

No. 64395-9-I

THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON

SKAGIT COUNTY and
SKAGIT COUNTY HEALTH DEPARTMENT,

Appellants,

v.

SKAGIT HILL RECYCLING,

Respondent.

APPELLANTS' RESPONSE AND REPLY

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I. INTRODUCTION

All solid waste handling facilities (SWHFs) are subject to regulation. None are completely “regulation-exempt.” However, a SWHF may be “permit-exempt” if it complies with certain regulations. A SWHF does not qualify for an exemption from solid waste permitting requirements based on a bare claim that the facility is “recycling” solid waste. “Recycling” is defined by regulation and, again, “recycling facilities” must also comply with applicable regulations. Failure to meet the regulatory requirements for “permit-exempt” status simply means that the facility needs to obtain a permit from the jurisdictional health department.

Following a hearing on the county’s motion for summary judgment, the superior court enjoined Avis, LLC; Skagit Hill Recycling, Inc.; and Scott Waldal (hereinafter “Skagit Hill”) from engaging in solid waste handling activities. Undisputed material facts in the record facts establish that Skagit Hill (1) does not have a solid waste permit from Health, (2) is not exempt from solid waste permitting requirements, and (3) does not enjoy the regulatory stay that Skagit Hill has tried to graft into this case.

Although the superior court declined to address the land use aspect of the county’s complaint because it found the lack of a required solid waste permit sufficient to grant the injunction, undisputed material facts in

the record establish that Skagit Hill does not have land use authority to use the property for solid waste handling, which conclusion provides an additional reason for the grant of summary judgment.

II. ISSUES

1. Is a solid waste permit required for the activities that Skagit Hill conducted?
2. If so, did Skagit Hill possess the required solid waste permit?
3. Does Skagit Hill enjoy a statutory stay applicable to operating “recycling” facilities that have applied for a renewal of their recycling permit?

III. FACTS

“The SHR property has operated as a sand and gravel pit since the early 1900s. The facility was first permitted as an inert landfill in [1993],”¹ CP 911, following code enforcement efforts against John Diamond (nee Schmid), the then-owner.

In 1991, Diamond applied for a grading permit, CP 837. His application included a SEPA checklist. CP 839-57. The county issued a SEPA mitigated determination of nonsignificance (MDNS) in 1991 for the “[a]pplication for a fill and grade permit to allow filling of an existing

¹ The original quote misstated the year as 2001. Permits were required for solid waste sites beginning in 1966. In 1991, a special use permit was required. CP 1685, 1757. See former SCC 14.04.150(2)(i).

gravel pit with an estimated 29,100 cubic yards of enert (sic) material.” CP

832-33. The county advised Diamond:

If you are considering recycling asphalt and concrete and hauling stumps or other wood wastes to the site for burning, other permits may be required.

CP 830. Planning thereafter issued a grading permit.² CP 835.

Diamond also applied for a solid waste permit. CP 465-72. His application included a SEPA checklist. CP 488-505. Diamond later amended his SEPA checklist to delete “waste recycling” from his proposed project. CP 514. After the amendment, the county initially issued a determination of non-significance (DNS), CP 553-54, but withdrew it and replaced it with a determination of significance (DS), CP 561, because of objections about the proposed acceptance of non-inert waste, CP 556-57, 559, and other concerns. Later, after “the parties reached an agreement on a revised DNS, including specific conditions to protect the environment,” CP 449, a DNS was issued for a proposal to “[r]eclaim an existing non-operating gravel pit by utilizing inert wastes for fill material.”³ CP 863-64. Health thereafter, on September 13, 1993, issued an inert waste landfill permit to Diamond. CP 869-83. Health advised, “[t]he site is permitted to receive only inert waste” and that the permit did

² The grading permit was limited to the acceptance of “clean fill,” not solid waste.

³ The description of the proposed project deleted the proposal to accept demolition waste.

not allow the facility to become operational until certain other approvals were obtained. CP 866.

There is no evidence that the required approvals were ever obtained or that the proposed inert waste landfill ever became operational. Instead, in 1995, Diamond again proposed to use the property for “recycling.” Planning told Diamond that he needed a special use permit and he appealed:

The appeal of JOHN R. SCHMID [Diamond] dated April 16, 1995, requesting that a Special Use Permit for solid waste handling should be issued by Skagit County retroactive to September, 1993 or requesting a ruling that a Special Use Permit is not necessary to conduct recycling operations on the subject property is hereby denied.

CP 891. The Hearing Examiner’s decision denying Diamond’s appeal was affirmed on further appeal. CP 885-86.

During this time – between 1984 and 2003 – a separate solid waste permit was required for all recycling operations in the state. The regulations did not provide for an exemption from permitting requirements. See former WAC 173-304-600. There is no evidence that Diamond or other person ever obtained the required “recycling” permit.

In 2000, the county re-zoned the property from Residential (R) to Rural Reserve (RRv). The development regulations adopted for the new zoning district did not allow solid waste handling facilities. SCC

14.16.310(2), (3). There is no evidence that Diamond operated a lawful landfill or recycling operation before 2000.

Skagit Hill began operation on September 22, 2006, after Diamond's inert waste landfill permit was transferred to Skagit Hill Recycling. CP 450. Before the transfer, Waldal told Pfaff-Dunton "that he would comply with the permit conditions and the plan of operation for the inert waste landfill." CP 590. The transferred permit was valid until December 31, 2006. It only licensed Skagit Hill to accept inert waste for landfilling. CP 597-603.

Skagit Hill did not seek or obtain a solid waste or land use permit to engage in any use other than inert waste landfill; however, Skagit Hill began to accept non-inert construction and demolition debris in 2006. CP 606-09. On September 26, 2006, Pfaff-Dunton told Skagit Hill that it "could not accept roofing or construction and demolition waste under its permit." CP 605. Skagit Hill continued to accept non-inert waste including tires and construction and demolition waste such as "wood, carpeting, foam, fiberglass, insulation, wiring, metals, plastics and roofing." CP 612-15. On October 13, 2006, Pfaff-Dunton told Skagit Hill that it "would need to apply for a different permit if they wanted to bring or accept non-inert wastes on the property." CP 611. On February 14, 2007, Pfaff-Dunton observed that additional non-inert waste had been dumped onto the property. CP 631-35.

Health denied Skagit Hill's application to renew the inert waste landfill permit for calendar year 2007 and imposed an abatement schedule. CP 637-38.⁴ Skagit Hill appealed. CP 452. Before the administrative appeal was final, Health issued a new inert waste landfill permit. CP 647. The 2007 permit included the following condition:

Only inert waste shall be accepted into the facility. Only inert waste shall be stock piled or landfilled at the facility. . . . If the waste is not a listed inert waste per WAC 173-350-990(2) then the operator shall receive written permission from the Health Department and meet WAC 173-350-990(3), criteria for inert waste, before the waste may be accepted at the facility. No other types of solid waste shall be accepted or allowed at the facility.

CP 651. The 2007 permit also included a new abatement schedule:

G. Compliance Requirement. Skagit Hill Recycling accepted construction and demolition wastes at the facility in violation of the inert waste landfill facility permit requirements. As part of the abatement process, Skagit Hill Recycling must not accept any additional construction and demolition wastes or any other solid wastes except inert waste at the facility. The existing piles of construction and demolition wastes must be covered to prevent precipitation from entering the piles. The piles of construction and demolition wastes including the asphaltic roofing waste must be removed from the facility by October 1, 2007. . . .

⁴ The Notice of Violation contained two abatement schedules: one for continued operation of an inert waste landfill and one for closure of the inert waste landfill. Compliance with the first abatement schedule allowed Skagit Hill to continue to operate until a new permit was issued. CP 638.

CP 654. On May 4, 2007, Health approved an amended operations plan for Skagit Hill. CP 656, 660-77. The first sentence of the amended Operations Plan, which was incorporated into the 2007 permit, provided “[o]nly inert materials will be accepted . . .” CP 660.

Skagit Hill did not appeal or comply with the 2007 inert waste landfill permit. It continued to accept and stockpile non-inert waste; CP 693, 695, 679-91; and it did not meet the October 1, 2007, compliance date for the removal of non-inert waste from the property. CP 453, 454-55, 679-91, 702-12.

Skagit Hill applied to renew the 2007 inert waste landfill permit for calendar year 2008. Skagit Hill’s responses to questions on its renewal application did not identify “recycling” as an activity:

[Question] Currently permitted solid waste handling activities: [Answer] land application and inert waste landfill

...

[Question] Existing permits: [Answer] solid waste permit and NPDES permit

...

[Question] Currently permitted operations: [Answer] land application and inert waste landfill.

...

[Question] Briefly describe current operations and activities at the facility site.] [Answer] [no response].

CP 697-700.

Health denied Skagit Hill's application to renew the 2007 inert waste landfill permit. CP 714-17. The denial provided:

Skagit Hill Recycling agreed to the [] compliance requirement before it was included in the 2007 permit. This compliance requirement provided Skagit Hill Recycling with the opportunity to apply for and obtain the necessary permits to receive approval for other solid waste activities that the inert waste landfill permit did not cover. The Health Department provided Skagit Hill Recycling with information and permit application forms on several occasions to begin the permit process. To date, Skagit Hill Recycling has not taken any steps to receive approval for any other activities than those allowed by the inert waste landfill permit.

CP 715-16.⁵ The 2007 permit expired on December 31, 2007. CP 649.

There is no evidence or claim that Health issued a permit that would have allowed Skagit Hill to stockpile, sort, or sell any type of solid waste.

⁵ The agreement that the Health Officer referenced in the quote above came from Skagit Hill's letter of March 30, 2007:

This is an amendment to our operation plan in response to a conversation between Scott Waldal and Peter Browning at approx. 10:26 am. At this time we will cover the debris piles and will remove them by the end of October 2007, at the same time we will continue to obtain the proper permit from Department of Ecology for this type of material. If the proper permit is issued before the end of Oct. 2007 then this material will not be removed but recycled as our goal has always been.

Skagit Hill Recycling, Inc. received the changes needed to our operation plan today Mar. 30, 2007[.] We will make the necessary changes to the plan and have a revised copy back to Skagit County Health no later than 15, April 1007.

CP 645 (italics added to reflect handwritten note.)

Skagit Hill appealed the denial of its renewal application to the Skagit County Health Officer. During a site visit by the Health Officer, Waldal described, and the Health Officer observed, the following:

. . . Construction and demolition debris was in the ‘pit’ or lower portion of the property. The piles of construction and demolition waste observed consisted of wood, sheetrock, wiring, plastics, insulation, and other amounts of materials associated with building demolition. Some of the construction and demolition piles had been put through the shredder, which removed the ferrous metals. Another pile was going to be put through the shredder to further process out ferrous metals for recycling. The appellant stated that in the future he intended to add additional processing to further separate recyclables and wastes. There was a pile of shredded tires and another pile of unshredded tires and a large pile of ash which were also present in this location. The appellant indicated that they are no longer taking ash.

CP 735. Skagit Hill did not manufacture a new product from solid waste, but simply sold or disposed of what it sorted. See CP 736 (“Appellant states that he intends to process all the material and take it off-site for recycling or final disposal at an appropriate landfill[.]”)

The Health Officer concluded:

. . . I do not agree that the construction and demolition debris is source separated, but clearly is further processed at the site. Since the construction and demolition materials do not meet the definition of source separated solid waste for the purpose of recycling, the facility does not meet the exemption criteria for a recycling facility. There is no provision for permit exemption in WAC 173-350 for partially source

separated material. The definition of source separated in WAC 173-350-100 says “Source separation means the separation of different kinds of solid waste at the **place where the waste originates.**” This is plain language that is difficult to interpret any other way than it is fully segregated prior to being transported away from the site of origination.

CP 736 (emphasis in original.)⁶ The Health Officer then denied Skagit Hill’s appeal. CP 739.

Although Skagit Hill has further appealed the Health Officer’s decision, which appeal pends before Division II of the court of appeals, it did not apply for or obtain a judicial stay and it has not obtained another solid waste permit.

Health staff observed that Skagit Hill continued “accepting, dumping, landfilling, handling, and otherwise processing solid wastes without a permit” throughout 2008 and 2009. CP 756-768, 1515, 1519-53, 1545-52, 1554-73, 1575-97, 1599-617, 1619-62, 1664-65. Planning staff made similar observations in 2008, noting, on August 8, 2008, “[a] very large pile of construction and demolition debris on the property and in the pit. This pile contained household items, including a mattress, plastics, lumber, linoleum flooring, particle board, etc.” CP 783, 808-15.

⁶ Skagit Hill appealed to the Pollution Control Hearings Board (PCHB). The PCHB affirmed the Health’s Officer’s decision. Skagit Hill then appealed to the superior court, which reversed the PCHB. However, Division II of the court of appeals accepted review of the superior court’s decision after the court commissioner found that the superior court committed obvious error. The matter remains on appeal. CPCPCPCP. No stay has been sought or granted in this matter.

On October 1, 2008, Planning staff “observed a [new] large pile of construction and demolition debris adjacent to the Skagit Hill Recycling office.” CP 789. Another new pile of waste containing “[n]on-inert materials were mixed in with inert materials” was observed on October 17, 2008. CP 789, 906-09.

Waldal did not deny the observations of county staff or controvert the photographic evidence that he was accepting, stockpiling, and sorting mixed construction and demolition debris. Waldal confirmed that Skagit Hill sorted solid waste, including tires and wood, for incineration, CP 913, and accepted carpeting and insulation. CP 914.

On June 12, 2009, Skagit County filed a complaint seeking an injunction and an order to abate a nuisance against Scott Waldal, Avis, LLC, and Skagit Hill Recycling, Inc. (collectively “Skagit Hill.”) The county’s complaint alleged that Skagit Hill was operating an unlawful solid waste handling facility and sought an injunction. CP 1-12.

IV. ANALYSIS

The material facts that support the injunction are not in dispute. Skagit Hill does not have a land use or solid waste permit that would allow it to process solid waste. Its license to operate an inert waste landfill permit expired on December 31, 2007. Yet it has continued to accept, sort and stockpile solid waste. What solid waste it could not sell to others was disposed of or incinerated at other locations.

Skagit Hill's arguments – that it permit-exempt and/or enjoys a statutory stay for waste recycling facilities – raise disputes about legal conclusions. The underlying material facts are not disputed, and the superior court's legal conclusions all follow from undisputed material facts.

Skagit Hill does not have a right to continue solid waste handling or landfilling with inert or non-inert waste given its complete disregard of zoning and solid waste laws, regulations, and ordinances. Nor can it complain that the injunction is too broad. *See City of Bremerton v. Sesko*, 100 Wn. App. 158, 995 P.2d 1257 (2000) (Order requiring unconditional abatement of the junkyard use of property in violation of zoning code, rather than ordering removal of only those items that were determined to be unlawful, was not an abuse of discretion in city's action to abate the nuisances, where the nuisances were extensive and had existed for years, and the property owners had made little attempt to rectify the situation.)

The trial court is vested with broad discretionary power to shape and fashion injunctive relief to fit the particular facts, circumstances, and equities of the case before it. Appellate courts give great discretion to the trial court's exercise of that discretion.

Brown v. Voss, 105 Wn.2d 366, 372, 715 P.2d 514 (1986).

A. Standard of review.

Summary judgment “shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together

with the affidavits, if any, show that there is no genuine issue to any material fact and that the moving party is entitled to a judgment as a matter of law.” CR 56(c).

The court may affirm a summary judgment grant if it is supported by any grounds in the record. *LaMon v. Butler*, 112 Wn.2d 193, 200-01, 770 P.2d 1027 (1989); *Graff v. Allstate Ins. Co.*, 113 Wn. App. 799, 802, 54 P.3d 1266 (2002), *review denied*, 149 Wn.2d 1013 (2003).

Further, “an appellate court may sustain a trial court on any correct ground, even though that ground was not considered by the trial court.” *Nast v. Michels*, 107 Wn.2d 300, 308, 730 P.2d 54 (1986).

We reject the District's argument that we are bound by the findings of fact entered by the trial court in these cases. The record of the proceeding below consists entirely of written and graphic material and contains no trial court assessment of witnesses' credibility or competency. Because the record on appeal is identical to that considered by the trial court, we are not bound by the trial court's findings of fact.

In re Request of Rosier, 105 Wn.2d 606, 616, 717 P.2d 1353 (1986)
(citations omitted.)

B. Undisputed material evidence supports the injunction.

“A public nuisance may be abated by any public body or officer authorized thereto by law.” RCW 7.48.220. To obtain an injunction, the county must establish (1) a clear legal or equitable right; (2) a well grounded fear of immediate invasion of that right; (3) acts that are or will

result in actual and substantial injury; and (4) the relative equities favor granting the injunction. *Tyler Pipe Industries, Inc. v. State Department of Revenue*, 96 Wn.2d 785, 792, 638 P.2d 1213 (1982).

1. Skagit Hill maintains a public nuisance.

It is unlawful for any person to dump or deposit or permit the dumping of depositing of any solid waste onto or under the surface of the ground . . . except at a solid waste facility for which there is a valid permit . . . or at a recycling operation, limited compost operation, or intermediate solid waste handling facility as specifically exempted in WAC 173-350-210, 173-350-220 and 173-350-310.

SCC 12.16.080(1). Violations of the county’s solid waste ordinance are “detrimental to the public health, safety and welfare and are hereby declared to be public nuisances.” SCC 12.16.440(1). Similarly, violations of the county zoning code are public nuisances. SCC 14.44.010(1). Such legislative and administrative decisions “indicate[] a decision by the legislative body that the regulated behavior warrants enjoining, *and that the violation itself is an injury to the community.*” *Kitsap County v. Kev, Inc.*, 106 Wn.2d 135, 139, 720 P.2d 818 (1986) (emphasis in original).

As will be discussed below, Skagit Hill was required to have, but did not have, a land use permit and a solid waste permit. Because it had neither, Skagit Hill maintained a public nuisance that could be enjoined on either ground.

2. The county has a clear legal or equitable right to enjoin the public nuisance.

Skagit Hill operated an unpermitted solid waste handling facility in a zoning district that does not allow such uses despite orders to cease operation. Even if Skagit Hill were to prevail in its appeal regarding the renewal of its 2007 inert waste landfill permit that is before Division II, its continued handling of non-inert waste would not be authorized because the 2007 permit may only be renewed “as is,” meaning Skagit Hill would still have to comply with the permit conditions that bar the acceptance and stockpiling of non-inert wastes and require removal of any non-inert waste from the property.

Skagit Hill’s unpermitted operation directly conflicts with the solid waste ordinances that “ensure that solid waste storage and disposal facilities are located, maintained, and operated in a manner so as to properly to protect the public health, prevent air and water pollution, are consistent with the priorities established in RCW 70.95.010, and avoid the creation of nuisances.” See RCW 70.95.160. Similarly, Skagit Hill’s operation conflicts with the county’s zoning ordinance, which provides uniform planning for the general safety and welfare of the community. See *Hubbard v. Spokane County*, 146 Wn.2d 699, 710, 50 P.3d 602 (2002).

Skagit Hill’s unpermitted use of the property for solid waste handling cannot be allowed to continue or be ignored. See *Buechell v.*

Doe, 125 Wn.2d 196, 210-211, 884 P.2d 910 (1994) (The governmental zoning power may not be forfeited by the action of local officers in disregard of the statute and the ordinance; the public has an interest in zoning that cannot be destroyed). Also see *State v. Riley*, 126 Wn. 256, 262, 218 P. 238 (1923) (To follow and uphold the law is the duty of courts and juries.)

There is no legal authority for the use of the Skagit Hill property for unpermitted solid waste activities; therefore, the county has a clear right to an injunction, which meets the first prong of the test for injunctive relief.

3. The county had a well-grounded fear of immediate invasion of its right.

Skagit Hill has long-ignored every county effort to get it to stop accepting and processing non-inert waste, including construction and demolition debris. It has not applied for permits required for such activities despite being told to do so. It knowingly operates without required land use and solid waste permits. And, although it has appealed Health's decision to deny the renewal of the 2007 permit, Skagit Hill has never bothered to seek a court-ordered stay.⁷

⁷ A judicial stay that continued the operations under the 2007 permit would not likely benefit Skagit Hill because the permit (1) only licenses Skagit Hill to landfill inert waste, (2) bars the acceptance and stockpiling of non-inert debris, and (3) does not license Skagit Hill to engage in the resale of any solid waste.

The county and the public have an interest in health and zoning ordinances that should not be defeated by willful violations of known regulations. See *City of Mercer Island v. Steinmann*, 9 Wn. App. 479, 483, 513 P.2d 80 (1973). Skagit Hill's obvious and continuing violations makes the county's fear of invasion of the protections provided by zoning and health ordinances immediate and well-grounded.

a) The acts complained of are or will result in actual and substantial injury.

"Improper methods and practices of handling and disposal of solid wastes pollute our land, air and water resources, blight our countryside, adversely affect land values, and damage the overall quality of our environment." See RCW 70.95.010(2).

Specifically, neighbors have complained about noise, flooding, and environmental concerns attributable to Skagit Hill's operations. Further, the observed degradation of non-inert waste and its continued exposure to rain and surface water presents a significant health and environmental risk. The leaching of persistent chemicals from treated wood, heavy metals from the ash, chemicals from plastics and insulation, etc. into the surface and ground water inevitably leads to their entry into the environment..

Generally, the violation of ordinances affecting the use of property inherently affects property values. See *Radach v. Gunderson*, 39 Wn. App. 392, 399, 695 P.2d 128 (1985). A mere setback violation creates a continuing injury to adjacent properties. *Radach*, 39 Wn. App. at 400

(“The improper setback creates a continuing condition which adversely affects the Radachs' enjoyment of their property. A continuing injury is remedied properly by injunction.”) The same holds for Skagit Hill’s more intrusive violations.

In addition to the obvious environmental concerns, Skagit Hill’s failure to pay the fees required for the permits they have failed to obtain conflicts with the county’s strong interest in efficient collection of such fees. See *Peters v. Sjolholm*, 95 Wn.2d 871, 885, 631 P.2d 937 (1981) (Brachtenbach, C. J., concurring) (“The government has a strong interest in the efficient collection of taxes which has long been recognized by the judiciary.”) (Citations omitted.)

Skagit Hill’s unpermitted, non-exempt use of the property is, by legislative definition, detrimental to the public health, safety, and welfare. See SCC 14.44.010(1), SCC 12.16.440(1). Because (1) the dumping of solid waste without a permit unlawful is unlawful and (2) that SCC 12.16.440(5)⁸ expressly grants authority to stop such activity by filing suit for an injunction (as is the case here), Skagit Hill’s activities are a nuisance per se that facially injures the public. See *King County ex rel Sowers v. Chisman*, 33 Wn. App. 809, 819, 658 P.2d 1256 (1983) (“This indicates a decision by the legislative body that the regulated behavior

⁸ “[T]he Health Officer may make a written request to the Prosecuting Attorney to bring injunctive action against a violator of this Chapter [12.16 SCC] in order to prevent further violations[.]”

warrants enjoining, and that the violation itself is an injury to the community.”)

b) The equities favor the injunction.

Skagit Hill maintains a public nuisance that injures the community. See RCW 7.48.130 (“A public nuisance is one which affects equally the rights of an entire community or neighborhood, although the extent of the damage may be unequal.”) It increases its own profit at the public’s expense.

Adding to the imbalance of equity, Skagit Hill has been ignoring Health’s and Planning’s enforcement since 2006 and 2008 respectively. Skagit Hill has been operating without any sort of permit since January 1, 2008, and has shown that it intends to continue to operate unlawfully.

The absence of any public benefit and the obvious public detriment is sufficient to enjoin Skagit Hill’s continuing violations. See *Radach v. Gunderson*, 39 Wn. App. at 399 (“The equities must be very compelling indeed to avoid an injunction to correct a clear violation of a zoning ordinance.”) No equities favor the defendants.

C. Undisputed material evidence precludes any defense to the injunction.

To prevail in this appeal, Skagit Hill must claim – as it does – and prove – as it fails to do – that it is permit-exempt because it did not have a permit to operate any kind of waste recycling facility when the injunction was entered. This need to prove permit-exemption negates its new claim

that it enjoys a statutory stay, which, even if it existed, would only allow Skagit Hill to accept inert waste for landfilling.

Skagit Hill confuses conclusions with facts and offers irrelevant facts as material facts. That Skagit Hill is not permit-exempt is a conclusion that is founded on undisputed material facts. That Skagit Hill does not enjoy a statutory stay (and thereby does not have a permit that would let it “accept, stockpile, sort, and resell” solid waste) is a conclusion that is also founded on undisputed material facts.

1. The injunction is not barred by the statutory stay available to operating waste recycling facilities when applications for renewal are denied or permits are suspended.

Skagit Hill argues that it enjoys a stay from the injunction under RCW 70.95.210⁹ and WAC 173-350-710(6)(c).¹⁰ This argument was not

⁹ RCW 70.95.210 provides:

Whenever the jurisdictional health department denies a permit or suspends a permit for a solid waste disposal site, it shall, upon request of the applicant or holder of the permit, grant a hearing on such denial or suspension within thirty days after the request therefor is made. Notice of the hearing shall be given [to] all interested parties including the county or city having jurisdiction over the site and the department. Within thirty days after the hearing, the health officer shall notify the applicant or the holder of the permit in writing of his determination and the reasons therefor. Any party aggrieved by such determination may appeal to the pollution control hearings board by filing with the hearings board a notice of appeal within thirty days after receipt of notice of the determination of the health officer. The hearings board shall hold a hearing in accordance with the provisions of the Administrative Procedure Act, chapter 34.05 RCW. If the jurisdictional health department denies a permit renewal or suspends a permit for an operating waste recycling facility that receives waste from more than one city or county, and the applicant or holder of the permit requests a hearing or files an appeal under this section, the permit denial or suspension shall not be effective until the completion of the appeal process under this section, unless the jurisdictional health department declares that continued operation of the waste

presented to the superior court; therefore, it should not be considered. See RAP 2.5(a) (“[A]ppellate court may refuse to review any claim of error which was not raised in the trial court[.]”)

However, should the court consider this argument, it will find that Skagit Hill does not qualify for the statutory stay.

Under the facts present here, a statutory stay is available when the facility meets three prerequisites: (1) it is an operating waste recycling facility, (2) a renewal application was denied and appealed, and (3) the health department has not found that continued operations poses a threat. Skagit Hill does not meet any of these prerequisites.

Further, its indispensable argument that it is permit-exempt precludes any application of the statutory stay: Skagit Hill must claim that it is exempt from solid waste permitting requirements, which would negate any claim that it ever applied for a “recycling” permit or need a stay under the statute, because if the stay were in effect, then it would only

recycling facility poses a very probable threat to human health and the environment.

¹⁰ WAC 173-350-710(6)(c) provides:

If the jurisdictional health department denies a permit renewal or suspends a permit for an operating waste recycling facility that receives waste from more than one city or county, and the applicant or holder of the permit requests a hearing or files an appeal under this section, the permit denial or suspension shall not be effective until the completion of the appeal process under this section, unless the jurisdictional health department declares that continued operation of the waste recycling facility poses a very probable threat to human health and the environment.

“revive” the very restrictive 2007 permit. That permit does not license Skagit Hill to engage in recycling of solid waste.

a) Skagit Hill did not operate a “waste recycling facility.”

Skagit Hill is not a “waste recycling facility.”

"Recycling" means transforming or remanufacturing waste materials into usable or marketable materials for use other than landfill disposal or incineration. Recycling does not include collection, compacting, repackaging, and sorting for the purpose of transport.

WAC 173-350-100. Skagit Hill did not, for example, make park benches from plastic waste. To the contrary, Skagit Hill accepts, stockpiles, sorts, and sells the components of construction and demolition debris. The waste that Skagit Hill couldn't sell to others was used for fill or incineration.¹¹ Thus, Skagit Hill is engaged in the exact operations that are excluded from the definition of recycling: landfill disposal, incineration, “collection, . . . repackaging, and sorting for the purpose of transport.”

Skagit Hill cannot enjoy a stay available to waste recycling facilities simply because it has pursued an appeal involving a restrictive,

¹¹ “. . . As part of the process at the SHR site there will be further removal of any incidental amount of debris from the wood waste. Some of the debris will be recycled. Carpeting, for example, can be sold to shipping companies for use as packaging. Dry insulation can be used in manufacturing new insulation. Any remaining plastics and metals can be recycled. The remaining wood waste can be combined with other CDL waste and sold as fuel for industrial operations.” CP 914.

non-recycling, inert waste landfill permit. This argument ignores the fact that the denied permit did not allow Skagit Hill to “recycle” solid waste.

The court should outright disregard Skagit Hill’s attempt to bootstrap an appeal of a restrictive inert waste landfill permit into the grounds for a statutory stay. First, the bootstrapping only works if the court allows Skagit Hill to revise the clear and unambiguous proscriptions in the 2007 permit through an untimely collateral attack.¹² Second, the bootstrapping argument is unsupported by pertinent authority or meaningful analysis. RAP 10.3; *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992). “Bootstrapping is no substitute for reasoning.” *1000 Virginia Ltd. Partnership v. Vertecs Corp.*, 1568 Wn. App. 566, 599, 146 P.3d 423 (2006) (Justice Johnson dissenting.)

b) Health did not deny an application to renew an “operating solid waste recycling” facility.

Health did deny a renewal application, but it was an application to renew an “inert waste landfill permit” not a permit for an “operating waste recycling facility”¹³ Skagit Hill possessed no other permits.

By definition, an inert waste landfill permit licenses the landfilling of inert waste. See WAC 173-350-100 (“‘Inert waste landfill’ means a

¹² The time to appeal the 2007 inert waste landfill permit has long since expired. See SCC 12.16.460(3) (“A request for hearing before the Health Officer shall be made in writing and served on the Health Officer within ten (10) working days . . .”)

¹³ Health did not suspend a permit for any kind of facility. Thus, the statutory stay applies only if health “denies a permit renewal” for an “operating waste recycling facility.”

landfill that receives only inert wastes.”) It is not a license to accept waste for stockpiling, sorting, and sale or to otherwise recycle waste. See *State v. Lake City Bowlers' Club, Inc.*, 26 Wn.2d 292, 295, 173 P.2d 783 (1946) (“The term ‘license’ is generally defined as a right granted by some authority to do an act which, without such license, would be unlawful. . . . When a right exists, it is in the nature of a permission and must be exercised according to law.”); RCW 70.95.170 (“[N]o solid waste handling facility or facilities shall be maintained, established, or modified until the . . . person operating such site has obtained a permit[.]”).

By its terms, the 2007 permit unambiguously barred Skagit Hill from accepting or stockpiling non-inert waste, the activity that Skagit Hill claims makes it an “operating waste recycling facility.”

The undisputed facts establish that Skagit Hill did not apply to renew a permit for a waste recycling facility. Skagit Hill’s responses to questions on its renewal application did not identify any “recycling” use. CP 697-700.¹⁴ That Skagit Hill only applied to renew a restrictive inert waste landfill permit logically follows from its indispensable claim that it is permit-exempt. Knowing that it did not possess the required “recycling”

¹⁴ Similarly, nothing in Skagit Hill’s application to renew the 2006 inert waste landfill permit for calendar year 2007 indicates that Skagit Hill was engaged in waste recycling. See CP 623-25. (Of course, the permit that was eventually issued for 2007 negates all of Skagit Hill’s efforts to engage in recycling.)

permit¹⁵ – which is an undisputed fact – Skagit Hill would not have applied to renew a “recycling” permit.

c) Skagit Hill does not enjoy the stay because Health found that Skagit Hill’s operations pose a threat.

The statutory stay is not available when “the jurisdictional health department declares that continued operation of the waste recycling facility poses a very probable threat to human health and the environment.” RCW 70.95.210.

The health department made the required finding:

The actions of this company have the potential for harm and irreparable injury to persons and the environment. Therefore, I ask that you [the Prosecuting Attorney] pursue injunctive relief against Skagit Hill Recycling to:

- Immediately cease and desist from accepting, dumping, storing, piling, handling, processing, etc. any solid waste, whether inert or non-inert, including construction and demolition, on this property.
- Remove and properly dispose of all solid waste, including materials that are intended for recycling, at the tie to a permitted solid waste facility. . . .
- Comply with all other county and state regulations specific to this property and all solid waste regulations.

¹⁵ Skagit Hill needed a permit for an intermediate solid waste handling facility. See WAC 173-350-100: (“ ‘Intermediate solid waste handling facility’ means any intermediate use or processing site engaged in solid waste handling which is not the final site of disposal. This includes material recovery facilities, transfer stations, drop boxes, baling and compaction sites.”)

CP 13. This finding, which has not been appealed to the Pollution Control Hearings Board, precludes the application of the statutory stay.

2. Skagit Hill’s operations are not exempt from solid waste permitting requirements.

Skagit Hill’s operation, which involved the acceptance, stockpiling, sorting, and sale or disposal of solid waste, is not permit exempt:

If a facility wants only to process mixed construction and demolition debris for hog fuel or other markets, instead of onsite disposal, they must have an intermediate solid waste handling permit – similar to a transfer station. This standard requires protection of the waste from wind, rain and snow to prevent environmental impacts. The standards also require detailed pollution control measures, safety plans and dust and odor controls. See WAC 1730350-310 for these standards.

CP 958.

In issuing its injunction, the superior court concluded that Skagit Hill’s operations are not exempt from solid waste permitting requirements.

CP 4267 (“Defendants are not exempt from having a valid solid waste permit.”)¹⁶ The order allows the future receipt of a permit or a future determination of exemption to modify the injunction. See, for example, CP 4251 (“Cease all solid waste handling activity on the Skagit Hill Recycling property undertaken in the absence of a valid solid waste permit

¹⁶ The parties fully briefed the exemption issue before the superior court. See, for example, CP 2432, 2850-62.

or determination by an agency or court with jurisdiction of exemption from solid waste permit requirements.”)

Undisputed material facts in the record support the superior court’s conclusion that Skagit Hill was not exempt from solid waste permitting requirements.

a) Skagit Hill does not meet the performance requirements that are required for an exemption from solid waste permitting.

Skagit Hill claims that it is exempt because it qualifies as a material recovery facility¹⁷ or a “piles used for storage” facility. Both of these types of SWHF are permit exempt if the operators comply with the “performance standards.”

For example, materials recovery facilities must meet the performance standards:

Material recovery facilities shall be managed according to the following terms and conditions to maintain their exempt status:

- (i) Meet the performance standards of WAC 173-350-040;

¹⁷ "Material recovery facility" means any facility that collects, compacts, repackages, sorts, or processes for transport source separated solid waste for the purpose of recycling." WAC 173-350-100. A material recovery facility is a subtype of “intermediate solid waste handling facility.” All material recovery facilities are exempt from permitting because, by definition, they exist only if they meet the requirements for permit exemption. If the facility does not meet the requirements for permit exemption, it is an “intermediate solid waste handling facility.” See WAC 173-350-310(2)(a) (“An owner or operator that does not comply with the terms and conditions of (b) of this subsection is required to obtain a permit from the jurisdictional health department as an intermediate solid waste handling facility[.]”)

(ii) Accept only source separated recyclable materials and dispose of an incidental and accidental residual not to exceed five percent of the total waste received, by weight per year, or ten percent by weight per load;

...

WAC 173-350-310(2)(b). "Piles used for storage" facilities must also comply.

(c) Owners and operators of all storage piles that are categorically exempt from solid waste handling permitting in accordance with (b) of this subsection shall:

...

(ii) Comply with the performance standards of WAC 173-350-040; and . .

WAC 173-350-320(1)(c) (ii).

The performance standards apply to all SWHFs, including materials recovery facilities and piles used for storage facilities:

The owner or operator of **all** solid waste facilities subject to this chapter shall:

(1) Design, construct, operate, and close all facilities in a manner that does not pose a threat to human health or the environment; . . .

...

(3) Conform to the approved local comprehensive solid waste management plan prepared in accordance with chapter 70.95 RCW, Solid waste management -- Reduction and recycling, . . . ;

(4) Not cause any violation of emission standards or ambient air quality standards at the property boundary of any facility and comply with chapter 70.94 RCW, Washington Clean Air Act; and

(5) Comply with all other applicable local, state, and federal laws and regulations.

WAC 173-350-040 (emphasis added.)

Material undisputed evidence establishes that that Skagit Hill did not meet these performance standards. Because it did not, it is not exempt from solid waste permitting requirements and there is no bar to the injunction.

(1) It is undisputed that Skagit Hill's operation posed a threat to human health.

Skagit Hill misses the point when it argues that there was no evidence of contamination. The exemption is not available when the operation poses a threat to human health. The existence of a threat is undisputed.

The Department of Ecology determined that construction and demolition debris posed a potential for harm to the environment and needed to be handled differently from inert waste:

The primary reason for this decision was that materials commonly found in demolition wastes, as defined in WAC 173-304-100(19), present a threat to groundwater and air quality in many circumstances given the design and operational standards in WAC 173-350-410. Problems associated with demolition wastes include leachate, gas generation, and landfill fires. Excluding waste streams associated with these problems eliminates essentially all demolition wastes that do not meet the criteria for inert waste. Another reason that demolition wastes are no longer included is that the initial reason for providing inert and demolition landfills has not proven to be a workable solution. Demolition wastes were originally included as a waste type in WAC 173-304-461 because of the generally inert materials in demolition waste and the difficulty in

segregating materials when razing a structure. The design and operation standards were developed around the average characteristics of wastes generated from demolishing whole structures. Single-type wastes, such as those generated by roofing contractors, were not intended to be included as demolition waste. The definition of demolition waste also excluded construction and land clearing debris. All of these materials have found their way into inert and demotion landfills, and have resulted in landfills with average waste characteristics that do not match those for which standards were originally developed

CP 956-57.

Dunton observed that Skagit Hill's practice of "shredding the non-inert waste and then leaving it lying on the ground in the quarry, exposed to the sun, rain, and weather, speeds up the decomposition of the non-inert waste." CP 457. She determined that "Skagit Hill Recycling's use of a quarry site with porous soils to pile, process, and store non-inert waste presents a particular hazard for ground water and surface water contamination. CP 457. Dubbel, who "observed degraded wastes and water runoff from the piles of waste [declared] if the occupants of these developed parcels used wells [for] drinking water or for watering stock and crops, there would be a risk of ingesting contaminants from the degraded non-inert wastes that had been accepted at the Skagit Hill Recycling facility." CP 1517.

The ash alone "contains elevated levels of elements that are potentially harmful to human health and the environment, such as

cadmium and lead, these elements will also be absorbed by plant life as would any other micronutrient. This presents a risk for harm to animal and human health.” CP 2122. The risk was observable. Rain that fell onto the uncovered “ash pile was soaking directly into the ground and was not running off to a sediment pond” and “posed a threat to groundwater quality.” CP 1669. Further, because the application rates for the “fertilizer” were exceeded by the stockpiling on uncovered ground in the pit, the underlying become unsuitable for plant life and hazardous to animal and human health. CP 4121.

More importantly, the Health Officer has determined that continued operation of Skagit Hill’s non-inert waste operation “have the potential for harm and irreparable injury to persons and the environment.” CP 13. Skagit Hill did not appeal this determination.

(2) It is undisputed that Skagit Hill’s operations did not conform to the county’s comprehensive solid waste management plan.

To qualify as a permit-exempt material recovery facility, Skagit Hill had to meet several restrictions on the waste that it accepted: (1) the waste had to be designated by the county as recyclable¹⁸; the waste had to

¹⁸ WAC 173-350-100 (“Recyclable materials’ means those solid wastes that are separated for recycling or reuse, including, but not limited to, papers, metals, and glass, **that are identified as recyclable material pursuant to a local comprehensive solid waste plan.**”) (Emphasis added.)

be “source separated”¹⁹; and (3) non-source separated recyclables had to be restricted to an incidental and accidental amount.²⁰

First, Skagit Hill did not restrict the solid waste that it accepted for sorting and resale to the materials designated in the county’s Comprehensive Solid Waste Management Plan (Solid Waste Plan), which designates the following as recyclable materials:

- Newspaper
- Cardboard
- Food waste (see Chapter 5)
- Office paper, according to current market specifications
- Mixed waste paper, according to current market specifications
- Magazines and catalogs
- Metals, including ferrous and non-ferrous scrap, tin cans and appliances
- Aluminum cans and foil
- Glass containers
- PET soda bottles, HDPE milk bottles, plastic film, and other plastics as markets allow
- Wood, drywall, concrete and asphalt
- Motor oil, antifreeze and car batteries
- Yard debris (see Chapter 5)

CP 2985.

¹⁹ See WAC 173-350-100 (“‘Material recovery facility’ means any facility that collects, compacts, repackages, sorts, or processes for transport **source separated** solid waste for the purpose of recycling.”) (Emphasis added.)

²⁰ See WAC 173-350-310(2)(b)(ii) (“Accept only source separated recyclable materials and dispose of an incidental and accidental residual not to exceed five percent of the total waste received, by weight per year, or ten percent by weight per load[.]”) Skagit Hill intentionally – not incidentally and accidentally – accepted non-designated and non-source separated solid waste.

There is no factual dispute that: (1) construction and demolition debris is not designated as a recyclable material; (2) Skagit Hill intentionally accepted tires, ash, and mixed construction and demolition containing furniture, laminates, linoleum, insulation, asphalt shingles, tar paper, furniture, toys, mattresses, carpeting, land clearing debris,²¹ etc.; (3) Skagit Hill sorted through the piles of mixed debris on-site to obtain resalable waste, and (4) Skagit Hill did not bother to comply with the compliance requirement in the 2007 permit to immediately remove non-inert waste from the property.

Second, The legislature clearly provided that regulatory exemptions are not available for “any facility . . . that . . . [h]andles mixed solid wastes that have not been processed to segregate solid waste materials destined for disposal from other solid waste materials destined for beneficial use.” RCW 70.95.305(2)(c). Thus the segregation of solid wastes must occur where the waste originated:

“Source separation” means the separation of different kinds of solid waste **at the place where the waste originates.**

WAC 173-350-100 (emphasis added.)

Skagit Hill’s operation plan called for the intentional acceptance of mixed debris and then stockpiling it on open ground, exposed to the

²¹ “Yard debris,” which is defined as “lawn clippings, leaves, weeds, vegetable garden debris, branches (under four inches in diameter) and brush,” is a designated recyclable material. Yard debris does not include landclearing debris such as trees and stumps.

weather, until it could be further sorted for sale or disposal. For example, Skagit Hill intentionally accepted carpeting, which is itself not a designated recyclable material, that was mixed in with the construction and demolition debris, sorted it on-site, and sold it to other vendors.

Third, in conflict with the above statute and regulation, Skagit Hill intentionally accepts mixed, unsegregated waste with the intent to sort through it for different kinds of materials, not all of which were designated recyclable materials. For example, the presence of carpeting, a non-designated recyclable, was not incidental or accidental.²² Skagit Hill accepted it with the intent to resell it.

Skagit Hill's intentional failure to comply with the requirement in the Operation Plan for the 2007 permit that all non-inert debris must be immediately returned to the person who dumped it or set aside in a segregated pile until it could be take to a landfill, CP 660,²³ confirms the intentional nature of Skagit Hill's acceptance of non-source separated debris.

²² Merriam-Webster's On-line Dictionary defines "incidental" as "occurring merely by chance or without intention or calculation." "Accidental" is defined as "occurring unexpectedly or by chance; happening without intent or through carelessness and often with unfortunate results." <http://www.merriam-webster.com/dictionary>.

²³ The Operation Plan provides in part:

Any material that is not acceptable will be removed from the dump area immediately upon discovery and put in a designated location for return to the party that dumped it or disposal to an approve landfill or transfer station. Any incidental non-inert waste that is dumped at the facility during normal activities will be separated and stockpiled in [an] area until which time there is a sufficient amount to make a load for disposal to an approve facility."

Skagit Hill's intentional practice inherently violates the source separation requirement and mocks the "accidental and incidental" exception to source separation. Thus, the superior court did need not to consider the percentages of "accidental and incidental" waste. The requirement that the disposed of waste be "incidental and accidental"²⁴ precludes its intentional acceptance, a practice that Skagit Hill cannot dispute.

The superior court's conclusion that Skagit Hill was not permitted to stand.

(3) It is undisputed that Skagit Hill violated emission standards.

The ash is a fine material that lacks structural integrity. It blew into Pfaff-Dunton's eyes during one site inspection. CP 4122. It has also blown onto neighboring properties. CP 1677-1678²⁵; CP 1681-83.²⁶ A

²⁴ Merriam-Webster's On-line Dictionary defines incidental as "occurring merely by chance or without intention or calculation." <http://www.merriam-webster.com/dictionary/incidental>. "Accidental" is defined as "occurring unexpectedly or by chance; happening without intent or through carelessness and often with unfortunate results." <http://www.merriam-webster.com/dictionary/accidental>.

²⁵ Betty Eaton declared, "I have also noticed dust from the Skagit Hill Recycling facility blow onto and land on my property. I am not in good health and breathing this dust concerns me. I suffer from cancer and hope to be a cancer survivor. I do not want to breathe the dust from a business that does not cover the ash and ground-up waste it has on its property."

²⁶ Justin Martinez declared, "From my residence, I look directly at a large pile of ash. This pile has dried and with the recent windy days, ash has been blowing onto my property. One morning I found a 1/8th inch layer of ash in my truck. The ash had blown in past the door and window seals overnight. More troubling is the discovery that ash has been getting into my home. My son is ten months old. About three weeks ago, when the weather was hot, my wife found the ash covering my son's white socks. . ."

representative of the Environmental Protection Administration advised Justin Martinez, who had complained about the ash that coated his residence, to “leave his property.” CP 4122.

None of these facts are disputed. When they are applied to the definition of air pollution, the conclusion that Skagit Hill failed to meet the performance standard for emissions follows. See RCW 70.94.030(2).²⁷

(4) It is undisputed that Skagit Hill did not comply with ordinances, regulations, and statutes.

(a) Skagit Hill violated regulations for the storage of fertilizer.

Skagit Hill argues that the ash that was stockpiled on the property is a fertilizer because its acceptance and stockpiling of tons of ash is another reason why it does not meet the “performance standards: the ash is not (1) an inert waste, see WAC 173-350-990²⁸; (2) a designated recyclable waste, and (3) Health has not made a determination that the ash is non-inert.

However, this argument does not help Skagit Hill because the ash was not stored like every other solid waste on the property and not in

²⁷ “ ‘Air pollution’ is presence in the outdoor atmosphere of one or more air contaminants in sufficient quantities and of such characteristics and duration as is, or is likely to be, injurious to human health, plant or animal life, or property, or which unreasonably interfere with enjoyment of life and property.”

²⁸ Ash is not listed as an “inert waste” in the regulation. The only way that it could be found to be an inert waste would be for Skagit Hill to have applied to Health for a determination that ash is an inert waste. There is no evidence that Skagit Hill ever made such a request and Health has not made the required finding.

accordance regulations controlling the storage of fertilizer. See WAC 16-201-210.²⁹ The “fertilizer” was not maintained indoors and there was no effort to cover it while outdoors. Like other solid waste at the property, it was not placed on the required impermeable surface. It follows that loading, unloading and mixing did not take place on a suitable surface. And there is no evidence that Skagit Hill made any effort to clean up the ash that blew or slurred from the pile when it rained. See CP 1536 ((bottom photograph: “Run-off by ash pile.”))

(b) Skagit Hill violated the zoning code.

Although the superior court was able to grant the injunction without ruling on the issue of whether Skagit Hill’s use violated the county’s zoning ordinance, the record establishes that Skagit Hill did not comply with zoning laws.

²⁹ WAC 16-201-210 provides in part:

- (2) If dry bulk fertilizer is stored outdoors, it shall be placed on a ground cover sufficiently impermeable to prevent seepage or runoff and shall be completely covered with a tarpaulin or other suitable covering to prevent contact with precipitation and surface water.
- (3) All loading, unloading, mixing and handling of dry bulk fertilizer at the storage facility shall be conducted on a surface of a size and design that will allow for the collection of spilled materials.
- (4) Operational areas shall be cleaned to prevent accumulation of dry bulk fertilizer spilled during loading and unloading.

Skagit Hill, which did not possess a land use permit to operate a solid waste handling facility on the property, had the burden of proving that the use of the property for solid waste handling – beyond the annually permitted use as an inert waste landfill – constituted a legal non-conforming use. *Miller v. City of Bainbridge Island*, 111 Wn. App. 152, 164, 43 P.3d 1250 (2002) (The landowner bears the burden of establishing the existence of a legal nonconforming use.)

Skagit Hill did not try to meet this burden because it could not. To establish a valid nonconforming use, a landowner must prove that (1) the use began before the applicable zoning ordinance was adopted; (2) the use was lawful before the ordinance was adopted; (3) the landowner did not abandon the use after the ordinance was adopted; and (4) the use was continuous, not occasional or intermittent. *Jefferson County v. Lakeside Indus.*, 106 Wn. App. 380, 385, 23 P.3d 542, 29 P.3d 36 (2001), *review denied*, 145 Wn.2d 1029 (2002).

While there is some evidence that the quarry was used for a de minimis amount of salvaging before 1979, undisputed evidence in the record establishes that the use was abandoned long before Skagit Hill acquired the property.

After June, 11, 1979, non-conforming uses were deemed abandoned if the use ceased “for any reason whatsoever for a period of

one (1) year.”³⁰ The abandonment did not need to be intentional. See *Choi v. City of Fife*, 60 Wn. App. 458, 803 P.2d 1330, *review denied*, 116 Wn.2d 1034, 813 P.2d 583 (1991) (Evidence of an intent to abandon is not necessary if the zoning scheme allows termination of nonconforming use rights after use has been unintentionally vacated, rather than intentionally abandoned.)

Skagit Hill’s own witness declared that the use of the property for the sale of solid waste was abandoned in the early 1980s. CP 1991 (“After Mr. Janicki passed away, it appeared that the site was not used for about two years. John Schmid, who is now known as John Diamond, then acquired the site.”)³¹ Diamond maintained that the dumping of demolition

³⁰ Former SCC 14.04.270 (Resolution 8003 adopted June 11, 1979) provided, in part:

(1) Intent. Any lot building, structures or legal use of land existing or established at the time of the adoption of these regulations shall be permitted to continue. It is the intent of this ordinance to permit these nonconformities to continue until they are removed, but not to encourage their survival. It is further the intent of this ordinance that nonconformities shall not be used as grounds for adding other structures or uses prohibited elsewhere in the same district.

...
(4) Abandonment. If any nonconforming use of land and/or building or structure is abandoned and/or ceases for any reason whatsoever for a period of one (1) year or more, any future use of such land and/or building or structure shall be in conformity to the zone in which it is located as specified by these regulations.

(5) Change in Use. A nonconforming use shall not hereafter be changed to any other nonconforming use, regardless of the conforming or nonconforming status of the building in which it is housed.

³¹ John Diamond declared that he acquired the property in 1986. CP 2028-29.

waste began in 1985.³² CP 466. In 1991, Diamond did not describe any stockpiling of solid waste on an “as is present condition” drawing that he submitted to the county. CP 857. Further, Diamond’s responses to questions on several SEPA checklists confirmed that he had abandoned any waste scavenging business:

[Question] What is the current use of the site and adjacent properties?

[Answer] Mining (Gravel Pit), Agriculture, Residential.

CP 847.

[Question] Do you have any plans for further additions, expansion, or further activity related to or connected with this proposal” If yes, explain?.

[Answer] Eventual platting for residential development.

CP 839.

In addition to the “abandonment” ordinance, between 1984 and 2003, a permit was required from the Health Department to operate a “recycling” business:

³² Beginning in 1966, permits were required for the storage of “junk” and/or “[a]ny manufacturing, processing, commercial or industrial use which may be classified as being detrimental to surrounding property because of possible obnoxious odors, noises, smoke, unsightliness, dust, vibration or handling of explosives.” (Ordinance no. 4081 dated April 12, 1966.) In 1979, the county adopted its first non-interim zoning ordinance. The 1979 ordinance restricted the uses permitted in the Residential zoning district, the designation of the zoning district in which the property was then located, to “single-family dwellings; mobile homes, as single-family dwellings; and duplexes.” CP 1713 (Former SCC 14.04.090(2)). Solid waste handling facilities were not allowed as a special use in the Residential zoning district. CP 1717 (Former SCC 14.04.150(2)).

All facilities which are subject to the standards of WAC 173-304-195, 173-304-300 . . . are required to obtain permits. . . .

Former WAC 173-304-600.³³ Diamond did not have a solid waste or land use permit for recycling.

Thus, in 1995, the county affirmed a Hearing Examiner's decision that Diamond needed a special use permit for his "proposal" to recycle solid waste. CP 884-85. The Hearing Examiner's decision provided:

The appeal of [Diamond] dated April 6, 1995 requesting that a Special use permit for solid waste handling should be issued by Skagit County retroactive to September, 1993 **or requesting a ruling that a Special Use Permit is not necessary to conduct recycling operations on the subject property is hereby denied.**

³³ Sections 195 and 300 applied to recycling facilities.

Waste recycling facility standards. (1) Applicability.

(a) These standards apply to facilities engaged in recycling or utilization of solid waste on the land, including but not limited to:

. . .

(iii) Accumulation of waste in piles for recycling or utilization.

. . .

Former WAC 173-304-300(1)(a)(iii) (adopted October 28, 1985; repealed February 9, 2003).

After approval by the department [of Ecology] of the comprehensive solid waste plan required by RCW 70.95.100, no solid waste disposal site or facility shall be maintained, established, substantially altered, expanded or improved until the county, city, or other person operating or owning such site has obtained a permit from the jurisdictional health department pursuant to the provisions of WAC 173-304-600.

Former WAC 173-304-195 (adopted October 28, 1985; repealed February 9, 2003).

CP 891 (emphasis added.) This decision constituted a final land use decision. See RCW 36.70C.020(2)(b); *Mercer Island Citizens for Fair Process vs. Tent City 4*, 156 Wn. App. 393, 398-99, 232 P.3d 1163 (2010). It is final and binding on Diamond and on Skagit Hill. See *Lejeune v. Callam County*, 64 Wn. App. 257, 264-65, 823 P.2d 1144 (1992)³⁴ (“Res judicata, modernly called claim preclusion applies to quasi-judicial decisions by administrative tribunals as well as to judicial decisions by courts. Claim and issue preclusion (res judicata) apply to quasi-judicial decisions by administrative tribunals as well as to judicial opinions by courts.”) (Internal citation omitted.) Also see *Clark v. Sunset Hills Memorial Park*, 45 Wn.2d 180, 190, 273 P.2d 645 (1954) (“These powers do not contemplate the restriction or authorization of land use on the basis of ownership by particular persons. The objective and purpose of land classification and use restriction powers is the coordinated physical development of the city or county.”)

Skagit Hill cannot challenge or collaterally attack the 1995 final land use decision. The principles of claim³⁵ and issue³⁶ preclusion prevent

³⁴ *Memorial Park* and *Lejeune* are pre-LUPA decisions. The recent *Tent City 4* decision establishes that since the Land Use Petition Act was adopted in 1995, the failure to appeal a land use decision binds the property owner and any successors.

³⁵ Claim preclusion, res judicata, curtails the relitigation of a claim or cause of action. A judgment has claim preclusive effect if the successive proceedings are identical in: (1) subject matter; (2) cause of action; (3) persons and parties; and (4) the quality of the persons for or against whom the claim is made. *Rains v. State*, 100 Wn. 2d 660,664, 674 P.2d 165 (1983). In general, a final ruling involving the same cause of action between the same parties will govern subsequent cases involving the same action. *Hadley v. Cowan*, 60 Wn. App. 433, 440-441, 804 P.2d 1271 (1991).

relitigation of this previously litigated issue.³⁷ See *Luisi Truck Lines v. Washington Utils. & Transp. Comm'n*, 72 Wn. 2d 887, 893, 435 P.2d 654 (1967).

Further, the 1995 final land use decision, Resolution no. 15878 was a final, quasi-judicial judgment on the merits. It controls the use of the property. See *Chelan County v. Nykreim*, 146 Wn.2d 904, 932, 52 P.3d 1 (2002) (“[A]n untimely petition under LUPA precluded collateral attack of the land use decision and rendered the improper approval valid”) citing *Wenatchee Sportsmen Ass'n v. Chelan County*, 141 Wn.2d at 181-82, 4 P.3d 123. The failure to perfect an appeal makes it unassailable. See RCW

³⁶ Issue preclusion, collateral estoppel, prevents a second litigation of issues even though a different claim or cause of action is asserted. *Seattle-First Nat'l Bank v. Kawachi*, 91 Wn. 2d 223, 225-26, 588 P.2d 725 (1978). Issue preclusion applies when (1) the issue decided in the prior adjudication was identical with the one presented in the action in question, (2) there was a final judgment on the merits, (3) the party against whom the claim preclusion is asserted was a party or in privity with a party to the prior adjudication, and (4) the application of the doctrine does not work an injustice on the party against whom the doctrine is to be applied. See *Rains v. State*, 100 Wn. 2d at 665.

³⁷ All of the elements for both preclusions are met. The subject matter is the same. Both claims involve whether a land use permit is necessary to use the property for recycling. The causes of action are the same. The 1995 administrative order and the county's complaint were both directed at stopping a developer – Diamond and Skagit Hill, respectively – from using the Property for solid waste recycling without a permit. Skagit Hill has privity with Diamond because it bought the Property from Diamond. See *Southcenter Joint Venture v. Nat'l Democratic Policy Comm.*, 113 Wn.2d 413, 418, 780 P.2d 1282 (1989) (A successor in interest to a party to an action that determines interests in property is subject to the preclusive effects of that action). Qualitatively, Diamond and Skagit Hill are the same. Each wanted to establish a solid waste handling business on the Property. The old and new issues are the same: whether a person can operate a solid waste handling facility on the property without a land use permit. Both parties have argued that a land use permit is not necessary because they do not have one.

36.70C.030(1) (Land Use Petition Act “shall be the exclusive means of judicial review of land use decisions.”)

There is no injustice in holding Skagit Hill to the 1995 land use decision. Waldal knew that the historical use was limited to the use of the property as a quarry and for an annual inert waste landfill permit. He then formed his own erroneous opinion about future uses:

When I purchased the Skagit Hill property I understood that it was authorized to operate as an inert waste landfill and sand and gravel mine. My understanding at the time of the purchase was that the property was used for the sale of sand, top soil and other landscaping materials. I intended to continue those activities and also **understood from my review and understanding of the state solid waste regulation that I could operate an exempt recycling operation for CDL (construction, demolition and land clearing] waste.**

CP 1819-20 (emphasis added.) That Waldal failed to confirm his opinion with Planning and Health is not an excuse for his personal failure to obtain the required land use permits.

Skagit Hill’s claim that there is a material dispute about the use of the property is an effort to relitigate the issues in the 1995 decision. It does not present a dispute about a material fact, and the court should not agree to any collateral attack because to do so would defeat the principle of finality in land use decisions. See *Skamania County v. Columbia River Gorge Commission*, 144 Wn.2d 30, 49, 26 P.3d 241 (2001) (“If there were

not finality [in land use decisions], no owner of land would ever be safe in proceeding with development of his property.”) (Alteration in original.)

(c) Skagit Hill violated SEPA.

The performance standards require compliance with SEPA. See WAC 173-350-040(5) (“Comply with all other applicable local, state, and federal laws and regulations.”). Solid waste handling facilities are not categorically exempt from SEPA. See WAC 173-11-305.

Skagit Hill avoided a SEPA review before starting to accept, stockpile, and sort solid waste at an abandoned quarry that had been dug excavated to the water table.

Significantly, it is undisputed that the previous owner did not pursue his proposal to accept construction and demolition debris or to recycle non-inert solid waste from the property. There is no dispute that the only “final” SEPA threshold determinations for the property were (1) a DNS for an “application for a fill and grade permit to allow filling of and gravel pit with an estimated 29,100 cubic yards of enert (sic) material.” and (2) a DNS for a proposal to “[r]eclaim an existing non-operating gravel pit by utilizing inert wastes for fill material.” Neither of which can be construed to permit anything other than filling the quarry with clean fill or inert waste.

It is also undisputed that expanding the solid waste activity from the landfilling of inert waste to an activity involving the stockpiling of

non-inert debris would have significant adverse environmental impacts that would have required an environmental impact statement. Skagit Hill did not refute Dubbel's opinion that "given . . . the geography and hydrogeology in the area of the Skagit Hill Recycling property, it is not likely that Skagit Hill Recycling could receive a landfill disposal permit for anything but an inert waste landfill." CP 455.

Nothing in the record refutes Skagit Hill's failure to comply with SEPA.

Again, Skagit Hill labors under the false assumption that it is exempt from all regulation simply because it claims to be "recycling." The court should not accept this unconscionable premise. The performance standards clearly require compliance with applicable laws, regulations and ordinances. None should be overlooked.

3. Undisputed facts establish that Skagit Hill did not meet additional requirements for the "piles" exemptions.

As noted above, Skagit Hill accepts mixed debris and stores it in piles. It then sorts through the debris to retrieve wastes that it can sell before disposing of or incinerating the remainder.

Because Skagit Hill disposes of some of the debris at incinerators, it claims it is exempt under the "piles used for storage or treatment" exemption. WAC 173-350-320. However, the piles depicted in the photographic evidence is not limited to "wood waste used for fuel or as a raw material or wood derived fuel." Because the observed piles contain

materials that do not constitute wood waste or wood derived fuel – linoleum, plastics, carpeting, etc. – they do not meet the standard for the permit exemption:

(b) In accordance with RCW 70.95.305, storage piles of wood waste used for fuel or as a raw material, wood derived fuel . . . are subject solely to the requirements of (c)(i) through (iii) of this subsection and are exempt from solid waste handling permitting. An owner or operator that does not comply with the terms and conditions of (c)(i) through (iii) of this subsection is required to obtain a permit from the jurisdictional health department and shall comply with all other applicable requirements of this chapter. . . .

WAC 173-350-320(b). Wood derived fuel and wood waste are defined as follows:

"Wood derived fuel" means wood pieces or particles used as a fuel for energy recovery, which contain paint, bonding agents, or creosote. Wood derived fuel does not include wood pieces or particles coated with paint that contains lead or mercury, or wood treated with other chemical preservatives such as pentachlorophenol, copper naphthanate, or copper-chrome-arsenate.

"Wood waste" means solid waste consisting of wood pieces or particles generated as a by-product or waste from the manufacturing of wood products, construction, demolition, handling and storage of raw materials, trees and stumps. This includes, but is not limited to, sawdust, chips, shavings, bark, pulp, hogged fuel, and log sort yard waste, but does not include wood pieces or particles containing paint, laminates, bonding agents or chemical preservatives such as creosote, pentachlorophenol, or copper-chrome-arsenate.

WAC 173-350-100. These definitions do not include the municipal waste³⁸ and designated recyclables that was mixed into the piles.³⁹ See RCW 70.95.305(2)(c), which is referenced in WAC 173-350-320(b):

This section does not apply to any facility or category of facilities that: . . . (c) Handles mixed solid wastes that have not been processed to segregate solid waste materials destined for disposal from other solid waste materials destined for a beneficial use.

. While some of the piles on the Skagit Hill property may have qualified for the piles for storage or treatment exemption, the piles of mixed construction and demolition debris did not.

Skagit Hill's bare claims that it was permit-exempt, which in effect are conclusions, do not present disputed material facts. Skagit Hill simply cannot demonstrate that it ever met the requirements to qualify for or to maintain permit-exempt status.

³⁸ WAC 173-35-100. "Municipal solid waste (MSW)" means a subset of solid waste which includes unsegregated garbage, refuse and similar solid waste material discarded from residential, commercial, institutional and industrial sources and community activities, including residue after recyclables have been separated. Solid waste that has been segregated by source and characteristic may qualify for management as a non-MSW solid waste, at a facility designed and operated to address the waste's characteristics and potential environmental impacts. . . .

³⁹ If a waste is not a designated recyclable, it is municipal waste.

D. Skagit Hill does not rebut the appearance of fairness presented by the original judge's actions.

The non-visiting superior court judge determined that she had a conflict of interest that arose when Skagit Hill filed its Answer. She eventually recused herself because of this conflict. No one has appealed this decision. Thus, it stands.

The non-visiting judge had a conflict of interest. The existence of a conflict of interest – one which neither party has the right to review – established the requisite appearance of fairness.

Skagit Hill argues that the county needs to provide “evidence of the judicial officer’s actual or potential bias.” Response at 45, citing *State v. Dugan*, 96 Wn. App. 346, 354, 979 P.2d 885 (1999). However, the proof that an appearance of fairness exists is found in the fact that the non-visiting judge determined that she had a conflict and could not fairly hear the matter. The county need not offer any further proof. It is sufficient that the non-visiting judge recused herself, thereby making the requisite finding of a conflict of interest.

It does not matter whether the non-visiting judge was biased against one or both parties. Her admitted conflict of interest and/or bias taints the whole proceeding and violated the due process clause of the fourteenth amendment to the United States Constitution which guarantees a right to a hearing free from judicial bias. *Hortonville Joint School Dist.*

No. 1 v. Hortonville Educ. Ass'n, 426 U.S. 482, 96 S.Ct. 2308, 49 L.Ed.2d 1 (1976).

The sad part about this is that while the county timely advised the judge about how ruling after recusal was improper, Skagit Hill remained silent and did not rebut the county's memorandum to the non-visiting judge. However, Skagit Hill now defends the non-visiting's judges post-conflict and post-recusal orders by arguing that the non-visiting judge did not abuse her discretion. However, Skagit Hill still cannot refute the conflict of interest or explain how rulings that were obtained in knowing violation of a canon of judicial conduct should stand. Skagit Hill has dirty hands in this matter and should not be allowed to benefit from the non-visiting judge's rulings.

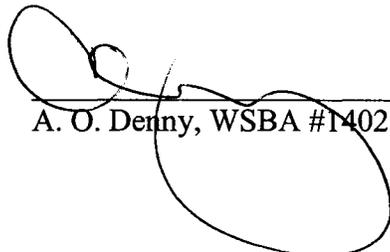
V. CONCLUSION

The court should deny Skagit Hill's cross-appeal, and it should reverse the orders of the non-visiting judge.

Dated this 10th day of September, 2010.

RICHARD A. WEYRICH
SKAGIT COUNTY PROSECUTING ATTORNEY

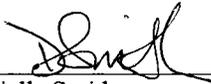
By:


A. O. Denny, WSBA #14021

DECLARATION OF DELIVERY

I, Danielle Smith, declare as follows:

I sent for delivery by: United States Postal Service; ABC Legal Messenger Service; and/or electronic mail, a true and correct copy of the document to which this declaration is attached, to tupper@tuppermackbrower.com, mack@tuppermackbrower.com, and doll@tuppermackbrower.com for James A. Tupper, Jr., Sarah Mack, and Brad Doll, Tupper Mack Brower, 1100 Market Place Tower, 2025 First Avenue, Suite 1100, Seattle, WA, 98121. I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct. Executed at Mount Vernon, Washington, this 10th day of September, 2010.



Danielle Smith