensive study and testimony, the Hearing Examiner determined that the County had not proven that Mr. Spencer's farm field qualifies as a protected wetland.

The Decision can be harmonized with the provisions of SEPA that acknowledge that the environmental analysis wheel does not always need reinvention. A primary purpose of SEPA is to ensure that "...environmental amenities and values will be given appropriate consideration in decision making along with economic and technical considerations...." RCW 43.21C.030(2)(a) and (2)(b). SEPA and the

adopted rules at WAC Chapter 197-11 are intended to require agencies to consider environmental information (impacts, alternatives, and mitigation) before committing to a particular course of action. WAC 197-11-055(2)(c). Nothing in the Decision undermines this policy of considering environmental issues. Here, certain environmental issues have been exhaustively considered, in the context of wetlands and flood hazard area. Other potential impacts have not been addressed such as, by way of example, traffic, noise, and air quality, among other things. Nothing in the Decision prevents DDES from examining these environmental impacts.

Read as a whole and not in isolation, the SEPA Rules (WAC Chapter 197-11) support the kind of guidelines imposed by the Decision. Indeed a major portion of the SEPA Rules deals exactly with the issues and process for using existing environmental documents. See Part Six "Using Existing Environmental Documents" in the SEPA Rules, WAC 197-11-600 through 197-11-640. By way of illustration, WAC 197-11-600(2) provides that an agency may use environmental documents that have previously been prepared in order to evaluate proposed actions, alternatives, or environmental impacts. The proposals may be the same as, or different than, those analyzed in the existing documents. Procedurally, WAC 197-11-600 provides that existing documents may be used for a proposal by employing one or more methods including:

(a) "Adoption," where an agency may use all or part of an existing environmental document to meet its responsibilities under SEPA. Agencies acting on the same proposal for which an environmental document was prepared are not required to adopt the document;

(b) "Incorporation by reference," where an agency preparing an environmental document includes all or part of an existing document by reference.

WAC 197-11-600(4)(a) and (b).

Condition 2(C) of the Decision does not prohibit review of environmental impacts. It does direct DDES to utilize existing options under SEPA to avoid redundant review by an agency otherwise bent on a "holy crusade." As this Court stated in *Parkridge v. Seattle*, 99 Wash.2d 454, 466, 573 P.2d 359 (1978):

The State Environmental Policy Act of 1971 and the other statutes and ordinances administered by the building department serve legitimate functions, none of which is intended for use by a governmental agency to block the construction of projects, merely because they are unpopular. We make the statement in light of the history of this matter and because the building permit application will be before the building department for further processing.

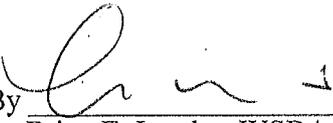
In the Decision, the Hearing Examiner was sending the same admonition to DDES that Division One sent to the City of Seattle in *Parkridge*.

V. CONCLUSION

For the foregoing reasons, this Court should deny review.

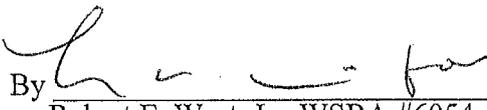
Respectfully submitted, this 29 day of June, 2010.

SOCIUS LAW GROUP, PLLC

By 

Brian E. Lawler, WSBA #8149
Denise M. Hamel, WSBA #20996
Lucy R. Bisognano, WSBA #37064
Attorneys for Ronald A. Shear

WEST LAW OFFICES, PS

By 

Robert E. West, Jr., WSBA #6054
Attorney for Appellant Spencer

III. CERTIFICATE OF SERVICE

I certify that on the 29th day of June, 2011, I caused a true and correct copy of JEFFREY L. SPENCER AND RONALD A. SHEAR'S ANSWER TO PETITION FOR REVIEW to be served on the following in the manner indicated below:

Attorney for King County DDES

Cristy Craig
Senior Deputy Prosecuting Attorney
King County Prosecuting Attorney's Office
King County Courthouse, Room W400
516 Third Avenue
Seattle, WA 98104
cristy.craig@kingcounty.gov

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U.S. Mail
E-Mail
Legal Messenger
Hand Delivery

Attorney for Defendant Spencer

Robert E. West, WSBA #6054
West Law Offices, PS
332 1st Street NE
Auburn, WA 98002
rwest@westlawoffices.com

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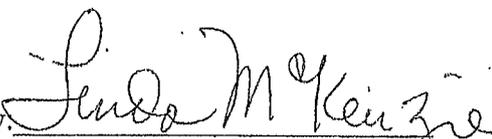
U.S. Mail
E-Mail
Legal Messenger
Hand Delivery

Attorney for Defendant King County
Hearing Examiner

Cheryl Carlson WSBA #27451
Senior Deputy Prosecuting Attorney
King County Prosecuting Attorney
King County Courthouse, Room W400
516 Third Avenue
Seattle, WA 98104
cheryl.carlson@kingcounty.gov

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Hand Delivery

By: 
Linda McKenzie, Legal Assistant

OFFICE RECEPTIONIST, CLERK

To: Linda McKenzie
Cc: cristy.craig@kingcounty.gov; cheryl.carlson@kingcounty.gov; rwest@westlawoffices.com;
Lucy Rake Bisognano
Subject: RE: King County, Spencer & Shear v. King County, No. 87514-6

Rec. 6-29-12

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Sent: Friday, June 29, 2012 3:34 PM
To: OFFICE RECEPTIONIST, CLERK
Cc: cristy.craig@kingcounty.gov; cheryl.carlson@kingcounty.gov; rwest@westlawoffices.com; Lucy Rake Bisognano
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Dear Filing Clerk:

Please accept for filing with the Supreme Court, the attached document named: Jeffrey L. Spencer and Ronald A. Shear's Answer to Petition for Review. The attachment corrects the cover page and signature page to our previous submission to include Robert West as attorney for Appellant Jeffrey Spencer.

Re: King County, a Washington municipal corporation, Jeffrey L. Spencer, a single man, Ronald A. Shear, a single man, Respondents vs.
King County Department of Development and Environmental Service, as executive agency, Petitioner
Case No. 87514-6; Court of Appeals, Division I No. 66433-6-1

Person Filing Document: Lucy R. Bisognano, WSBA #37064, Phone: 206-838-9130; lbisognano@sociuslaw.com

Sincerely,
Linda McKenzie, Legal Assistant

Linda McKenzie
SOCIUSLAWGROUP PLLC
Two Union Square
601 Union Street, Suite 4950
Seattle, WA 98101.3951
Direct Dial: 206.838.9153
Direct Fax: 206.838.9154
www.sociuslaw.com

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