

64868-3

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NO. 64868-3-I

WASHINGTON STATE COURT OF APPEALS  
DIVISION ONE

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KING COUNTY,

Appellant,

v.

LEO McMILIAN,

Respondent.

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**APPELLANT'S REPLY BRIEF**

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**ORIGINAL**

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## I. ISSUE STATEMENT

1. **SHOULD THIS COURT CONCLUDE, AS AN ISSUE OF FIRST IMPRESSION, THAT A TRESPASSER MAY NOT ESTABLISH A LEGAL NONCONFORMING USE IN WASHINGTON?**
2. **DOES DIVISION TWO'S DECISION IN CITY OF UNIVERSITY PLACE v. McGUIRE APPLY TO THE QUESTION OF LAWFUL ESTABLISHMENT OF LEGAL NONCONFORMING USES?**
3. **SHOULD McMILIAN'S REQUEST FOR ATTORNEY FEES UNDER RCW 4.84.370 BE DENIED?**

## II. CLARIFICATION REGARDING THE EXAMINER'S RULING AND CONTENT OF THE RECORD

The documentary evidence before the Examiner establishes that no wrecking yard use existed on the subject parcel in 1958. The documentary record contains no evidence to support McMilian's claim that a non-conforming wrecking yard use existed on the subject parcel in 1958, when the subject parcel was zoned residential. Affidavits supporting McMilian's position discuss the time frame prior to 1957 and after 1970. CP 279, 283, 286, 289. Hearing Exhibit 11, the tax assessor's historic photograph showing a structure on the subject parcel shows no automobiles of any kind. CP 97. Only Helene Mecklenberg's affidavit discusses the parameters of her business in 1958, and it reflects no wrecking yard operation on the subject parcel. CP 105. A 1960 aerial

photograph confirms the facts described in Ms. Mecklenberg's affidavit.

CP 53. Neither testimonial nor documentary evidence contradict

Mecklenberg's statement.

McMilian's Statement of the Case presents as fact a variety of claims contrary to the Examiner's decision and the record. McMilian's brief brazenly misstates the Examiner's findings, claiming the Examiner found that a storage yard use existed "since before 1958." See Respondent's Opening Brief at ii, 32. Instead, the Examiner found only that "during prior ownerships, some spillover of the wrecking operation occurred onto the subject property." CP 20. The Examiner made no finding regarding when the spillover began, a critical element of McMilian's burden of proof. On review ". . . that lack of an essential finding is presumed equivalent to a finding against the party with the burden of proof . . .," here McMilian. In re Welfare of A.B., 168 Wash.2d 908, 927, 232 P.3d 1104, 1114 (Wash.,2010), citing State v. Armenta, 134 Wash.2d 1, 14, 948 P.2d 1280 (1997) ("In the absence of a finding on a factual issue we must indulge the presumption that the party with the burden of proof failed sustain their burden on this issue."); Smith v. King, 106 Wash.2d 443, 451, 722 P.2d 796 (1986) ("[W]e presume from the absence of further findings in that regard that second purchasers [who had the burden of proof] failed to sustain their burden."); Golberg v. Sanglier,

96 Wash.2d 874, 880, 639 P.2d 1347, 647 P.2d 489 (1982) (same); Pilling v. E. & Pac. Enters. Trust, 41 Wash.App. 158, 165, 702 P.2d 1232 (1985) (same).

McMilian argues that ". . . the subject parcel had always been used by its prior owners to store trailers, equipment, vehicle hulks, and auto parts," but the documents cited in support of his claims make no such statements. Respondent's Opening Brief at 3, and see Clerk's Papers referenced there, attached to this brief as exhibit A. McMilian's brief blatantly inflates the amount of auto wreckage removed from the subject parcel. Respondent's Opening Brief at pages 4-5. In his brief McMilian claims that "tens of thousands of tires" weighing "over 24 million pounds" were removed from the subject parcel. Id. These statements are not supported by the record.

McMilian's claims contradict his own witness' testimony. Tim Pennington, who McMilian hired to clear the subject parcel, testified that "a good seven, eight hundred tires were removed" and that there were "a few hundred" tires there. CP 1024, 1030. McMilian cites to hearing exhibit 14 to support his claim to have removed vast amounts of auto wreckage from the subject parcel, but that document reflects everything McMilian's very active wrecking operation scrapped over a two year period. See CP 104, discussion at CP 959. Exhibit 14 simply proves the

intensity of McMilian's wrecking yard use. It tells this Court nothing about when, how, or how much wreckage was deposited on the subject parcel, or by whom.

### **III. ARGUMENT**

Zoning laws are an expression of the will of the people as adopted by their duly elected representatives. Legal nonconforming uses are recognized as a narrow exception to zoning laws, intended to protect the rights of those who have invested in the use of their property at the time the zoning code is adopted. This Court should not extend the right to establish a use which violates the zoning code, and which is highly offensive to the rightful owners of neighboring parcels, to those who can show neither financial investment in the use nor any legal right to use the subject parcel at the time the zoning code was adopted.

In this case previous wrecking yard owner Richie Horan admitted that from the time he took ownership of the wrecking yard parcel in 1977 until he sold it to McMilian in 2002 he never had permission to use the subject parcel. CP 829. The record contains no evidence that any wrecking yard owner prior to Horan had permission to use the subject parcel. See CP. Thus, the Examiner correctly inferred that any wrecking yard use of the subject parcel was a trespass. This Court should reinstate the Examiner's legal conclusion that "the requirement that there be a

lawful establishment of the nonconforming use must logically include that it had been established under due property ownership or permission, i.e., not merely by trespass, criminal or not." CP 112.

1. **THIS COURT SHOULD CONCLUDE, AS AN ISSUE OF FIRST IMPRESSION, THAT A TRESPASSER MAY NOT ESTABLISH A LEGAL CONFORMING USE IN WASHINGTON.**

No previous Washington appellate court has considered the issue presented in this case, which is whether a trespasser can establish a legal nonconforming use. McMilian has the burden to prove that the Examiner's decision to the contrary "is an erroneous interpretation of the law, after allowing for such deference as is due the construction of a law by a local jurisdiction with expertise." RCW 36.70C.130(1)(b). This Court should conclude that the Examiner correctly relied on Washington's strong public policy against legal nonconforming uses and hold as a policy matter that one whose predecessors lacked any colorable property right at the time the zoning changed cannot prove a lawful use.

The purpose of the nonconforming use right is to allow an otherwise lawful but now nonconforming use to continue so as to avoid deprivation of property without due process. Christianson v. Snohomish Health Dist., 133 Wash.2d 647, 677, 946 P.2d 768, 782 (1997). Due process prevents only the abrupt termination of what one had been doing

lawfully. Meridian Minerals Co. v. King County, 61 Wash.App. 195, 212, 810 P.2d 31, 40 (1991) citing Baxter v. Preston, 115 Idaho 607, 768 P.2d 1340 (1989).

"An act of the legislature which has for its object the preservation of the public interests against the illegal deprivations of private individuals ought to be sustained, unless it is plainly violative of the constitution or subversive of private rights." Lawton v. Steele, 152 U.S. 133, 140, 14 S.Ct. 499, 502 (U.S.1894). Here the act of the legislature was the adoption of residential zoning in 1958. That code should be enforced unless it can be clearly shown to have violated a property right at the time of adoption. McMilian cannot make that showing.

At minimum this Court should conclude that the Hearing Examiner properly considered the trespass issue as a factor in his analysis regarding whether McMilian met his burden of proof, as did the Alaska, Delaware, and New Jersey courts as described in the County's opening brief. However, if this Court should decide to adopt the Pennsylvania rule regarding lawful uses it should also adopt the additional proof requirements Pennsylvania courts use to protect neighboring property owners. McMilian cites to County of Fayette v. Cossell, 60 Pa.Cmwlt. 202, 430 A.2d 1226 (1981), in support of his argument that a use proponent should only have to show that the use existed and was lawful

under the zoning code immediately prior to adoption of the current regulation. See Respondent's Opening Brief at 24-25. However, Pennsylvania also requires use proponents to prove, among other factors, that no individual property rights or the public health, safety and welfare would be adversely affected by the nonconforming use. See American Law of Zoning and Planning, 5<sup>th</sup> ed., Patricia Salkin and Robert M. Anderson § 12:8, Thompson Reuters, 2010. This Court should not adopt one part of the Pennsylvania system without the protection of the other.

One who cannot show any right to use a parcel to begin with should not be allowed to establish a persistent right to use that parcel in direct violation of the public interest. The Examiner correctly concluded that McMilian failed to meet his burden to prove existence of a lawful use in 1958. There is simply no evidence in the record that any wrecking yard owner had permission to use the subject parcel. The public interest in enforcement of the zoning code, as illustrated here by an entire neighborhood forced to see, hear and smell a wrecking yard in their backyards, outweighs whatever limited right prior wrecking yard owners had to squat on their neighbor's property. The Examiner's ruling should be reinstated.

2. **DIVISION II'S ANALYSIS IN CITY OF UNIVERSITY PLACE v. McGUIRE DOES NOT GUIDE THE COURT'S ANALYSIS HERE BECAUSE THE FACTS AND LAW IN THAT CASE ARE UNLIKE THOSE BEFORE THIS COURT.**

McMilian relies heavily on dicta in City of University Place v. McGuire and a laundry list of exjurisdictional authority none of which apply to the analysis here. King County does not dispute the well-established rule that once a nonconforming use is legally established it runs with the land. In this case the Hearing Examiner concluded that no nonconforming wrecking yard use was legally established. University Place is legally and factually distinguishable.

In University Place Division II considered whether McGuire's application for a site development permit was properly denied. City of University Place v. McGuire, 102 Wash.App. 658, 660, 9 P.3d 918, 920 (Wash.App. Div. 2, 2000). McGuire wanted to mine 26,000 cubic yards of gravel on a parcel adjacent to a residential area. McGuire's parcel had been part of a larger parcel previously used to mine gravel. McGuire's parcel had been severed by the relocation of a road. Id. There was no dispute that the previous owner had legally operated a gravel mine, and that the mine became legal nonconforming in 1956, before the parcels were severed. Id. at 662.

The legal issue that Division II, and ultimately the Washington Supreme Court, focused on was whether the nonconforming use was abandoned. The Courts also considered whether the doctrine of diminishing assets, which had not previously been adopted in Washington, should authorized mining on McGuire's parcel because it was a portion of the "mother parcel" in 1956 when the mine became legal nonconforming.

Id.

Division II reversed an examiner's factual conclusion that the nonconforming mining use was abandoned. Division II reasoned that McGuire's site was:

(1) never mined; (2) geographically isolated from any mining operations; (3) not included in any required mining application, permit, or reclamation plan; (4) ignored as a potential mining source for 17 years; and (5) offered for sale for residential and commercial development with no mention of mining uses.

Id. at 672-673.

The Supreme Court ultimately reversed. The Supreme Court held that under the doctrine of diminishing returns the nonconforming use right applied to all of the mining parcel as it existed in 1956. City of University Place v. McGuire, 144 Wn.2d 640, 652, 30 P.3d 453 (2001). The Supreme Court found that the hearing examiner's finding that the use was not abandoned was supported by substantial evidence. Id. The Supreme

Court reviewed the evidence in the light most favorable to McGuire, because he “prevailed in the highest forum that exercised fact-finding authority” and reversed Division II. Id. at 652-653. Neither Division II nor the Supreme Court focused on the general rule upon which McMilian relies.

The only issue in the case presented here which is arguably similar to University Place is whether this Court should uphold the Examiner's ruling on the ground that McMilian failed to meet his initial burden to prove that any legal nonconforming wrecking yard use of the subject parcel was never abandoned. Unlike the situation in University Place here all evidence must be reviewed in the light most favorable to the County.

In this case the strongest piece of evidence regarding the 1957-1968 timeframe is Mecklenberg's affidavit. That document states that between 1957 and 1968 her business operated within a fenced perimeter on the wrecking yard parcel. CP 105. Because Mecklenberg disclaimed use of the subject parcel and had no interest in it McMilian failed to meet his initial burden that any wrecking yard use of the subject parcel was never abandoned. Division II's reference to the general rule that once established a non-conforming use runs with the land is simply irrelevant where the question is whether the asserted nonconforming use was legally established in the first place.

3. **EVEN IF THIS COURT REVERSED THE EXAMINER AND FOUND AN EQUAL PROTECTION VIOLATION MCMILIAN STILL COULD NOT RECOVER ATTORNEY'S FEES UNDER RCW 4.84.370.**

McMilian has requested an award of attorney's fees under RCW 4.84.370. McMilian acknowledges that he is not entitled to fees under the plain language of that statute because King County prevailed before the Hearing Examiner. Respondent's Opening Brief at 47. Nonetheless McMilian urges this Court to find that RCW 4.84.370 violates the equal protection clause based on Justice Sanders' dissent in Habitat Watch v. Skagit County. Id. at 49 quoting Habitat Watch v. Skagit County, 155 Wn.2d 397, 424-431, 120 P.3d 56 (2005).

The procedural context of this case illustrates why Justice Sanders' dissent in Habitat Watch was incorrect. In his dissent Justice Sanders stated that

[t]he statute creates two classes with respect to the payment of attorney fees: private litigants, who pay attorney fees if they oppose the local government decision and lost again at the superior court and Court of Appeals, and local governments, who never pay attorney fees under the statute.

Id. at 425. Sanders is mistaken regarding the code enforcement context at issue here. In this case if King County had lost before the Examiner RCW 4.84.370 would place the County in exactly the same position as a private

party who lost before an examiner. If the County appealed a contrary ruling and lost before the Superior Court and the Court of Appeals it would have to pay attorney fees. Thus RCW 4.84.370 treats the local government the same as private individuals and does not violate equal protection.

Even if this Court found an equal protection violation McMilian would not be entitled to attorney fees. In Habitat Watch if the Court had found an equal protection violation the appellants would not pay statutory attorney fees because the statute would be invalid as to them. The reverse situation does not apply here. This Court could only invalidate RCW 4.84.370, not amend it. McMilian, having lost before the Examiner, would still not be entitled to fees. His request should be denied.

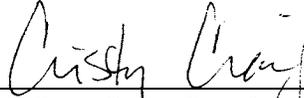
#### **IV. CONCLUSION**

The Examiner correctly concluded that one who enters a parcel without permission of the owner should not be able to establish a disfavored nonconforming use. The hearing record shows that no wrecking yard use existed on the subject parcel in 1958, that any wrecking yard use was unlawful at that time, and that McMilian failed to prove that any wrecking yard use was never abandoned from 1958 until the present. The Examiner committed no error. His decision should be reinstated.

DATED this 22nd day of September, 2010.

DANIEL T. SATTERBERG  
King County Prosecuting Attorney

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Cristy Craig", is written over a horizontal line.

CRISTY CRAIG, WSBA # 27451  
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# **Exhibit A**

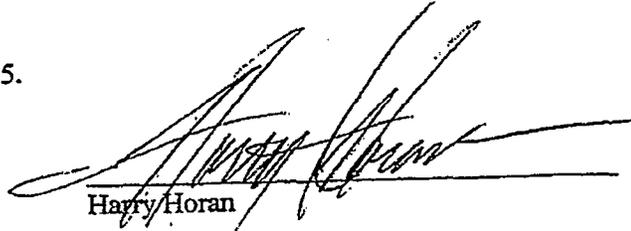
EXHIBIT # 110

KC-00250



Based on my historical knowledge of the area, and my visits to the property, I confirm that  
this property was used for wrecking operations before 1957.

DATED this 22 day of July, 2005.

  
Harry Horan

SUBSCRIBED AND SWORN to before me this 22 day of July, 2005.

Jenny Doan  
Printed Name: Jenny Doan  
NOTARY PUBLIC in and for the State of  
Washington residing at Orvillup, WA  
My commission expires: 9-25-05

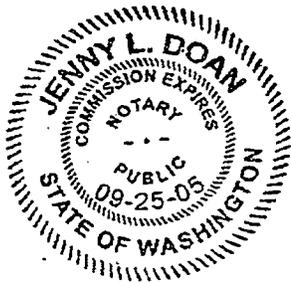


EXHIBIT # 1E

KC-00253

10553447  
*McMILLIAN CODE ENFORCEMENT APPEAL*  
DDES FILE NO. E05G0103

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1 A: There was some sapling trees. What I mean by saplings, they were like two to  
2 three inches around. There was stumps, like old growth stumps that, like  
3 somebody had logged the property off previously. They were like rotted in the  
4 ground. And then there was cars and parts throughout the property. They were in  
5 the trees. There was little roads going into the trees. There was cars up against  
6 the stumps. There was cars partially on top of the stumps and on the ground kind  
7 of tilted. There was just parts throughout it. There, a lot of the cars had been there  
8 for a long time. They were rusted. But they were, they'd been moved around  
9 whenever he needed room he'd just move the cars over there and then move them  
10 back and forth across both sites. And just used them both the same.

11 Q: Are you fairly familiar with cars makes, models?

12 A: I am.

13 Q: Kind of a car buff?

14 A: I would say so.

15 Q: Okay. Could you tell anything about the age of the cars that you saw on Lot  
16 9038?

17 A: Well, I can tell you that I found wood spoke wheels, like off a Model A, Model T.  
18 There was just a whole bunch of antique parts over there. Studebaker parts.

19 Q: Studebakers ran through when?

20 A: Up until the 40s and probably '51. A lot of stuff that was over there was in the  
21 40s, '45, '46. Bumpers. There was piles of bumpers there. On site. Seats. The  
22 seats had been there for so long that the material was gone completely off the  
23 seats. It was just the metal frames that were left of the seats. There was still  
24 spoked wheels. Just all kinds of stuff.

25

**DECLARATION OF SERVICE**

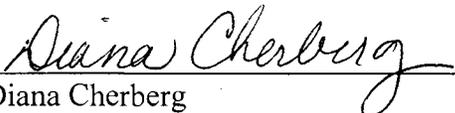
The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the foregoing is true and correct:

That on September 22, 2010, I sent in the manner below, true and correct copies of the APPELLANT'S REPLY BRIEF and this DECLARATION OF SERVICE to:

Jean Jorgensen  
SINGLETON & JORGENSEN, INC., P.S.  
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Renton, WA 98057-5716  
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[Via U.S. Postal Mail & Electronic Mail]

Sherry McMilian  
PO Box 508  
Maple Valley, WA 98038  
[Via U.S. Postal Mail]

DATED at Seattle, Washington this 22nd day of September, 2010.

  
Diana Cherberg

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