

NO. 87514-6
SUPREME COURT
OF THE STATE OF WASHINGTON

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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.

JEFFREY L. SPENCER AND RONALD A. SHEAR'S
SUPPLEMENTAL BRIEF

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I. IDENTITY OF RESPONDENTS

Respondents Jeffrey L. Spencer (Spencer) and Ronald A. Shear (Shear) submit this supplemental brief to reiterate their opposition 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. STATEMENT OF THE CASE

At each stage of this litigation—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—DDES has sought unchecked enforcement powers that would allow it to pursue its years-long vendetta against Respondents. By reinstating the Hearing Examiner’s decision, the Court of Appeals, Division One, affirmed the Hearing Examiner’s power to impose reasonable restrictions on DDES’s ability to harass and impede Respondents. DDES has now advanced a new, last-ditch argument—not briefed to Division One—that certain incidental site grading activity was unpermitted and therefore illegal, and that any illegality connected with a nonconforming use renders the entire nonconforming use invalid. No Washington court has so-held. Indeed the full Division One decision is consistent with existing Washington case law and should be upheld.

This case arose as a code enforcement action brought by King County, through DDES, against Shear and Spencer. The County claimed Shear was operating, a “materials processing facility,” a new County term that came into existence in the fall of 2004, in a regulated flood hazard area and regulated wetland, without permits. DDES Notice of Code Violation (“Notice of Violation”), Exhibits before the Hearing Examiner (“EHE”), Sub. No. 18, Ex. 7. 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 BRC had established that Shear’s operation was a prior nonconforming use, first as a lawful “interim recycling facility” and later as a “materials processing facility,” and that a conditional use permit (CUP) was nonetheless required due to the Hearing Examiner’s perception of the expansion of the use since Ord. No. 15032 was adopted. Conclusion of Law (“COL”) No. 38, HE, CP 274. Shear chose not to contest this decision and has stood willing to proceed with the CUP process. In reinstating the Hearing Examiner’s decision, Division One rejected DDES’s legal positions and wholly supported Shear’s operation within the reasonable, and lawful, parameters set by the Hearing Examiner. *See King County v. King County Department of Development*

and Environmental Services, 167 Wn.App. 561, 568, 273 P.3d 490 (2012) (hereafter “DDES”).

Now DDES suggests, as supported by Pierce County’s Amicus Curiae brief (the “Amicus Brief”), 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. As the Petition states, from the very beginning Respondents believed that Shear’s operation was not subject to permit requirements. Petition at p. 4. The issue was so complex that 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. (Emphasis added.)

Importantly, the Hearing Examiner’s 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. DDES has never before—not in its initial LUPA appeal, nor in its Response to Respondents’ appeal to Division One—framed the legality of site grading as an appealable issue, and as such Division One never addressed it. Indeed, whether Shear exceeded the baseline

exemption for site grading—an assumption made by the Hearing Examiner at Conclusion of Law No. 34 based on his “reasonable inference” from a review of aerial photographs—has never been a briefed issue before any prior court: *See* COL 34, HE, CP 273. 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 DDES*, 167 Wn.App. at 568. DDES has consistently rallied around Conclusion of Law No. 10 that there was “no conclusive evidence that actual crushing operations and grinding began before the winter or spring of 2005.” *See* COL 10, HE, CP 267. This Court should reject DDES’s last-ditch attack on the legality of Respondents’ established use because the Examiner’s conclusions regarding grading were not at all akin to the permits at issue in the *First Pioneer* case on which Amicus Pierce County, and impliedly DDES, relies. *See, First Pioneer Trading Company, Inc. v. Pierce County* 146 Wn.App. 606, 615, 191 P.3d 928 (2008).

III. ARGUMENT

This Court should affirm the Court of Appeals and its remand to the Hearing Examiner for further proceedings consistent with the Hearing Examiner’s order. Respondents reiterate and augment their argument that the Division One decision is consistent with established Washington law as follows.

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 Wn.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. Transcript of Hearing (“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*, 167 Wn.App. at 568. This is simply 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 Wn.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. Division One was correct to give due deference to the Hearing Examiner's interpretation of the code with respect to establishing nonconforming use.

2. THE HEARING EXAMINER'S FINDING OF UNPERMITTED GRADING DID NOT PRECLUDE THE EXISTENCE OF A VALID NONCONFORMING USE. DIVISION ONE'S DECISION DOES NOT CONFLICT WITH *FIRST PIONEER TRADING COMPANY, INC. V. PIERCE COUNTY*.

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.

First Pioneer is entirely 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*, 146 Wn.App. at 615 (2008). Therefore, Division Two 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.

The facts of this case are entirely different. 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*.

Likely because of the clear distinction between the present case and *First Pioneer*, the Amicus Brief creates a hypothetical to suggest Respondents' bad acts. In the hypothetical, 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 certain unpermitted grading, that Respondents' valid nonconforming use should be similarly precluded. Using Pierce County's arguments, if Shear's vehicles had expired tabs at any time during the time of operations, would he then be disqualified from operating a non-conforming use? Or if one of his delivery vehicles was inadvertently overloaded, would that disqualify Shear's operation?

In this case, Shear 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 both exceptionally complex and the subject of good-faith dispute before the Hearing Examiner. And again, DDES never argued in Superior Court or in Division One that possible grading infractions in site preparation could preclude the establishment of a nonconforming use.

The Amicus Brief also asserted that Division One's decision in *McMilian 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 *McMilian*, "compliance with both land use legislation and general legislation is required to establish a 'lawfully existing' use." (Emphasis added.)) This is a misreading of *McMilian*, a case Division One cited in the *DDES* decision. 167 Wn.App. at 566 (2012). In *McMilian*, 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. *McMilian*, 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 *McMilian* would have had nothing to consider. But that is not the rule, and the court in *McMilian* considered

the trespasser's status vis a vis the land, and determined 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 have rights to due process, and who complied with laws as to the property as they understood them to apply. 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 in the Amicus Brief. 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.

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 Wn.App. 175, 178, 84 P.3d 927 (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 of 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 Wn.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., Burién 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*, 167 Wn.App. at 569. 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 Wn.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*.

IV. CONCLUSION

For the foregoing reasons, this Court should affirm the Court of Appeals and remand to the Hearing Examiner for further proceedings consistent with the Hearing Examiner's order.

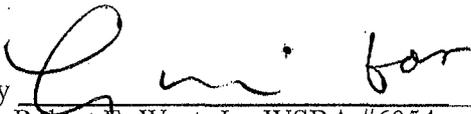
Respectfully submitted, this 7 day of November, 2012.

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V. CERTIFICATE OF SERVICE

I certify that on the ____ day of November, 2012, I caused a true and correct copy of JEFFREY L. SPENCER AND RONALD A. SHEAR'S SUPPLEMENTAL BRIEF 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 Supplemental Brief" for filing with the Supreme Court.

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