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Case #: 1036523

NO. 86162-0-1

DIVISION I COURT OF APPEALS  
OF THE STATE OF WASHINGTON

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MATHEW AND KAYLYNE NEWELL,  
Petitioners

v.

PIERCE COUNTY, WASHINGTON  
Respondent

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PETITION FOR REVIEW BY THE SUPREME COURT

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## **I. IDENTITY OF PETITIONERS**

Petitioners are property owners Mathew and Kaylyne Newell.

## **II. COURT OF APPEALS DECISION**

Court of Appeals, Division I Case No. 86162-0-1 filed October 28, 2024 is attached **Appendix 1**.

## **III. ISSUES PRESENTED FOR REVIEW**

- A. County's Actions Violated Petitioners' Constitutionally Protected Non-Conforming Property Rights. RAP 13.4(b)(3).
- B. Person/Persons, Acting Under Color of State Law, Violated Petitioners' Substantive Due Process Rights, Depriving Them of Constitutionally Protected Property Rights, Contrary to 42 U.S.C § 1983. RAP 13.4(b)(3).
- C. Review should be accepted to clarify substantial public interest issue of application and scope of non-conforming use rights. RAP 13.4(b)(4).

## **IV. SUMMARY OF WHY REVIEW SHOULD BE ACCEPTED**

This case should be accepted for review pursuant to RAP 13.4(b), prongs (3) and (4).<sup>1</sup> Review should be accepted under RAP 13.4(b)(3) because Petitioners have a vested right to

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<sup>1</sup> RAP 13.4(b)(3): If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

maintain their non-conforming use. Petitioners' vested right is a constitutionally cognizable property right. The County Deputy Hearing Examiner's ("HE") Decisions erroneously extinguish Petitioners' legal nonconforming use without compensation and in violation of Petitioners' constitutional rights.<sup>2</sup>

Review should be accepted under RAP 13.4(b)(3) because Petitioners have shown that person/persons, acting under color of state law, violated their substantive due process right and deprived them of a constitutionally protected property right, contrary to 42 U.S.C § 1983 by bringing multiple, unfounded enforcement actions against Petitioners. Those County acts violated Petitioners' substantive due process right, and if upheld, wrongly eliminates Petitioners' business.

This Petition also presents an issue of substantial public interest under RAP 13.4(b)(4) offering the Court opportunity to clarify substantial public interest issue of application and scope of non-conforming rights. Despite affirmation by multiple

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<sup>2</sup> RCW 36.70C.130(1)(f): The land use decision violates the constitutional rights of the party seeking relief.

county planners, both pre and post property purchase that their intended use was grandfathered, the County instead applied a subsequently enacted code to extinguish Newells' nonconforming use and render their business illegal. Most cities and county codes include nonconforming use provisions, which are often invoked. A review of appellate cases shows eleven cases where centerpiece issue was nonconforming use - just in 2023-2024.<sup>3</sup> Review would add needed clarity.

## V. STATEMENT OF CASE

Before making a one-million-dollar purchase to relocate their dump truck contracting yard business, Petitioners Matthew

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<sup>3</sup> *Matthew and Kaylyne Newell v. Pierce County*, Docket Number: 86162-0-I (28 October 2024); *King Cnty. v. Friends of Sammamish Valley*, 525 P.3d 214 (27 February 2023); *Judith Zimmerly, Jerry Nutter, & Nutter Corp. v. Columbia River Gorge Comm'n* 527 P.3d 84, (2023); *English Farm LLC v. City of Vancouver*, Docket Number: 56890-0-II (May 02, 2023); *King Cnty. v. Friends of Sammamish Valley*, 530 P.3d 1023 (June 12, 2023) (Superseded); *Kitsap Cnty. v. Kitsap Rifle & Revolver Club*, Docket Number: 57628-7-II (June 21, 2023); *Olsen v. Chelan Cnty.* Docket Number: 39177-9-III, (June 27, 2023); *Icicle/Bunk, LLC v. Chelan Cnty.*, 537 P.3d 321 (October 17, 2023); *Latta v. Chelan Cnty.*, Docket Number: 39261-9-III (October 31, 2023); *Munce v. City of Anacortes*, Docket Number: 57940-5-II (November 07, 2023); *H4IT Props. v. Chelan Cnty.*, Docket Number: 39772-6-III (October 03, 2024).



and Kaylyne Newell (“Petitioners” or “Newells”),  
understandably undertook pre-purchase due diligence by  
seeking out qualified Pierce County Planning Staff to confirm  
their use would be allowed on the property (“Property”).

Newells were aware that in **2004** County Planner confirmed  
the Property as a non-conforming contractor yard use. “...in  
1978, the Property was zoned General (G)....This zone allowed  
a contractor’s yard outright per the code in effect at the time.”  
In 1995, the zone was changed to Rural Separator. CP301-302.

**In May 2013**, before Newells owned the Property, the  
County brought Enforcement Action (NOV) alleging the  
contractor yard had been enlarged. CP304-308. CP329. Aerials  
dated 1998/99, 2011, 2012- depict the contractor yard extended  
full site. CP364-366. Then-owners appealed and the County  
withdrew the NOV. CP309-317.

**Pre-purchase**, Newell expressly asked about the  
grandfathered use scope several times to County Planner in  
writing. CO319. That Planner undertook research and affirmed  
multiple times in writing that Newells’ planned use met the

non-conforming use scope. CP319-320. In reliance, Newells purchased the Property **January 2019** and operated their contractor yard use. CP321-322;CP276.

In **March 2019** the County issued enforcement “Inquiry” to Newells. CR323-325. Planning staff conferred and concluded that Newells’ use met the 2004 confirmed Contractor Yard nonconforming use. CP275.

In **September 2019**, spurred on by complaints of one unhappy constituent, and amplified by an elected official’s staff, county Planner brought enforcement against Newells for allegedly enlarging the use. CP275,334-337. The Planner correctly characterized Newell’s use as contractor yard, but incorrectly claimed that Newells “enlarged” the use. Newells appealed, citing their use’s grandfathered status, and noting the size and area of the use was unchanged since 2013, six years prior to Newell’s 2019 purchase as documented by County aerals. CP328,275,338-348,CP364-366. County Planners agreed! The enforcement action was rescinded. CP350.

Thereafter, Emails show that the one complaining

constituent continued to needle the elected official.

CP229,331,354-356. Emails also show County Planning Staff

met from time to time in response and remained steadfast

Newells' use was legally non-conforming. CP275-276. Ignoring

the Planners' opinions, the elected official's staff continued to

brainstorm on stopping Newells' use CP326,328,330,333,

CP326;354-356,327. Each time elected officials got involved,

enforcement was aimed at Newells:

#### **Planning Action:**

**CP323- On March 8, 2019,** County “investigates;” sends Newells enforcement “Inquiry”.

**CP275. June - July 11, 2019** As a result Planners conferred, finding Newells' use non-conforming- Planning closed the case.

#### **First Elected Official Interference:**

**CP326 -May 29, 2019-** Elected official staff emails suggest rebranding Newell use as new “truck dispatch use”

**CP275 June 17, 2019, within a few weeks, outlier** Planner Hoffmann **opened a new Case** to claim Newells expanded the Contractor Yard.

**CP331 August 8, 2019 –** Constituent complains to Elected County Council: “When I contacted you regarding the noise issues from this truck company, I asked for a response. I would like to take this time to thank you for it, **oh, wait you never responded. To me this shows a lack of interest by our elected representative**

of this area. Will most certainly be relaying that info on the Facebook pages for this community and especially when election time comes.”

**CP 328- August 13-18, 2019** - more Emails between planning and elected official staffs- “this has been on **council’s radar**” “**CM [council member] needs to give constituent update.**” “**Your saying county determined no permit – I need to be certain because CM X is communicating**”.

**CP 330- August 18, 2019- Email from Elected Official asks:** “what are we doing about this?” & more Emails fly between planning and elected official staffs

**CP 333-August 30, 2019-** Matter is elevated to County Executive  
**September 5, 2019** -Exec’s staff asks elected official: what’s happening?

**CP334-337 September 6, 2019-** Hoffmann issues Violation notice (NOTC) to Newells on previously abandoned theory of unpermitted expansion of Contractor Yard

**CP275. September 20, 2019**, Newells timely appealed the NOTC

**CP275. November 4, 2019**, after appeal, Planner Hoffmann rescinded NOTC.

### **Continued Elected Interference:**

**CP228-229 January 6, 2020<sup>4</sup>**, Hoffmann sends Newells 2nd NOTC, claims Newells operate “new” use of truck fleet delivery.

**CP354-356 Jan-to Feb, 2020**, Elected Official updates  
**Constituent: “new levels of enforcement being enacted”**

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<sup>4</sup> **Appendix 2;** PCC 18A.33.280(B)&(I) defining the two uses.

**CP 327-June 22, 2020. Elected Official pushes back on planner pausing enforcement during Covid – Asks any way to move forward?**

**CP 230-232<sup>5</sup> - June 25, 2020. Hoffmann issues present NOTC – Newells re-branded as Dispatch Fleet Truck use.**

Newells appealed. CP200,357-362. Significantly, the County expressly stated it was NOT pursuing a claim of an **enlarged** contractor yard use, but rather Newells' use was a truck dispatch use, under the new code.<sup>6</sup>

The County presented Planner Hoffman as sole witness.<sup>7</sup>

The Planner testified both that Newells' use fit the non-conforming contractor yard use,<sup>8</sup> then testified based on his one-day's observation of parked trucks on 24 December 2020, Newells' use was a truck fleet dispatch use.<sup>9</sup> On cross, the

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<sup>5</sup> **Appendix 2**

<sup>6</sup> CP18-Transcript of HE Hearing **Appendix 3** ("HETR")17:11-12; CP23HETR22:3-21,

<sup>7</sup> CP19-29-HETR18-28,CP29-30-HETR28-29,CP40-47-HETR39-46,CP47-62-HETR46-61.

<sup>8</sup> CP31-HETR30:24-31:8,CP37-HETR36:1-10,CP38-TR37:4-38:5, CP30-HETR38:20-39:4,CP42-HETR41:20-42:1,CP61-HETR60:2-20, CP61-TR60:25-61:14 CP37-HETR36:1-10.

<sup>9</sup> CP24-HETR23:17-22,CP32-33-HETR31:20-32:8,CP28-HETR27:14-17,CP24-HETR23:14-22,CP32-33-HETR31:20-32-8.

Planner's testimony changed again, agreeing Newells' use **was** a contractor yard use.<sup>10</sup> The Planner candidly admitted **he had no evidence** in exhibits or in testimony or in his possession that the Newells' trucks involved, "delivery of distributions from one vendor to another" CP40-HRTR39:5-11, as is required by definition of the truck dispatch use. PCC 18A.33.280(I). Two neighbors testified, but also importantly confirmed that Newells' use had not changed from January 2019.<sup>11</sup> Newells relied on the County's definition of contractor yard use<sup>12</sup> and submitted proof of County Planner's pre-purchase research and affirmation that Petitioners' intended use was non-conforming. Newells submitted gave proof of County's prior withdrawn enforcement and submitted their dump truck use contracts in support of construction sites and from construction company

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<sup>10</sup> CP56-57-HETR55:14-56:13.

CP59-HETR58:1-16,CP54-HETR53:1-9,CP60-HETR59:9-25.

<sup>11</sup> Neighbors testified Newells had more trucks, but County had made clear they were not pursuing use enlargement. Neighbors also testified non-Newell trucks had briefly parked on the Property but had been removed months prior to the HE hearing. CP88-HETR87:8-11,CP93-HETR92:13-20,CP96-TR 95:11-17.

<sup>12</sup> CP26-HETR8:17-25. PCC18A.33.280.B; CP120-121-HETR119:17-120:8,

owners describing Newells' use delivering aggregates to the construction sites, consistent with the County's definition of contractor yard use. CP367-369,CP370-372.<sup>13</sup>

Thereafter, despite the dearth of supporting evidence, the HE found the County established Newells' use was a truck fleet dispatch use, denying Newells' appeal and their Motion for Reconsideration. As a result, the nonconforming status of Newells' Property and use was extinguished.<sup>14</sup>

Newells filed a Land Use Petition Act ("LUPA") Chapter 36.70C.RCW appeal Petition.<sup>15</sup> Newells pursued a 42 U.S.C. § 1983 claim ("1983 Claim") CP601-745, and damages based on the County's negligent misrepresentation. The Trial Court granted the LUPA appeal, CP562-563, but denied the negligent misrepresentation and 1983 Claim. CP601-745, CP916-917.

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<sup>13</sup> CP101-116-HETR100-115,CP102-HETR101:22-24,CP121-HETR 120:2.

<sup>14</sup> CP180-195.

<sup>15</sup> CP450-501

## **VI. ANALYSIS IN SUPPORT OF REVIEW**

### **A. COUNTY VIOLATED PETITIONERS' CONSTITUTIONALLY PROTECTED NON-CONFORMING USE PROPERTY RIGHTS. RAP 13.4(b)(3).**

"Judicial review of land use decisions is governed by LUPA." *Whatcom County Fire Dist. No. 21 v. Whatcom County*, 171 Wn.2d 421, 426, 256 P.3d 295 (2011). In a LUPA appeal, the appellate court "sits in the same position as the superior court." *Id.* Deference is not given to the lower court's decisions. *Griffin v. Thurston County*, 165 Wn.2d 50, 55, 196 P.3d 141 (2008). Instead, the Court applies the LUPA standards to the administrative record and hearing examiner's decision, giving deference to the hearing examiner's legal and factual determinations. *Durland v. San Juan County*, 174 Wn.App. 1, 12, 298 P.3d 757 (2012).

Here review should be accepted. Petitioners are entitled to relief because "the land use decision violates the constitutional rights of the party seeking relief." RCW 36.70C.130(1)(f). This standard is a question of law, which this court reviews de



novo. *Whatcom County Fire Dist. No. 21*, 171 Wn.2d at 426. "In reviewing an administrative decision, [this court] stands in the same position as the superior court." *Habitat Watch v. Skagit County*, 155 Wn.2d 397, 405-06, 120 P.3d 56 (2005).

To assert a LUPA due process claim, a person must show that they have a constitutionally protected property interest. *Durland v. San Juan County*, 182 Wn.2d 55, 69, 340 P.3d 191 (2014). "A constitutionally protected property interest exists when a plaintiff demonstrates that [they] possess[] a 'legitimate claim of entitlement' under the law." *Id.* (quoting *Bd. of Regents v. Roth*, 408 U.S. 564, 577, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972)).

"A nonconforming use is a 'vested' property right that has protections." *Icicle/Bunk, LLC v. Chelan County*, 28 Wn.App. 2d 522, 529, 537 P.3d 321 (2023). *Van Sant v. City of Everett*, 69 Wash. App. 641, 649, 849 P.2d 1276 (1993).

The nonconforming use principle has its roots in common law. *City of Univ. Place v. McGuire*, 144 Wash.2d 640, 649, 30

P.3d 453 (2001). " 'A nonconforming use is a use which lawfully existed prior to the enactment of a zoning ordinance, and which is maintained after the effective date of the ordinance, although it does not comply with the zoning restrictions applicable to the district in which it is situated.' " *Id.* at 648, 30 P.3d 453 (quoting *Rhod-A-Zalea & 35th, Inc. v. Snohomish County* , 136 Wash.2d 1, 6, 959 P.2d 1024 (1998)).

The right to use and enjoy land is a property right. *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 107 S.Ct. 3141, 97 L.Ed.2d 677 (1987); *West Main Assocs. V. City of Bellevue*, 106 Wash.2d 47, 50, 720 P.2d 782 (1986).

Although this Court reviews the Examiner's decision directly, the Trial Court's observation below is astute and worthy of consideration, finding Petitioners hold a lawful non-conforming use right:

There is no dispute the property has a prior non-conforming use, which in layman's terms is referred to as being "grandfathered in." That use was as a facility to support a business which located construction equipment, including dump trucks, and for that equipment's maintenance and repair

historically. This was under a general-use zoning prior to enactment of PCC 18A.33.280, more specifically. And that use allowed a contractor's yard and associated use per the code then in effect.

The use of the property is and has been authorized under Pierce County Code 18A.33.280 as described as being a "contractor's yard" since at least the 1970s. By current ordinance, a "contractor's yard" is an "area for construction or contracting a business office, outdoor storage, repair and maintenance of heavy equipment and vehicles." Notably, "heavy equipment and vehicles" are not defined by the ordinance. Nevertheless, the plain meaning and understanding would include dump trucks.

The agency's explanatory note as to this particular section of the ordinance indicates that the property is meant to "support delivery of construction materials used in construction projects."

The unassailable testimony is that the property is used for dump trucking business, and those trucks transport materials consumed in various locations, which are construction projects.

.....  
CP623-624-LUPATR3:10-4:12,CP625-LUPATR6:17-21,  
LUPA TRANSCRIPT **Appendix 4.**

Petitioners' vested rights cannot be taken away once created.

*Navlet v. Port of Seattle*, 164 Wash.2d 818, 828 n. 5, 194 P.3d

221 (2008). Petitioners have the right to continue their legal

nonconforming uses, subject to proof of existence and

reasonable government regulations. *City of Univ. Place v.*

*McGuire*, 144 Wash.2d 640, 648, 30 P.3d 453 (2001);

*McMilian v. King County*, 161 Wash.App. 581, 591, 255 P.3d

739 (2011) ; 8A *E. McQuillin, Municipal Corporations*, §

25.180.20.

The Trial Court agreed the Petitioners should be allowed to continue the nonconforming use:

At the outset, the law allows for a pre-existing legal non-conforming use to continue in spite of a subsequent contrary zoning ordinance being inactive or approved. *Jefferson County vs. Lakeside*, which is 106 Wn. App. 380, a 2001 case. .... I find and conclude that the pre-existing use of the property for dump truck operations is a pre-existing use that is and should be allowed to continue.<sup>16</sup>

1. Newells Established Non-Conforming Use By Substantial Evidence

As the party asserting a nonconforming use, Petitioners had burden of showing: "(1) that the use existed before the County enacted the zoning ordinance, (2) that the use was lawful at the time, and (3) that it did not abandon or discontinue the use." *Seven Hills, LLC v. Chelan County*, 198 Wn.2d 371, 398, 495 P.3d 778 (2021). Newells met that burden.

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<sup>16</sup> CP626-LUPATR6:8-16. **Appendix 4.**

It's uncontested and supported by substantial evidence that County affirmed the non-conforming contractor yard use in 2004 and use continued through Newells' 2019 purchase. CP301-302. The pre-purchase use area is undisputed and documented by arial photos. CP3640366. The record shows Newells did not expand that area. Id. CP275-276.

It's also undisputed that Planner was given written and detailed description of Newells' planned use pre-purchase. CP319-321. The Planner confirmed Newells' planned use fell within nonconforming use scope. CP321-2.

Further, it's uncontested that post-purchase, when Newells appealed the County's first 2019 enforcement, numerous County planners agreed Newell's use was non-conforming. The County withdrew that enforcement action. CP275-276.

It's undisputed County Planner agreed Newells' activity described by Contractor CP367-378, 370-372 is a contractor Yard use:

**MS. LAKE: Okay. And would you agree that the activity described in this letter fits the description of a contractor yard use?**

MR. HOFFMANN: From what they are describing in the letter, it sounds like there's specific jobs that the -- the dump -- the trailers and side dumpsters -- they call them side dumps -- with experience, yeah, **that the trucking mentioned in the letter is in support of a project, construction project or projects.**

MS. LAKE: Well, **you would agree that that's contractor yard use, correct?**

MR. HOFFMANN: **That would fit under a contractor yard use, yes.**

**CP38HETR 37:8- 38:5.** Emphasis added. Similarly, NW Cascade describes that:

**Newell Brothers drivers are experienced in the specific nature of heavy/civil constructions sites,** as this is the only type of work that they have ever performed for us. Newell Brothers only operates dump truck/trailers and side dump trucks that are specifically designed for this type of dirt work."

**CP376.** It's undisputed Planner Hoffman agreed Newells'

activity described by NW Cascade is Contractor Yard use:

MS. LAKE: Okay. Would you agree that the activity described in this letter, performed by Newell Brothers, fits the -- the contractor yard use?

MR. HOFFMANN: Because they are providing aggregate goods to specific job sites, **yes.**

**CP39HETR38:13-38:4.** The HE also had undisputed evidence

from no less than three County Planners who all agree Newells'

activity is non-conforming contractor use. (Kamieniecki- 2004,

Buhl - 2018, and Arbogast- 2019). Also, prior owner's declaration describing his legally non-conforming use, was to "haul materials in support of construction projects," exactly as Newells do. CP363.

Newells submitted actual contracts, detailing Newells' activity delivering materials to construction projects.<sup>17</sup> This precisely fits County's definition of (allowed) contractor yard use (**CP120,HETR 119:17-25**)- not the definition of (unallowed) "vendor to vendor" fleet delivery truck use.<sup>18</sup>

Factual issues are reviewed under substantial evidence standard. *Freeburg v Seattle*, 71 Wn. App 367, at 37, 859 P2nd 610 (1993).

Substantial evidence is a sufficient quantity of evidence in the record to persuade a fair-minded, rational person of the truth of the finding. *Hilltop Terrace Homeowner's Ass'n v. Island County*, 126 Wash.2d 22, 34, 891 P.2d 29 (1995)). Substantial evidence supports validity of Newells' non-conforming use.

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<sup>17</sup> CP367-370.

<sup>18</sup> PCC18A.33.280.I,CP228-229;Appendix2.

## 2. No Substantial Evidence Shows Newell Use Changed.

Once landowner establishes that a legal nonconforming use existed, the burden shifts to municipality to show landowner abandoned or discontinued the use after enactment of the relevant zoning ordinance. This burden of proof is not an easy one. *Van Sant v. City of Everett*, 69 Wash.App. 641, 647-48, 849 P.2d 1276 (1993).

Because Newells established the non-conforming use, the burden shifted to the County to prove abandonment, discontinuance or change in use. The County did not do so. Instead, it argued Newells' use "changed" but lacked any supporting evidence.

Protected property rights cannot be lost or voided easily. "There is properly a high burden of proof that must be met by the City before Van Sant loses what was a vested property right." *Van Sant* at 649.<sup>19</sup>

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<sup>19</sup> In *Van Sant*, error found when "hearing examiner seemed to give little weight to the fact that, in 1972, the City had previously recognized a non-conforming commercial use of the property at issue." *Van Sant* at 649. Here, County also disregards affirmed non-conforming rights, "further, just because the use hasn't changed from what Mr. Malyon was



3.County Inappropriately Applies Subsequent Zoning Ordinance Retroactively To Eliminate Newells' Right.

Washington law allows preexisting legal nonconforming uses to continue in spite of subsequent contrary zoning ordinance. *Jefferson County v. Lakeside Industries*, 106 Wash.App. 380, 385, 23 P.3d 542 (2001), *review denied*, 145 Wash.2d 1029, 42 P.3d 974 (2002).

On March 1, 2006, the County Council amended the code, adding a new use: “trucking fleet dispatch and servicing centers:”

Grocery chain distribution centers, parcel delivery distribution centers; trucking fleet dispatch and servicing centers, storage of fabricated concrete blocks, finished lumber storage yards, new automobile storage areas. Often in close proximity to marine ports.

CP530-531. This 2006 use post-dates County’s 2004 recognition of the non-conforming use. The HE erred by allowing the County to apply the new code retroactively to extinguish a non-conforming use.

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doing, from what Mr. -- from what the Newell Brothers started off doing, **doesn't mean it's the correct use for the property.**” CP99HETR 98:8-11. Emphasis added.

Washington law allows preexisting legal nonconforming uses to continue in spite of a subsequent contrary zoning ordinance. *Jefferson County v. Lakeside Industries*, 106 Wash.App. 380, 385, 23 P.3d 542 (2001), *review denied*, 145 Wash.2d 1029, 42 P.3d 974 (2002). That is exactly what took place here, where HE erred in applying a 2006 code change to extinguish conforming use which vested in 1978 and was formally acknowledged in 2004.

A statute cannot be given retroactive effect if the effect interferes with vested rights, particularly when result is to deprive one of his or her property without due process of law. See *Gillis v. King County*, 42 Wn.2d 373, 376, 255 P.2d 546 (1953), as quoted in *Seven Hills, LLC v. Chelan Cnty.* (Wash. 2021).

**4. No Substantial Evidence That Newell Use Is New Freight Dispatch Use.**

Planner Hoffman testified he observed trucks on Newell site only one day: 24 December 2019. He never saw trucks in operation, never saw where they went, but (simply) “knew” trucks were used as delivery fleet based on his observation of

the parked trucks alone. CP24-HETR23:17-22,CP32-33-HETR31:20-32:8,CP28-HETR27:14-17,CP24-HETR23:14-22,CP32-33-HETR31:20-32-8.

Planner Hoffman also conceded he had **no evidence** of any kind that Newells' trucks fit the definition of a delivery service, i.e., were involved "delivery of distributions from one vendor to another":

**MS. LAKE:** Mr. Hoffmann, do you have any evidence in your exhibits or in your testimony or in your possession that the Newell Brothers' trucks involved, quote, "delivery of distributions from one vendor to another"?

**MR. HOFFMANN:** No, I do not have any evidence to that effect.<sup>20</sup>

Thus the County had no evidence to support Newells' use changed from non-conforming contractor yard to the later adopted definition of "freight dispatch". "No evidence" is not "substantial evidence", as is required to support the HE's ruling.

Even the complaining neighbors testified that the Newell use hadn't changed in substance since it began in January 2019.

CP88-HETR87:8-11,CP93-HETR92:13-20 CP96-HETR95:11-

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<sup>20</sup> CP40-HETR39:5-11.

17. In unpublished opinion, *Greer v. Washougal Motocross, LLC*, No. 33823-8-II (Wash. App. 2007), the Court described the test for a changed non-conforming use:

We hold that **to change a nonconforming use that is defined by the physical use of the land, the property owner must change its actual purpose or physical activity**. This interpretation of "changed" in the ordinance is most consistent with the overall approach to nonconforming uses both in this ordinance and in the common law. **If a nonconforming use is defined by the actual use of the land, then in order to determine if that use has "changed," for the sake of consistency, the County must look to the actual use of the land as well.**

Nothing in the record shows Newells changed the physical use of the land or its actual purpose or physical activity.<sup>21</sup>

So.....why was the unsupported enforcement pursued?

**B. COUNTY PERSON/PERSONS, ACTING UNDER COLOR OF STATE LAW, VIOLATED NEWELLS SUBSTANTIVE DUE PROCESS RIGHT AND DEPRIVED THEM OF A CONSTITUTIONALLY PROTECTED PROPERTY RIGHT. RAP 13.4(b)(3)**

Person/persons, acting under color of state law, violated

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<sup>21</sup> Under Washington common law, a nonconforming use may be "intensified" *Kitsap County v. Kitsap Rifle & Revolver Club*, 184 Wn. App. 252, 268, 337 P.3d 328 (2014) (*quoting City of University Place v. McGuire*, 144 Wn.2d 640, 649, 30 P.3d 453 (2001)).

Newells' substantive due process right and deprived them of a constitutionally protected property right, contrary to 42 U.S.C § 1983.<sup>22</sup>

Even though County planning staff affirmed multiple times that Newells' use was legally non-conforming, the elected official's staff continued to seek enforcement means. That ultimately took the form of illegally rebranding the Newells' use from Contractor yard to truck fleet dispatch use, based on a similar land use enforcement case the County had pursued and lost a "few years go". CP326. However, the County's 2006 adoption of that new use occurred **after** this subject Property's non-conforming use was affirmed in 2004, which use the Newells continued. "Through the changes to its code, the County can phase out nonconforming uses-but it cannot do so through retroactive application of its zoning laws. *Seven Hills, LLC v. Chelan Cnty.* (Wash. 2021). Emphasis added. The same is true here.

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<sup>22</sup> *Mission Springs, Inc. v. City of Spokane*, 134 Wn.2d 947, at 962-3, 954 P.2d 250 (Wash. 1998). *Vine Street Commercial Partnership v. City of Marysville* (Wash. App. 2003).

Section 1983 acts often do not occur in the sunshine, and sometime must be ferreted out. Although the County argues “There is no suggestion, for example, that the County acted with malice, bias, pretext”- the correlation of the dates of the one constituents’ complaints to corresponding dates of elected official interference tells the real story. Had Planners been left on their own, in a matter of mere months, multiple Planners investigated and found Newells’ use nonconforming, exactly as was affirmed per-purchase. Instead in 2019 and 2020, each time elected officials got involved, Newells suffered enforcement action. Ultimately, that elected official’s staff persuaded one planner to re-cast Newells’ use from a contractor yard to the 2006 definition of a “truck dispatch” use and pursue enforcement on that ill-conceived basis. CP276,230-232.

The elected official’s arbitrary or irrational refusal or interference<sup>23</sup> with Newells’ rights occurred here and violates

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<sup>23</sup> "Irrational" is defined as "[u]nreasonable, foolish, illogical, absurd...." Black's Law Dictionary 829 (6th ed.1990). A plaintiff seeking section 1983 relief can also show that a municipality's land use authorities violated plaintiff's rights to substantive due process, by demonstrating the governmental

substantive due process. *Bateson v. Geisse*, 857 F.2d 1300 (9th Cir.1988) at 1304; *Robinson v. City of Seattle*, 830 P.2d 318, 119 Wash.2d 34 at 64 (Wash. 1992); *Sintra, Inc. v. City of Seattle*, 119 Wash.2d 1, 21 n. 11, 829 P.2d 765 (1992); *R/L Assocs., Inc. v. City of Seattle*, 113 Wash.2d 402, 412, 780 P.2d 838 (1989).

“City council members who improperly interfere with the process by which a municipality issues permits deprive the permit applicant of his property absent that process which is due. *Bateson*, 857 F.2d at 1303; *Blanche Rd. Corp. v. Bensalem Township*, 57 F.3d 253, 267-68 (3d Cir.) (deliberate and improper interference with the process by which the township issues permit established substantive due process violation even if permits were ultimately issued), *cert. denied*, 516 U.S. 915,

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action was “**tainted by improper motive.**” *de Botton v. Marple Township*, 689 F.Supp. 477, 481 (E.D.Pa.1988), *cited in Robinson v. City of Seattle*, 830 P.2d 318, 119 Wash.2d 34 (Wash. 1992).

“ “[w]here an official could be expected to know that his conduct would violate statutory or constitutional rights, he should be made to hesitate.” ” ... *Burns v. Reed*, 500 U.S. 478, 111 S.Ct. 1934 1944, 114 L.Ed.2d 547 (1991), *cited in Robinson v. City of Seattle*, 830 P.2d 318, 119 Wash.2d 34 (Wash. 1992).

116 S.Ct. 303, 133 L.Ed.2d 208 (1995); *Bello v. Walker*, 840 F.2d 1124, 1129 (3d Cir.) (improper interference with the process by which municipality issues building permit is arbitrary and violates substantive due process), *cert. denied*, 488 U.S. 868, 109 S.Ct. 176, 102 L.Ed.2d 145 (1988); *Scott v. Greenville County*, 716 F.2d 1409, 1419 (4th Cir.1983) (county council's intervention in administrative issuance process of a building permit violates due process)" *quoted in Mission Springs, Inc. v. City of Spokane*, 134 Wn.2d 947, at 965.

In *Mission Springs*, this Supreme Court found: "Without material dispute of fact it appears these [city] defendants abrogated Mission Springs' right to obtain issuance of a grading permit when the City Council acted to deny issuance of this or any permit and the City Manager acquiesced in the council's demands," *Id*, finding such actions constituted a due process violation.

Acknowledging this Court's de novo review, the below Court correctly found starkly similar behavior by County actors:



Initially and after neighbor complaints, the agency officials for the County opined that the petitioner's non-conforming use did not run afoul of the code. But after prompting from an elected representative official, the County re-examined the issue and determined that the petitioner's use was a violation of current code and zoning. In particular, the agency found the use was that of a "Warehouse Distribution and Freight Movement" use, which is defined by the same code, but which section was enacted well after the established non-conforming grandfathered use.

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Here, the testimony is clear the property is not used as a warehouse or distribution center. In other words, it's not used as a transfer facility.

\*\*\*

Here, there is no evidence that the council intended to modify the meaning or use of the construction yard use or description by limiting it to construction companies alone; or, to restrict dump truck operations by amending the ordinance to include that to be a common carrier within warehouses.

\*\*\*

Moreover, I do not concur with the re-branding of the petitioner's use of that of a "Warehouse Distribution and Freight Movement" use or that such re-branding is, in fact, correct. In my considered opinion, that finding and conclusion below was in error.<sup>24</sup>

The grievance here is underscored and more egregious since the County initially correctly found Newells' grandfathered

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<sup>24</sup> **Appendix4-CP624-625-LUPATR4:22-5:8,CP625-LUPATR5:19-22, CP8-LUPATR8:4-9,CP262-LUPATR6:17-22.**

rights valid, only to later pivot to deny those rights, upon complaint of one constituent and pressure by elected County official/staff. The parallel with *Mission Springs* cannot be clearer. Under similar facts, the *Mission Springs* Court found:

...we have rather a straightforward situation where clear legal rights of the citizen were violated by city council members acting in excess of their lawful authority and by a City Manager acting in excess of his own lawful authority but at the urging of the City Council...The City Council's action was the moving force of the constitutional violation, ...Thus, Mission's claim is properly cast as a civil rights action for precisely the same reasons liability was imposed under 42 U.S.C. sec.1983 against individual council members under nearly identical, if not less aggravated, circumstances in *Bateson*.

Id at 954 P.2d 257. Such arbitrary or irrational refusal or interference with processing a land use permit violates substantive due process. *Bateson*, 857 F.2d at 1304.

**C. ELECTED OFFICIAL INTERFERENCE  
CONTRADICTS PLANNER'S PRE-PURCHASE  
AFFIRMATION WHICH NEWELLS RELIED ON TO  
THEIR DETRIMENT**

Ironically, but for the elected officials' interference, the County's pre-purchase affirmation of Newells' non-conforming status would be accurate. But the unwarranted post-purchase

enforcement results in the tort of negligent misrepresentation, where an exception to the public duty doctrine applies, based on the Planner's pre-purchase special relationship with Newells.

In *ESCA Corp. v. KPMG Peat Marwick*, 135 Wash.2d 820, 826, 959 P.2d 651 (1998), this Supreme Court affirms the negligent misrepresentation definition of Restatement (Second) of Torts:

"One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information."

Whether a party owes a duty in tort to another party is a question of law. *Tincani v. Inland Empire Zoological Soc'y*, 124 Wn.2d 121, 128, 875 P.2d 621 (1994). Courts review questions of law, including duty, de novo. *Michaels v. CH2M Hill, Inc.*, 171 Wn.2d 587, 597, 257 P.3d 532 (2011).

In a negligence action, the threshold determination is whether the government entity defendant owes a duty of care to plaintiff. *Taylor v. Stevens County*, 111 Wn.2d 159, 163,

759 P.2d 447 (1988). Applying the public duty doctrine, a duty must be one owed to the injured plaintiff, not the public in general, to be actionable. *Chambers-Castanes v. King County*, 100 Wn.2d 275, 284, 669 P.2d 451 (1983).

A “special relationship” between the plaintiff and public official gives rise to a duty to use reasonable care when furnishing information. A “special relationship” arises when (1) there is privity or direct contact between the public official and the plaintiff, (2) the official, in response to a specific inquiry, provides express assurances, and (3) the plaintiff justifiably relies on the representations of the official. *Taylor*, 111 Wn.2d at 166.

Here, the undisputed record shows a “special relationship” existed between Newells and County based on Newells’ several, specific e-mail interactions with the County: (1) there was direct contact between Newells and County Planner, (2) Newell specifically asked and the County planner gave express assurances he investigated this specific Property and the dump truck use was non-conforming, CP320-321 and (3) Newells

relied on County assurances to purchase the Property, after which the County pursued enforcement actions against Newells to Newells' detriment. Once the existence of duty is established, as here Newells may proceed in tort against the County. *Taylor v. Stevens County*, 111 Wn.2d 159, 163, 759 P.2d 447 (1988).

## VII CONCLUSION

The case facts may be unique, but the issues are of constitutional importance and substantial, statewide public interest. Review is warranted under RAP 13.4(b)(3) and RAP 13.4(b)(4).

*Counsel certifies that this motion contains 4,994 words in compliance with RAP 18.17(c)(10) [5,000 words].*

Respectfully submitted this 26<sup>th</sup> day of November 2024.

GOODSTEIN LAW GROUP, PLLC

/s/ Carolyn A. Lake .  
Carolyn Lake, WSBA #13980  
Attorneys for Appellants Newell



## **CERTIFICATE OF SERVICE**

The undersigned certifies under the penalty of perjury under the laws of the State of Washington that I am now and at all times herein mentioned a resident of the State of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and competent to be a witness herein.

On the date given below, I caused to be served the foregoing document on the following persons and in the manner listed below:

David Owen Pierce County Prosecutor's Office 930 Tacoma Ave S, Ste 946 Tacoma, WA 98402-2102 Email: <a href="mailto:david.owen@piercecountywa.gov">david.owen@piercecountywa.gov</a>	<input type="checkbox"/> U.S. First Class Mail <input type="checkbox"/> Via Legal Messenger <input type="checkbox"/> Overnight Courier <input checked="" type="checkbox"/> Electronically via email
Peter Helmberger Pierce County Prosecutor / Civil 955 Tacoma Avenue South, Suite 301 Tacoma, WA 98402-2160 Email: <a href="mailto:peter.helmberger@piercecountywa.gov">peter.helmberger@piercecountywa.gov</a>	<input type="checkbox"/> U.S. First Class Mail <input type="checkbox"/> Via Legal Messenger <input type="checkbox"/> Overnight Courier <input checked="" type="checkbox"/> Electronically via email

DATED this 27 day of November 2024, at Tacoma, Washington.

/s/ Carolyn A. Lake

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**

MATTHEW AND KAYLYNE NEWELL,

Appellants,

v.

PIERCE COUNTY,

Respondent.

No. 86162-0-I

DIVISION ONE

UNPUBLISHED OPINION

MANN, J. — In Washington, a legal nonconforming use is a use that “lawfully existed” before a change in zoning regulations and is allowed to continue even though it no longer complies with current zoning. A protected nonconforming status generally grants the right to continue the existing use but will not grant the right to significantly change, alter, extend, or enlarge the existing use.

Before purchasing property in Tacoma, Washington, Matthew and Kaylyne Newell (Newells) inquired with Pierce County Department of Planning and Land Services (the County) whether a nonconforming contractor yard use previously granted on the property would allow Newell to operate a dump truck business. The planner confirmed a nonconforming use was approved for the property in 2004. At that time, the nonconforming use was a “contractor yard” consisting of an excavation business along



with one dump truck and one backhoe. The Newells purchased the property and proceeded to operate at least five semi-trailer dump trucks dispatched from the property to deliver materials. After neighbor complaints about increased noise, dust, and traffic, the County initiated an enforcement action asserting that Newell was operating an unauthorized delivery truck fleet.

The Newells appealed and the hearing examiner affirmed the enforcement action determining that the Newells' actual use was as a central dispatch and servicing of a delivery truck fleet. The Newells appealed the decision in Pierce County Superior Court under the Land Use Petition Act (LUPA), ch. 36.70C RCW, and brought additional tort claims against the County. The trial court disagreed with the hearing examiner and granted the Newells' LUPA appeal. Additionally, the trial court granted summary judgment on the tort claims in favor of the County. On appeal to this court, the Newells argue the hearing examiner's decision is not supported by substantial evidence, is an erroneous interpretation of the law, and is a clearly erroneous application of the law to the facts. The Newells also argue summary judgment dismissal of their tort claims was error.

We affirm the trial court's dismissal of the Newells' tort claims. We reverse the trial court's decision on the LUPA appeal and affirm the hearing examiner's decision.

I

A

The Newells own real property at 12603 34th Avenue, Tacoma, Washington (the property), located in the Mid-County Community Plan area and zoned as Rural Separator (R-Sep). The Newells purchased the property from Boyd and Bette Malyon

(Malyons) who owned the property since at least 1978. The property includes a single-family residence and a 4,000 square foot shop. Two construction companies have operated on the site, one established in 1977 and one established in 1994. When those companies were established, the property was in the general zone classification and a contractor yard was a permitted use. In 1995, the zone classification was amended to RSep. Contractor yards are not allowed in the RSep zone.

The Malyons' use of the property and potential violation of the RSep zoning was first documented by the County in 2004. In December 2004, Stefan Kamieniecki, an associate planner with the County, wrote the Malyons to confirm their existing nonconforming use. The 2004 letter provided in part:

Current zoning for your parcel is Rural Separator (RSep). This zone does not allow a business such as a contractor's yard in any form. However, when you stated that you began your business approximately 26 years ago the zoning was General (G) and would have allowed a business such as yours in the G zone.

....  
You have established to my satisfaction that your business has continued uninterrupted since 1978 and that all required permits for the parcel have been obtained.

Therefore, your business is considered a legally established nonconforming use in the [RSep] zone classification.

(Emphasis added.)

In 2013, the County initiated an enforcement action after the Malyons expanded the size of the yard space by grading in close proximity to a creek—a designated critical area. The County eventually withdrew the enforcement action after the expansion was pulled back from the creek. In 2019, the County planning staff noted that an expansion of a nonconforming use permit should have been required for the expanded yard space.

In late August 2018, the Newells e-mailed County associate planner Dan Buhl, seeking information about the approved nonconforming use, and whether it would transfer with sale. The Newells explained that they operated a “dump truck company” but did not have a contractor license, so they needed to know whether a dump truck license would satisfy the zoning requirements. Buhl responded on September 4, 2018:

As long as the use has been continuous since the [2004 letter] was written, there are still non-conforming rights. Please be aware there are very special circumstances about expanding a non-conforming use. Below is the special note in our use matrix for areas zoned RSep in Mid-County concerning contractor yards:

“Only legally existing contractors yards formerly designated. . . . shall be allowed to remain and expand. . . . expansions shall require approval of an Administrative Use Permit.”

In mid-September 2018, Newell and Buhl had the following e-mail exchange:

[E-mail from Newell to Buhl]:

If I purchase this land with the shop and house for my dump truck company, Newell Brothers Inc, is this nonconforming status transferrable to me? [Malyon] has continued to run his excavating and dump truck business there and is still doing business as a contractor. There will not be a lapse in operating a business except the short time it would take to move.

[Reply e-mail from Buhl]:

As long [as] they have continually run the business since the date the non-conforming use was determined, you would be able to continue the use if you take ownership. Again, you could not expand the use without an Administrative Use Permit, but you can run the business in the same area the business currently operates.

(Emphasis added).

The Newells purchased the property in January 2019 for \$971,859.80.

On March 8, 2019, a citizen complaint was filed with the County over noise and traffic issues with a trucking business on the property. The County sent the Newells a public service request inquiry concerning a land use and/or public nuisance issue on the property. County code enforcement officer Jason Arbogast visited the property and took pictures from the public right of way and discussed with staff whether the traffic was consistent with the contractor yard approved in the 2004 letter. On July 11, 2019, Arbogast closed the March 8 noise and traffic complaint because “trucks observed had been found compliant with the [2004 letter] and the current zoning.” But, a week later, the inquiry was transferred to associate planner Roy Hoffmann and assigned a new case number to research whether there had been an expansion of the contractor yard approved in 2004.

In August 2019, Barney Phillips, a neighbor, contacted a Pierce County councilmember regarding activity on the site:

For your info, the trucking outfit at 12603 34th Avenue has added 2 more trucks for a total now of 14. He had told a neighbor he intends to double the number when he had 12 and he is on his way to doing that. He is pretty much out of room on the north side and the only place he can park more trucks will be in the field on the south side. The intersection at 128th and 34th Ave is showing some wear from the constant traffic of these trucks. Noise has also increased with repairs to the equipment.

On September 6, 2019, Hoffmann issued a notice and order to correct (NOTC) letter for an expansion of the yard without required permits. The Newells appealed and the NOTC was later rescinded.

Meanwhile, the County continued to receive complaints from neighbor Phillips:

I have been here for over 36 years, before the mentioned property was purchased by Boyd and Bette Malyon. Once the Malyons built their home they also built a metal building for their dump truck. We rarely heard the

dump truck run as he would start it in the building or along the south side where there were some evergreen and deciduous trees. He was respectful of the neighbors and tried to create as little impact as possible. In that respect it remained a very quiet neighborhood until the current owner moved in.

When Newell Brothers moved in they had 5 trucks and, months later he has added 2 more trucks to his growing fleet. In short time more trucks arrived, these were trucks from other companies that he is, as I have been informed, renting/leasing space to. There are now a dozen trucks on site. Sometimes more appear and sometimes a couple less. One is the former owner's dump truck. Some days there is a lot of traffic from many companies dropping off and picking up trailers. The truck traffic from and to the property can be overwhelming at times.

Phillips went on to describe noise from the business as early as 3:00 a.m., the addition of several trucks at the site with various company names, and fueling activity occurring until 10:00 p.m. or later.

Subsequently, Hoffmann took photos of the trucks on site and researched the business. Hoffmann looked up various websites, such as the Washington Secretary of State Corporations and Charities Division, which classified the Newells' business as "transportation & warehousing."

On January 6, 2020, Hoffmann sent an inquiry letter to the Newells about a request to investigate an alleged additional business operating at the site based on the observations by County staff of eight or more parked large semi-trucks with open air trailers. The letter provided the use definitions for contractor yard and warehousing, distribution, and freight movement from the Pierce County Code (PCC) 18A.33.280 along with clarifying notes:

The large trucks appear to be operating as a delivery fleet . . . some of the trucks have company names on them. . . . A delivery truck fleet. . . is not a permitted use.

. . . .

Explanatory Note: The key difference with truck use in [the contractor yard] category is to support the delivery of construction materials used in conjunction with specific construction projects.

....

Explanatory Note: Delivery trucks within [warehousing, distribution, and freight movement] category involve delivery/distribution of materials (raw or processed) from one vendor to another.

On June 25, 2020, the County issued a NOTC for operating a delivery truck fleet business and provided the relevant definition in PCC 18A.33.280.I, and the following:

Staff observed 7 or more large commercial trucks exceeding 18,000 gross vehicle weight . . . there may be nonconforming rights to operate a contractor yard use (using smaller weight trucks/vehicles and a smaller yard area) occurring on the parcel as well.

....

The Department's position is that the larger trucks . . . are being used as a delivery truck fleet business and are not supporting on-site nonconforming contractor yard use.

The County provided the Newells with three options to potentially cure the violation: (1) permanently remove all commercial trucks not related to on-site contractor yard use, (2) if asserting the large semi-truck delivery business is replacing the contractor yard use then it is necessary to apply for a site specific information letter which will be reviewed for compliance with PCC 18A.70.050.A, or (3) if through a successful appeal the larger trucks are deemed part of contractor yard use, the County asserts the intensity of use is more than a 10 percent expansion of the use outlined in the 2004 letter and thus an administrative use permit (AUP) is needed for the expanded use.

## B

On July 9, 2020, the Newells appealed to the Pierce County Hearing Examiner's Office denying any violation. The hearing was conducted on February 18, 2021.

Stephen Shelton presided as the hearing examiner. Hoffmann and Matt Newell testified, along with neighbors Barney Phillips and Tom Freudenstein.

Hoffmann's testimony was inconsistent about the distinction between contractor yard use and delivery truck fleet. He testified that when he observed the trucks on site he could not tell whether they had been used to deliver materials, raw or processed, from one vendor to another. Hoffmann described the trucks he observed as having a "semi front" and being very long with a "metal C shape." Hoffmann testified that Malyon's declaration, described below, did not provide enough information to make a determination of the use from the declaration alone.

Phillips testified that he lived next to the Newells' property since 1983 and observed Malyon's business of hauling dirt and gravel from the property which was low impact because Malyon used one dump truck and one backhoe. He testified that he observed no material on the property since Newell started operating and "all they have is empty trucks. They start at 4:00 o'clock in the morning." Phillips testified that when the Newells first moved in, there were five trucks plus Malyon's dump truck and he has since added more for a total of 14 trucks. During the summer months, Phillips observed some of the trucks had other company names on them and some would park overnight or for extended periods of time. He observed no loading or material handling on the property but that the trucks were serviced on site. When asked if the trucks with other company names were still on site, he confirmed that they hadn't been there for several months. When asked if the Newells' business changed from when it came on site, Phillips answered the business more than doubled in size—they first came in with the

five trucks. The other neighbor present at the hearing, Freudenstein, agreed with Phillips's testimony.

Matt Newell testified that his company subcontracts to deliver aggregate to job sites using dump trucks and side dumps, including spreading it out if required, along with exporting off projects. Newell confirmed that no other equipment is used, only the dump trucks. Newell also confirmed the trucks are dispatched by his brother who is at another location, but that the trucks come and go from and are serviced on the property. Additionally, Newell stated that if the County had recorded a lis pendens or any kind of notice of violation that would show in a title report, he would not have completed the purchase of the property.

Hearing exhibit A-28 was the declaration of Boyd Malyon describing his use of the property prior to the sale to the Newells:

2. My wife Bette and I owned the above described property, prior to sale to the Newells.
3. The work I did on site included but was not limited to storing and using dump truck to haul materials in support of construction projects.
4. I also had a backhoe for excavating, loading and transporting.

C

On June 17, 2021, the hearing examiner entered findings of fact and conclusions of law, denying the Newells' appeal. The hearing examiner concluded that a legal nonconforming use was granted to the property in 2004 for a contractor yard that utilized a portion of the property for storage of material and one dump truck that was used to haul material and equipment to job sites. Conclusion of law 3 states:



The County granted a legal non-conforming use for a contractor yard on the Appellants' property in 2004 to a former owner who had a construction business and who utilized a portion of the property for storage of material and 1 dump truck which he used to haul equipment and materials to his construction jobs. The County acknowledged continued use of the property as a contractor yard in 2013 during an enforcement action against the former owner for an unlawful expansion of the yard.

The hearing examiner confirmed that the Malyons' contractor yard business was recognized by the County in 2013 during an enforcement action for an unlawful expansion on the property. The hearing examiner then determined that the neighbor complaints were based on a significant increase in impact to the neighborhood due to a significant change in the use of the property. The subsequent investigation by the County showed that the Newells' sole business was a trucking company that transported materials and not a contractor yard.

The hearing examiner determined that in the prepurchase e-mails between Buhl and Newell, Buhl was clear that the Newells' use must be consistent with the past usage to maintain nonconforming status. As to Arbogast's determination that the Newells' use was compliant in 2019, the hearing examiner determined that Arbogast was only considering the usage as to whether the nonconforming use was being expanded. The hearing examiner concluded it would be unreasonable to conclude that Buhl and Arbogast considered the actual use occurring at the site—solely to park and service 13 or more semitrucks with trailers to transport materials for other contractors 7 days a week from early morning to late evening. As for Hoffmann's inconsistent testimony, the hearing examiner noted that Hoffmann clarified his testimony once he was able to review the Newells' documents. Additionally, the hearing examiner agreed

with Hoffmann's testimony that Malyon's declaration did not provide sufficient detail to make usage determinations.

The hearing examiner concluded that the Newells' current use of the property was different than the Malyons' 2004 use of the property as a contractor yard. The hearing examiner concluded that the Newells' use instead met the definition of a central dispatch facility. Conclusion of law 11 states:

In considering the testimony, exhibits, findings and conclusions, the County was able to prove by a preponderance of evidence that the Appellants operated the Newell Brothers trucking company on their property consistent with PCC 18.A.33.280I "as a central dispatch and servicing of a delivery truck fleet, where no reloading (transfer facility), warehousing, or consolidation of materials takes place on site" which is a use not permitted in the Rural Separator Mid-County Community Plan (R-Sep Mid-County) zoning designation of their property.

The hearing examiner denied the Newells' appeal.

D

After unsuccessfully moving for reconsideration, the Newells petitioned for review of the hearing examiner's decision by the Pierce County Superior Court. By stipulation, the trial court bifurcated the negligent misrepresentation damages cause of action to be taken up after a ruling on the LUPA matter. On March 25, 2022, the trial court granted the Newells' LUPA appeal.

On April 14, 2022, the Newells amended their petition to allege an additional claim of deprivation of rights in violation of 42 U.S.C. § 1983, and sought compensatory or punitive damages.

On April 22, 2022, the County appealed the trial court's LUPA decision to Division Two of this court and moved for discretionary review. Division Two stayed the matter while final judgment was pending on the tort claims.

On May 6, 2022, the Newells moved for partial summary judgment on the civil rights claim and argued that given the trial court's LUPA ruling, the denial of their existing protected property right violated substantive due process. The County cross moved for summary judgment on the civil rights claim arguing that the Newells were afforded notice and an opportunity to be heard. The County also argued the negligent misrepresentation claim should be rejected because there was no specific assurance given that the Newells could expand their business.

The trial court granted the County's motion for summary judgment and dismissed all of the Newells' tort claims with prejudice. The court entered a final order noting that all claims were resolved. The Newells filed a notice of appeal to Division Two.

On August 5, 2022, the County amended its notice of appeal to include the trial court's order resolving all claims. After the pending motion for discretionary review was dismissed as moot, the case was transferred to this court for review.

## II

Judicial review of land use decisions is governed by LUPA. Lauer v. Pierce County, 173 Wn.2d 242, 252, 267 P.3d 988 (2011). This court may affirm or reverse the land use decision under review or remand it for modification or further proceedings. RCW 36.70C.140. LUPA sets forth six standards for relief from an administrative land use decision. RCW 36.70C.130. The Newells seek relief under the following:

- (a) The body or officer that made the land use decision engaged in unlawful procedure or failed to follow a prescribed process, unless the error was harmless;
- (b) The land use decision 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;
- (c) The land use decision is not supported by evidence that is substantial when viewed in light of the whole record before the court;
- (d) The land use decision is a clearly erroneous application of the law to the facts.

RCW 36.70C.130(1).

In reviewing a land use decision, this court stands in the same position as the superior court and reviews the administrative record. Phoenix Dev., Inc. v. City of Woodinville, 171 Wn.2d 820, 828, 256 P.3d 1150 (2011). Standards (a) and (b) present questions of law that this court reviews de novo. Phoenix Dev., 171 Wn.2d at 828. RCW 36.70C.130(1)(b) does not require a court to give complete deference to the local jurisdiction's interpretation of the law, but rather "such deference as is due." Wash. State Dep't of Transp. v. City of Seattle, 192 Wn. App. 824, 838-39, 368 P.3d 251 (2016).

"The substantial evidence standard of review, under standard (c), requires the court to determine whether a fair-minded person would be persuaded by the evidence of the truth of the challenged findings." Lauer, 173 Wn.2d at 252-53. When reviewing a challenge to the sufficiency of the evidence we view facts and inferences in a light most favorable to the party that prevailed in the highest forum exercising fact-finding authority. Phoenix Dev., 171 Wn.2d at 828-29. In this case, the County. This court does not weigh evidence or substitute its judgment on the evidence. Phoenix Dev., 171

Wn.2d at 832. The burden of proof is on the party challenging the decision of the hearing examiner. RCW 36.70C.130(1). In this case, the Newells.

“[U]nder standard (d), a decision is clearly erroneous if, ‘although there is evidence to support it, the reviewing court on the record is left with the definite and firm conviction that a mistake has been committed.’” Lauer, 173 Wn.2d at 253 (quoting Phoenix Dev., 171 Wn.2d at 829). Unchallenged findings of fact are verities on appeal. Seven Hills, LLC v. Chelan County, 198 Wn.2d 371, 384, 495 P.3d 778 (2021).

### III

A legal nonconforming use is a use that “lawfully existed” before a change in zoning regulations and is allowed to continue even though it no longer complies with current zoning. Rhod-A-Zalea & 35th, Inc. v. Snohomish County, 136 Wn.2d 1, 6, 959 P.2d 1024 (1998).

The theory of the zoning ordinance is that the nonconforming use is detrimental to some of those public interests (health, safety, morals or welfare) which justify the invoking of the police power. Although found to be detrimental to important public interests, nonconforming uses are allowed to continue based on the belief that it would be unfair and perhaps unconstitutional to require an immediate cessation of a nonconforming use.

Rhod-A-Zalea, 136 Wn.2d at 7 (citing State ex rel. Miller v. Cain, 40 Wn.2d 216, 220-21, 242 P.2d 505 (1952)).

Our Supreme Court has recognized that “nonconforming uses limit the effectiveness of land-use-controls, imperil the success of community plans and injure property values.” Rhod-A-Zalea, 136 Wn.2d at 8. Thus, nonconforming uses are generally disfavored and Washington courts have routinely held that the doctrine is a narrow exception to the state’s power to regulate land. King County, Dep’t of Dev. &

Env't Servs. v. King County, 177 Wn.2d 636, 646, 305 P.3d 240 (2013). "A protected nonconforming status generally grants the right to continue the existing use but will not grant the right to significantly change, alter, extend, or enlarge the existing use." Rhod-A-Zalea, 136 Wn.2d at 7.

As we summarized in McMilian v. King County:

local governments are motivated to allow nonconforming uses to persist in order to avoid constitutional challenges to zoning ordinances. However, while "[a]s a general proposition, due process prevents the abrupt termination of what one had been doing lawfully[,] [t]he protection does not generally extend beyond this purpose."

161 Wn. App. 581, 592-93, 255 P.3d 739 (2011) (footnote omitted) (quoting Meridian Minerals Co. v. King County, 61 Wn. App. 195, 212, 810 P.2d 31 (1991)).

#### IV

An applicant asserting a nonconforming use bears the initial burden to prove "(1) the use existed before the county enacted the zoning ordinance; (2) the use was lawful at the time; and (3) the applicant did not abandon or discontinue the use for over a year." First Pioneer Trading Co., Inc., v. Pierce County, 146 Wn. App. 606, 614, 191 P.3d 928 (2008). The Newells argue that the hearing examiner erred in not concluding that they met their burden to establish that their current use of their property is a valid lawful nonconforming use. We disagree.

Pierce County defines "nonconforming use" as "a use or activity that was lawful prior to the adoption, revision or amendment of the comprehensive plan or development regulation but that fails by reason of such adoption, revision, or amendment to conform to the present requirements of the comprehensive plan or development regulation."

PCC 18.25.030. "Use" is defined as "the purpose or activity for which land or buildings are arranged, or intended, or for which land or buildings are occupied or maintained."

PCC 18.25.030.

A

The first questions before us are whether there was a valid nonconforming use established on the Newell property, and, if so, what was that nonconforming use? The hearing examiner answered both questions in conclusion of law 3. The hearing examiner concluded that as of 2004 there was a legal nonconforming use on the property, and the use was as a contractor yard that was used for storage of material and one dump truck used to haul equipment and materials to construction jobs.

Other than characterizing conclusion 3 as an incorrect and "anemic" description of the scope of the nonconforming use, the Newells fail to challenge the basis for the hearing examiner's conclusion. It is undisputed that Malyon testified by declaration that his use of the property, prior to sale to the Newells in 2019, was for storage and operating a dump truck to haul materials in support of construction projects, as well as operating a backhoe for excavating, loading, and transporting materials. Malyon's declaration was supported by the neighbors' testimony that Malyon had one dump truck and one backhoe and stored materials on site. This is consistent with the County's use history that the Malyons operated an excavation business.

The hearing examiner's description of the nonconforming use is supported by substantial evidence. The hearing examiner did not err by concluding the legal

nonconforming use approved at the property was for storage of material and one dump truck used to haul equipment and materials to construction jobs.<sup>1</sup>

B

The Newells next argue that the hearing examiner erred because no evidence shows the Newells changed the use at the property from the nonconforming contractor yard approved in 2004. We disagree.

1

The Newells assign error to the hearing examiner's findings of fact 13, 14, 15, 17, and 19. Because each of these findings are supported by substantial evidence, we disagree. Finding 13 provides:

13. . . . On August 21, 2019, an entry in the Case Summary Report noted that there were several questionable issues that needed to be investigated and talked about to decide if enforcement action was warranted or not.

The Newells argue that this portion of finding 13 is misleading by omission because the "questionable issues" were whether the original nonconforming use had been expanded. But finding 13 is supported by the case summary report entry by Arbogast, which reads: "Hoffmann and I met to discuss if enforcement action will be warranted in this case . . . there are several questionable issues that need to be investigated . . . before reaching that conclusion."

The Newells challenge the portion of finding 14 that states:

14. . . . On November 4, 2019, the County rescinded the Notice to the Appellants, apparently, because the County had closed the 2013 enforcement action against the Malyons when the violation was corrected.

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<sup>1</sup> And the County does not dispute that Newell could operate on the site for exactly that nonconforming use.



The Newells argue that the County rescinded the 2019 NOTC because the County was aware that the 2013 enforcement action against the Malyons had been closed. It is not clear in the record why the County rescinded its 2019 enforcement action against the Newells for expanding the nonconforming use. But the 2019 expansion enforcement is not before us and the finding has no bearing on whether there is substantial evidence supporting the hearing examiner's conclusion that the Newells' current actual use was a change from the originally approved nonconforming use.

The Newells assigns error to the portion of finding 15 that states:

15. . . . Unlike the low impact on the neighborhood from Mr. Malyon's contractor business and yard when he had one dump truck, the Appellants impact on the neighbors increased upon moving in with five semi-trucks creating more traffic, noise, exhaust, vibrations and dust starting at about 4:30 AM five days a week and sometimes earlier and also continuing on weekends when the trucks are being washed. These impacts have continued to increase as more trucks were located on the property and as of November 13 there were 12 trucks, some times more or less, on site operating 24/7.

The Newells argue that finding 15 is not supported by substantial evidence because the County did not bring its enforcement action for an expansion of use, but a new use. Therefore, the Newells contend, any expansion of trucks is irrelevant. But the Newells' argument goes to the law—not the factual basis of the finding. Finding 15 accurately summarizes the information in the e-mail from Phillips to the County and in Phillips's testimony.

The Newells also assign error to finding 17 which states:

17. On December 31, 2019, Mr. Hoffmann received an email from Mr. Phillips providing more detail on the truck companies who have or had trucks on the Appellants property in addition to the Malyon and Newell Brothers: Wolf Brothers, Parker's, Harlow Trucking, Barrett's Trucking and

Different View. He also stated that a Christensen Fuel truck comes in during the week between 8 to 9 PM and fuels trucks until 10 PM or later.

The Newells argue that finding 17 reflects only a snapshot in time and is misleading by omission. But finding 17 is an accurate summary of Phillips's e-mail and is supported by Phillips's testimony.

Finally, the Newells challenge finding 19 which states:

Mr. Hoffmann conducted an internet search of Newell Bothers and confirmed the business being "Transportation & Warehousing", having a USDOT number, advertising for truck driver jobs through Truckdrivingjob.com, a page in Quick Transport Solutions Inc as a Washington Transport Company and an active carrier, a Company Snapshot noting USDOT number and cargo carried as "General Freight," a LinkedIn page for Matt Newell noting history in transportation and trucking, and an L&I Workers Comp calculation of having in "Quarter 2 of Year 2020 "11-20 Workers".

But other than assigning error to finding 19, the Newells offer no argument demonstrating any defect. Finding 19 is supported by the exhibits attached to the County's staff report.

2

The Newells argue that there is no evidence to support the hearing examiner's conclusion that the Newells changed the use of the property from the nonconforming contractor yard approved in 2004, to a delivery truck fleet use. We disagree.

The PCC defines the use of a "Contractor Yard" as:

Contractor Yards Use Type refers to an area for construction or contracting business offices, interior or outdoor storage, repair, or maintenance of heavy equipment, vehicles, or construction supplies and materials.

PCC 18A.33.280.B. In contrast, the PCC defines the use of Warehousing, Distribution, and Freight Movement as:

Warehousing, Distribution, and Freight Movement Use Type refers to the large scale warehousing and distribution of manufactured or processed products for one or more businesses, the large scale distribution of raw, manufactured, or processed products for one or more businesses at a central location, and the central dispatch and servicing of a delivery truck fleet, where no reloading (transfer facility), warehousing, or consolidation of materials takes place on site. Materials may be stored inside a building or in outdoor storage areas.

PCC 18A.33.280.I (emphasis added).

The interpretation of a municipal ordinance is a question of law reviewed de novo. Ellensburg Cement Prods., Inc. v. Kittitas County, 179 Wn.2d 737, 743, 317 P.3d 1037 (2014). We construe a municipal ordinance according to the rules of statutory interpretation. Ellensburg Cement, 179 Wn.2d at 743. Our objective is to ascertain and give effect to the legislature's intent. Ellensburg Cement, 179 Wn.2d at 743. We look first to the text of a statute to determine its meaning. Griffin v. Thurston County Bd. of Health, 165 Wn.2d 50, 55, 196 P.3d 141 (2008). Where the meaning of statutory language is plain on its face, the court must give effect to that plain meaning as an expression of legislative intent. City of Spokane v. Spokane County, 158 Wn.2d 661, 673, 146 P.3d 893 (2006).

The Newells argue there is no evidence of a "delivery truck fleet" use. A fleet is defined as a group of trucks operated under unified control.<sup>2</sup> The Newells have at least five semi-trailer dump trucks and or side dumps as supported by evidence from Phillips, testimony by Matt Newell, and as determined in unchallenged conclusion 4. It is undisputed that the Newells use trucks to deliver materials. Matt Newell testified the

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<sup>2</sup> MERRIAM-WEBSTER ONLINE DICTIONARY, <https://www.merriam-webster.com/dictionary/fleet> (last visited Oct. 28, 2024).

trucks are dispatched from and are serviced on the property. Phillips testified that no loading or handling of materials takes place at the property and this testimony was not refuted by Newell. Additionally, the nature of the Newells' business is classified as "transportation & warehousing" by the Washington Secretary of State.

Our role "is not to determine whether evidence may support one decision over another" but to determine whether there is enough evidence to persuade a fair-minded person that the Newells' use is consistent with the definition of a central dispatch and servicing of a delivery truck fleet. Phoenix Dev., 171 Wn.2d at 832. Based on the evidence and viewed in the light most favorable to the County, there is substantial evidence supporting the hearing examiner's conclusion.

3

The Newells argue that the hearing examiner erred by applying the definition of the warehousing, distribution, and freight movement use in PCC 18A.33.280.I. This is so, they contend, because that definition was adopted in 2006—after the approval of the Malyon's nonconforming contractor yard in 2004. Newell's argument appears to miss the point of the hearing examiner's conclusion. The hearing examiner concluded first, that the Newells no longer used the property consistent with the use approved in 2004. The hearing examiner instead concluded that the Newells' current use better fit the definition of a different use—a warehousing, distribution, and freight movement use—a use prohibited in the RSep zone. The Newells are bound to comply with current county laws and regulations unless their use matches the nonconforming use approved in 2004. See Rhod-A-Zalea, 136 Wn.2d at 12.

The hearing examiner did not err by relying on PCC 18A.33.280.I to identify a change in use.

4

The Newells argue that the hearing examiner erred by failing to recognize that a nonconforming use may intensify. The Newells rely on Kitsap County v. Kitsap Rifle & Revolver Club, 184 Wn. App. 252, 268, 337 P.3d 328 (2014) for support. We disagree.

“Under Washington common law, nonconforming uses may be intensified, but not expanded.” City of Univ. Place v. McGuire, 144 Wn.2d 640, 649, 30 P.3d 453 (2001). Our Supreme Court explained in Keller v. City of Bellingham, 92 Wn.2d 726, 731, 600 P.2d 1276 (1979):

When an increase in volume or intensity of use is of such magnitude as to effect a fundamental change in a nonconforming use, courts may find the change to be proscribed by the ordinance. Intensification is permissible, however, where the nature and character of the use is unchanged and substantially the same facilities are used. The test is whether the intensified use is “different in kind” from the nonconforming use in existence when the zoning ordinance was adopted.

(Citations omitted.)

In Kitsap Rifle, the Kitsap county code prohibited expansion of the area of the nonconforming use and prohibited any alteration or enlargement of the nonconforming use. 184 Wn. App. at 270-71. Division Two of this court relied on Keller to interpret the county code as prohibiting expansion but not intensification. Kitsap Rifle, 184 Wn. App. at 272.

Under Pierce County’s code, nonconforming uses shall not be enlarged, expanded, extended, replaced, or altered except as expressly permitted in chapter 18A.70 PCC. PCC 18.A.70.030.A. Pierce County allows a nonconforming use to

change to another nonconforming use of equal or lesser intensity and will consider, when determining intensity, the impacts including traffic, size and scale, noise, glare, dust, and hours of operation. PCC 18A.70.050. Any expansion of use may be allowed in limited percentages such as 5 percent outright, or 10 percent for an industrial nonconforming use with and approved AUP. PCC 18A.70.040.

Here, unlike in Kitsap Rifle, the PCC addresses expansion and intensification. The County's position, as shown in the NOTC, appears to be that the term expansion includes intensification and that the Newells' business exceeds the allowed 10 percent increase. The County gave the Newells three choices: (1) remove all commercial trucks and return the property to the previously approved contractor yard; (2) if the Newells contend they are changing use then apply for site specific information letter; (3) or if through a successful appeal it was determined that the larger trucks were part of a contractor yard, then the use had intensified and the Newells are required to apply for an AUP.

The hearing examiner did not fail to consider intensification.

Based on the foregoing, and because we view facts and inferences in favor of the County, we conclude substantial evidence supports the hearing examiner's decision.<sup>3</sup>

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<sup>3</sup> Newell seeks relief under RCW 36.70C.130(1)(f) but other than assigning error, Newell does not argue the land use decision violates Newell's constitutional rights. "We will not consider an inadequately briefed argument." Norcon Builders, LLC v. GMP Homes VG, LLC, 161 Wn. App. 474, 486, 254 P.3d 835 (2011).

V

The Newells argue the hearing examiner erred by not equitably and judicially estopping the County from bringing the enforcement action. The Newells assert equitable estoppel applies to County action here because (1) the County's position that dump truck use qualifies as a contractor yard is inconsistent with its current position, (2) the Newells acted in reliance upon the County's representation and purchased the property, (3) the Newells would be injured by County's current position that their use is not allowed, (4) estoppel is necessary to prevent manifest injustice, and (5) estoppel will not impair governmental functions because the County was content to allow dump truck use for over 30 years.

Conversely, the County argues that (1) any prior statements were not inconsistent with its current position and the Newells did not make it clear what their actual use would be, (2) the Newells present insufficient evidence of an injury, (3) the Newells fail to provide support that estoppel is necessary to prevent a manifest injustice, and (4) the Newells fail to show estoppel will not impair the County's ability to enforce the zoning code. We agree with the County.

"Equitable estoppel prevents a party from taking a position inconsistent with a previous one where inequitable consequences would result to a party who has justifiably and in good faith relied." Silverstreak, Inc. v. Wash. State Dep't of Labor & Indus., 159 Wn.2d 868, 887, 154 P.3d 891 (2007). "When equitable estoppel is asserted against the government, the party asserting estoppel must establish five elements by clear, cogent, and convincing evidence: (1) a statement, admission, or act by the party to be estopped, which is inconsistent with its later claims, (2) the asserting

party acted in reliance upon the statement or action, (3) injury would result to the asserting party if the other party were allowed to repudiate its prior statement or action, (4) estoppel is “necessary to prevent a manifest injustice,” and (5) estoppel will not impair governmental functions.” Silverstreak, 159 Wn.2d at 887. Under this burden of proof, the trier of fact must be convinced the fact in issue is “highly probable.”

Kramarevcky v. Dep’t of Soc. & Health Servs., 122 Wn.2d 738, 744, 863 P.2d 535 (1993).

Here, planners Buhl and Hoffmann made statements to the Newells confirming the County approved a nonconforming use on the property in 2004 and that the Newells could continue the approved use—the business as operated by Malyon—but that any expansion would require a permit. That is consistent with the County’s current position, that operating as Malyon did is an approved nonconforming use, but expansion or change to operate multiple dump trucks is not a conforming use. Additionally, as to injury, the Newells simply say injury would result but fail to explain how. As for manifest injustice, the Newells state estoppel is plainly necessary without explaining why. Lastly, the Newells fail to argue how estoppel will not impair governmental functions other than to say that allowing the Malyons’ use did not impair governmental functions.

The Newells failed to establish the five elements of equitable estoppel by clear, cogent, and convincing evidence. The hearing examiner did not err.<sup>4</sup>

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<sup>4</sup> The Newells also argue in the alternative, that they were innocent purchasers under PCC 18.25.030 and enforcement should be barred. The Newells’ argument is sparse and provides little beyond reciting the code provision. Thus, we decline to address this issue as improperly briefed. Palmer v. Jensen, 81 Wn. App. 148, 153, 913 P.2d 413 (1996) (“Passing treatment of an issue or lack of reasoned argument is insufficient to merit judicial consideration.”).



VI

The Newells argue the trial court erred by dismissing their claim of negligent misrepresentation on summary judgment. The Newells contend that the County was negligent in communicating false information which they relied on in purchasing the property. The Newells assert the undisputed record shows that the County had a special relationship with them. The Newells rely on Meaney v. Dodd, 111 Wn.2d 174, 759 P.2d 455 (1988) and Rogers v. City of Toppenish, 23 Wn. App. 554, 596 P.2d 1096 (1979). Conversely, the County argues no special relationship was created because there was no specific inquiry by the Newells, and no express assurance was given to Newell. We agree with the County.

Summary judgment is properly granted when the pleadings, affidavits, depositions, and admissions on file demonstrate there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c); Folsom v. Burger King, 135 Wn.2d 658, 663, 958 P.2d 301 (1998). The burden is on the party moving for summary judgment to demonstrate there is no genuine dispute as to any material fact and reasonable inferences from the evidence must be resolved against the moving party. Folsom, 135 Wn.2d at 663. The motion should be granted only if, from all the evidence, a reasonable person could reach only one conclusion. Folsom, 135 Wn.2d at 663. An appellate court engages in the same inquiry as the trial court when reviewing an order for summary judgment. Folsom, 135 Wn.2d at 663. Appellate review is de novo. Folsom, 135 Wn.2d at 663.

“Every negligence action requires a showing of ‘a duty of care running from the defendant to the plaintiff.’” Woods View II, LLC v. Kitsap County, 188 Wn. App. 1, 26,

352 P.3d 807 (2015) (quoting Honcoop v. State, 111 Wn.2d 182, 188, 759 P.2d 1188 (1988)). “Traditionally, regulatory statutes and municipal laws impose duties on public officials owed to “the public as a whole” and not to specific individuals.” Mull v. City of Bellevue, 64 Wn. App. 245, 251, 823 P.2d 1152 (1992) (citing Meaney, 111 Wn.2d at 177). Thus, under the public duty doctrine, a government entity will not be liable for negligence unless the entity owes a duty to the plaintiff as an individual, rather than to the public in general. West Coast, Inc. v. Snohomish County, 112 Wn. App. 200, 207, 48 P.3d 997 (2002).

An exception to the public duty doctrine is a special relationship. West Coast, 112 Wn. App. at 207. A special relationship arises where (1) there is direct contact between the public official and the injured plaintiff which sets the latter apart from the general public, (2) there are express assurances given by a public official, and (3) those assurances give rise to justifiable reliance on the part of the plaintiff. West Coast, 112 Wn. App. at 207. The second element requires that incorrect information is clearly set forth by the government and the government intends that it be relied upon. Meaney, 111 Wn.2d at 180. And any express assurance given by the government must be unequivocal. Meaney, 111 Wn.2d at 180.

In Meaney, a sawmill owner’s building application indicated the sawmill would create a minimal increase in noise and at no time prior to permit issuance did the owner inform the County of the specific noise level at which the mill would operate. 111 Wn.2d at 176. The owner was told that his application complied with all applicable codes. Once operating, the sawmill was in violation of noise regulations. Meaney, 111 Wn.2d at 180. Our Supreme Court concluded that no special relationship was established

because the county was entitled to rely on the owner's representation and had no duty to verify the owner's statements. Meaney, 111 Wn.2d at 180-81. Additionally, the owner did not ask expressly about noise and could not rely on the permit as assurance that the sawmill would comply with noise regulations. Meaney, 111 Wn.2d at 180. The court distinguished Rogers, and determined there was no evidence of a specific inquiry or misrepresentation by the county. Meaney, 111 Wn.2d at 181.

In Rogers, Rogers asked a city building inspector whether an apartment could be built on a property he was planning to purchase. 23 Wn. App. at 555. The inspector told Rogers the property was zoned for an apartment. Rogers purchased the property and the city issued him a building permit. Later, the city manager advised Rogers that only single-family residences or duplexes were permitted and Rogers's building permit was rescinded. The inspector argued that Rogers had no right to rely on the informal opinion of the inspector. Because both the zoning map and the city records confirmed apartments were never allowed, the court found there was a negligent representation of a material fact upon which Rogers relied to his damage. Rogers, 23 Wn. App. at 554. The inspector "had a duty as the administrator of the zoning ordinances to inform accurately an individual member of the public the zoning classification concerning specific real property once the inquiry and its purpose were made known." Rogers, 23 Wn. App. at 558.

Here, the parties agree there was direct contact between the Newells and the County. But the Newells fail to establish a specific inquiry that set them apart from the general public, or that the County gave express unequivocal assurances. The Newells' inquiry was more like that in Meaney. The Newells asked the County whether their

“dump truck company” would be able to operate under the nonconforming use established by the Malyons. The Newells did not follow up with specific questions as to expansion or what type of dump truck business would comply with the approved nonconforming use or whether an AUP would be necessary given the specifics of their business. It was the Newells’ responsibility to comply with codes, regulations, and ordinances. Meaney, 111 Wn.2d at 179.

And, unlike in Rogers, the County gave accurate information to the Newells when it said that as long as Malyon’s use was continuous the nonconforming rights remained. The County continued, however, by cautioning “be aware there are very special circumstances about expanding a nonconforming use.” In a follow-up e-mail, the County again warned that

As long [as] they have continually run the business since the date the non-conforming use was determined, you would be able to continue the use if you take ownership. Again, you could not expand the use without an Administrative Use Permit, but you can run the business in the same area the business currently operates.

(Emphasis added.)

Nothing said by the County was a direct misstatement of fact. The County specifically stated the Newells had to operate the same business or use in the same area as the Malyons. It was the Newells that assumed that their actual use qualified as the same business or use. “It is only where a direct inquiry is made by an individual and incorrect information is clearly set forth by the government, the government intends that it be relied upon and it is relied upon by the individual to his detriment, that the government may be bound.” Meaney, 111 Wn.2d at 179.

The trial court did not err by granting summary judgment in favor of the County on the negligent misrepresentation claim.<sup>5</sup>

We affirm the trial court's dismissal of the Newells' tort claims. We reverse the trial court's decision on the LUPA appeal and affirm the hearing examiner's decision.<sup>6</sup>

Mann, J.

WE CONCUR:

Birk, J.

Chung, J.

---

<sup>5</sup> Because we agree with the County on the LUPA claim, we do not address Newell's civil rights claim for damages under 42 U.S.C. § 1983. See Mercer Island Citizens for Fair Process v. Tent City 4, 156 Wn. App. 393, 232 P.3d 1163 (2010) (claims for damages based on a LUPA claim must be dismissed if the LUPA claim fails).

<sup>6</sup> The Newells seek attorney fees on appeal. Because the Newells do not prevail, they are not entitled to attorney fees.

3E



**Pierce County**  
**Planning & Public Works**

2401 South 35<sup>th</sup> Street, Room 2  
Tacoma, Washington 98409-7460  
piercecountywa.gov/ppw

**Dennis Hanberg—Director**  
dennis.hanberg@piercecountywa.gov

January 6, 2020

Matthew and Kaylyne Newell  
12603 34<sup>th</sup> Avenue East  
Tacoma WA 98446

**RE: Inquiry Regarding a Potential Non Permitted Use Operating at Address 12603 34<sup>th</sup> Avenue East**

**Parcel No: 0319114082**

Dear Matthew and Kaylyne Newell:

We have received a recent inquiry to investigate an alleged additional business operating on this parcel. Although a Contractor Yard use has been operating on this site for several years, it appears from recent viewings of the site that a delivery truck fleet may be operating on the site as well.

On two separate occasions, 8 or more parked large semi-trucks (pulling open air trailers) were observed by County staff from the 34th Avenue East right of way. The large trucks appear to be operating as a delivery fleet, and not operating as trucks related to a Contractor Yards use. Some of the trucks have company names on them.

A delivery truck fleet is described in the Pierce County Zoning Code under the use category 'Warehousing, Distribution, and Freight Movement' and is **NOT** a permitted use in the Rural Separator Mid County Community Plan zoning designation of this parcel.

The following are the Contractor Yards and Warehousing, Distribution, and Freight Movement descriptions from Pierce County Code Title 18A.33.280:

**B. Contractor Yards.** Contractor Yards Use Type refers to an area for construction or contracting business offices, interior or outdoor storage, repair, or maintenance of heavy equipment, vehicles, or construction supplies and materials.

*Explanatory Note: The key difference with truck use in this category is to support the delivery of construction materials used in conjunction with specific construction projects.*

**I. Warehousing, Distribution, and Freight Movement.** Warehousing, Distribution, and Freight Movement Use Type refers to the large scale warehousing and distribution of manufactured or processed products for one or more businesses, the large scale distribution of raw, manufactured, or processed products for one or more businesses at

a central location, and the central dispatch and servicing of a delivery truck fleet, where no reloading (transfer facility), warehousing, or consolidation of materials takes place on site. Materials may be stored inside a building or in outdoor storage areas.

Explanatory Note: *Delivery trucks within this category involve delivery/distribution of materials (raw or processed) from one vendor to another.*

Please contact us to schedule a meeting to discuss the specific use of the large trucks/trailers on this parcel.

I can be reached at [ray.hoffmann@piercecountywa.gov](mailto:ray.hoffmann@piercecountywa.gov) or (253) 798-2788.

Sincerely,



Ray Hoffmann  
Associate Planner

RH:kgf

cc: Kathleen Larrabee, Manager, Resource Management  
Yvonne Reed, Code Enforcement Officer, Lead





June 25, 2020

**NOTICE AND ORDER TO CORRECT**

SENT REGULAR AND CERTIFIED MAIL

9171 9690 0935 0239 3845 03

Matthew and Kaylyne Newell  
12603 34<sup>th</sup> Avenue East  
Tacoma WA 98446

This Notice is For: Operating a Delivery Truck Fleet Business  
Subject Property: 12603 34<sup>th</sup> Avenue East, Tacoma  
Case Number: 67725  
Parcel Number(s): 0319114082

Our records indicate that you are the current owner of the site. As the owner, you are responsible for activities that take place on the property. This is a notice to stop all unallowed activity unless otherwise directed by County staff.

Recently our office received a public service request concerning an alleged delivery truck fleet business on your property. On December 24, 2019, Pierce County conducted a site visit and confirmed that a delivery truck fleet business was operating on your property. Staff observed 7 or more large commercial trucks exceeding 18,000 Gross Vehicle Weight (GVW) parked between the existing large shop and the north property line.

The County does recognize that there may be nonconforming rights to operate a contractor yard use (using smaller weight trucks/vehicles and a smaller yard area) occurring on the parcel as well. The contractor yard use was established through a nonconforming use rights letter dated December 13, 2004.

**DESCRIPTION OF CONFIRMED VIOLATION(S)**

The delivery truck fleet business (operating on the site) is described in the Pierce County Zoning Code under the use category 'Warehousing, Distribution, and Freight Movement' and is **NOT** a permitted use in the Rural Separator Mid County Community Plan (Rsep Mid County) zoning designation of this parcel.

**PIERCE COUNTY CODE (PCC) SECTION**

The unpermitted work is specifically in violation of:

**PCC 18A.33.280.I**

**Warehousing, Distribution, and Freight Movement.** Warehousing, Distribution, and Freight Movement Use Type refers to the large scale warehousing and distribution of manufactured or processed products for one or more businesses, the large scale distribution of raw, manufactured, or processed products for one or more businesses at a central location, and the central dispatch and servicing of a delivery truck fleet, where no reloading (transfer facility),



warehousing, or consolidation of materials takes place on site. Materials may be stored inside a building or in outdoor storage areas.

A delivery truck fleet, as described in Warehousing, Distribution, Freight Movement use category, is not allowed per PCC Table 18A.27.020 in the Rsep Mid County zoning designation of this parcel.

The Department's position is that the larger trucks (i.e. 18,000 GVW and over) are being used as a delivery truck fleet business and are not supporting an on-site nonconforming contractor yard use.

#### **HOW TO CORRECT THE VIOLATION(S)**

There are potentially three courses of action the property owner may take:

1. Permanently remove all commercial trucks from the site that are not directly related to an on-site contractor yard (including, but not limited to, the identified trucks in excess of 18,000 GVW). You will need to provide adequate proof to this Department which trucks (if any) are related to an on-site contractor yard per the County use level description as follows.

##### **PCC Section 18A.33.280.B**

**Contractor Yards.** Contractor Yards Use Type refers to an area for construction or contracting business offices, interior or outdoor storage, repair, or maintenance of heavy equipment, vehicles, or construction supplies and materials.

2. If you are making the case that the large (18+ GVW) truck fleet delivery business is replacing the contractor yard use as outlined in the December 13, 2004 letter and thus changing from one nonconforming use to another, you would need to apply for a Site Specific Information (SSI) letter to obtain an appealable Department decision on this matter. The Department will review an SSI submittal for compliance with:

##### **PCC 18A.70.050. A**

A nonconforming use may change to a conforming use allowed within the zone classification in which the use is located or to another nonconforming use of equal or lesser intensity. When determining intensity, the Director may consider impacts including, but not limited to, traffic, impervious surface, size and scale, noise glare, dust, and hours of operation.

(Note: The department's position is that the current truck fleet delivery business is of a higher intensity based on many of the above listed impacts)

3. If through a successful challenge(s), the larger trucks are ultimately deemed part of a contractor yard use, the Department's position is that the intensity of use (both size and number of trucks) is beyond a 10% expansion of what was originally intended in the Department's nonconforming use letter dated December 13, 2004. The landowner could then apply for an Administrative Use Permit to legitimize the larger contractor yard.

When you are correcting the above-described violation(s), you must comply with all federal, state, and local regulations.

Notice and Order to Correct  
Matthew and Kaylyne Newell  
June 25, 2020

Failure to comply with this order is a violation of Pierce County's public nuisance regulations per PCC 8.08.050 L, and/or P.

**ENFORCEMENT ACTION(S)/PENALTIES**

**If you do not comply with this Notice, Pierce County may take the following enforcement action(s):**

- Record a Notice of Non-Compliance on title with the Pierce County Auditor. Non-Compliance notifies any interested parties or lenders of a violation on the property.
- You may be issued civil penalties of up to \$1,000 for each day you fail to comply. We will turn over any unpaid civil penalties to a collection agency.

**APPEAL**

Per Pierce County Code Titles 1.22.090 and 18.140, you may appeal this notice in writing. For your appeal to be accepted, your appeal form must be received at the Pierce County Development Center **within fourteen (14) calendar days** of the date of this Notice.

**To Appeal**

- Complete the enclosed "Appeal of a Determination of a Responsible County Official" (printed on white paper). For more information about the appeal process, see the "Appeal Process Information" form (printed on green paper).
- Deliver completed Appeal form, **a copy of this letter**, and the \$250.00 application fee to:  
Pierce County Development Center/Annex  
2401 South 35<sup>th</sup> Street  
Tacoma, WA 98409  
**or** apply online at: <http://www.co.pierce.wa.us/DocumentCenter/View/4233>.
- We may waive the appeal fee if you qualify. Please see the attached "Appeal Fee Waiver" form.

Thank you for your anticipated cooperation in resolving this matter. Please contact me at [ray.hoffmann@piercecounitywa.gov](mailto:ray.hoffmann@piercecounitywa.gov) or at (253) 798-2788 to ask questions regarding this Notice and Order to Correct.

Sincerely,



Ray Hoffmann  
Associate Planner

RH:kgI

Encl: Appeal Process Information  
Appeal Form  
Appeal Fee Waiver  
Nonconforming Use Letter to Boyd and Betty Maylon, dated December 13, 2004

cc: Kathleen Larrabee, Planning Manager, Resource Management, PALS  
Rob Jenkins, Current Planning Supervisor, Planning Division, PALS  
Sean Gaffney, Planning Manager, Planning Division, PALS

Judge: Honorable Thomas Patrick Quinlan  
Date: Friday, March 16, 2022  
Time: 9:00 a.m.

THE SUPERIOR COURT FOR THE STATE OF WASHINGTON  
IN THE COUNTY OF PIERCE

MATTHEW AND KAYLYNE NEWELL,

NO. 21-2-07529-2

Petitioners,

DECLARATION REGARDING  
FILING OF TRANSCRIPT

v.

PIERCE COUNTY,

Respondent.

1. The undersigned declares that I am the attorney for the Petitioners in this matter.
2. Attached for filing is a true and complete original of the VERBATIM REPORT OF PROCEEDINGS of 18 February 2021 Hearing before the Pierce County Land Use Hearing Examiner in the matter of MATTHEW AND KAYLYNE NEWELL v. PIERCE COUNTY, Administrative Appeal No. 938856, filed as part of the record review for this above referenced LUPA judicial appeal.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated this 13th day of December 2021 and signed at Tacoma, Washington.

GOODSTEIN LAW GROUP PLLC

By: /s/Carolyn A. Lake

Carolyn A. Lake, WSBA No. 13980

Attorneys for Petitioners

DECLARATION RE: FILING OF TRANSCRIPT -1

GOODSTEIN LAW GROUP PLLC

211213.pld.Dec of Filing Transcript

501 South G Street

Tacoma, WA 98405

253.779.4000

FAX 253.779.4411

CP 000001

APPENDIX 3

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF PIERCE

---

IN THE MATTER OF:	)	APPLICATION NO. 938856
	)	
MATHEW NEWELL and KAYLYNE	)	
NEWELL,	)	
	)	
Appellants,	)	
	)	
vs.	)	
	)	
PIERCE COUNTY PLANNING AND	)	
LAND SERVICES,	)	
	)	
Respondents.	)	

---

VERBATIM REPORT OF PROCEEDINGS  
(FROM TAPED PROCEEDINGS)

---

BE IT REMEMBERED that the foregoing proceedings were taken from the land use hearing in the above-referenced matter, heard on February 18, 2021, before STEPHEN R. SHELTON, Deputy Hearings Examiner, STUART E. SHELTON INJURY LAW, 8825 Tallon Lane NE, Suite G, Lacey, WA 98516-6607.

CAROLYN A. LAKE, Attorney at law, GOODSTEIN LAW GROUP, PLLC, 501 South G Street, Tacoma, WA 98405, appeared remotely on behalf of the Appellants;

DAVID OWEN, Pierce County Prosecuting Attorney, Civil Division, 955 Tacoma Avenue South, Suite 301, Tacoma, WA 98402-2160, appearing remotely on behalf of the Respondent.

Also present remotely were Kathleen Larrabee, Planning Manager, and witnesses Ray Hoffmann, Barney Phillips, Tom Freudenstein, and Mathew Newell.

Proceedings Transcribed by: Catherine M. Vernon, CSR

## I N D E X

Witness Name: \_\_\_\_\_ Page Nos. \_\_\_\_\_

Colloquy: 4-5, 62-69, 139-144

Introduction: 5-18

Ray Hoffmann, PC Planner: 18-28, 28-39, 39-46, 46-61

Motion to Dismiss: 69-78, 96-100

Barney Phillips: 78-86, 86-87, 89-90, 91-93

Tom Freudenstein: 93-95

Closing Arguments: 123-139

Exhibits

Exhibit No: \_\_\_\_\_ Marked: \_\_\_\_\_ Admitted: \_\_\_\_\_

Nos. 1-6

16

1           WHEREUPON, the following proceedings were  
2 had and done, to wit:

3           MADAM CLERK: I am recording for you right  
4 now.

5           HEARINGS EXAMINER SHELTON: Okay. Good  
6 morning, ladies and gentlemen. I guess good  
7 afternoon, ladies and gentlemen. I'm opening the  
8 public hearing, Thursday, February 18th, about 1:04.

9           This is the administrative appeal under the  
10 last name of Newell, Application No. 938856.

11           My name is Stephen R. Shelton. I'm a  
12 Deputy Hearings Examiner who will be addressing this  
13 public hearing today.

14           At this point, prior to further  
15 introductions, I believe the Planner on this matter,  
16 Mr. Hoffmann, will provide an introduction as to how  
17 we'll be addressing the public hearing, since we are  
18 obviously on Zoom with all of the participants outside  
19 this hearing room.

20           At this time, Mr. Hoffmann, good afternoon,  
21 sir.

22           MR. HOFFMANN: Good afternoon.

23           HEARINGS EXAMINER SHELTON: And did you  
24 have that introduction, sir, before we proceed?

25           MR. HOFFMANN: Uh, yes. For the record, my

1 name is Ray Hoffmann, Associate Planner, Pierce  
2 County.

3 I believe there is a slide presentation --

4 MADAM CLERK: Does he want --

5 MR. HOFFMANN: -- which sort of summarizes.

6 MADAM CLERK: -- that right now?

7 HEARINGS EXAMINER SHELTON: I'm sorry, what  
8 was the question?

9 MADAM CLERK: Does he want the Power Point  
10 to start right now?

11 MR. HOFFMANN: I believe there's a --

12 MADAM CLERK: Are you ready for his  
13 presentation?

14 HEARINGS EXAMINER SHELTON: No, I'm not  
15 ready for that presentation.

16 MR. HOFFMANN: No.

17 HEARINGS EXAMINER SHELTON: This is an  
18 introduction I thought should be provided. Does the  
19 -- does the -- is it a Power Point presentation?

20 MR. HOFFMANN: Correct.

21 HEARINGS EXAMINER SHELTON: And does that  
22 address the fact that we're on the Zoom proceedings  
23 today?

24 MR. HOFFMANN: Yes.

25 HEARINGS EXAMINER SHELTON: Okay. So this

1 is -- the introduction then is on a -- on a  
2 presentation. It's not going to be verbally provided  
3 by either you or I?

4 MADAM CLERK: I don't think -- I don't  
5 think he has -- he doesn't understand that you're  
6 talking about that.

7 UNIDENTIFIED FEMALE SPEAKER: Yeah, he has  
8 that.

9 HEARINGS EXAMINER SHELTON: Okay. There's  
10 an introduction here I'd like to provide. I'll just  
11 read the relevant portions of it.

12 Thank you all for joining our hearing today  
13 via Zoom. We're holding it in this format that allows  
14 participants to engage remotely to comply with public  
15 health protocols.

16 It's a very different experience for all of  
17 us, so thank you for your patience as we move forward.

18 As I indicated, my name is Stephen Shelton,  
19 Deputy Hearings Examiner. Staff will be controlling  
20 the technology today. I will be essentially presiding  
21 over the hearing and the staff will be running the  
22 other aspects of the meeting.

23 I do have the names on a list who are  
24 currently present. I'm not sure who on that list will  
25 be testifying. I will address that later in these



1 proceedings.

2 I will provide an opportunity as to when  
3 people will be able -- enabled to speak and I'll  
4 simply make sure that you can be heard. You would  
5 need to use your controls at the bottom of your screen  
6 to un-mute yourself. So please be muted while the  
7 proceedings are ongoing, except when it's your  
8 opportunity to speak.

9 MR. HOFFMANN: Yeah.

10 HEARINGS EXAMINER SHELTON: Just please  
11 make sure your microphone settings are turned up so we  
12 all can hear the presentations.

13 Oh, so that is the general introduction.  
14 Prior to the presentation, Mr. Hoffmann, just a brief  
15 introduction of myself. I indicated, as a Deputy  
16 Hearings Examiner, I'll be presiding today. I was  
17 appointed a little over a year ago. I'd also been a  
18 Deputy Hearings Examiner in the late nineties for  
19 several years. In past lives I've been a land use  
20 attorney for Pierce County, the judge in the City of  
21 Puyallup, Town of Ruston, and City of Sumner. And I  
22 am currently of counsel in my brother's law firm down  
23 in Lacey, restrictive -- restricted to personal  
24 injury.

25 If there's any questions about my

1 opportunity to fairly hear this proceeding today,  
2 please bring that to my attention. And, seeing no  
3 concerns, at this time, Mr. Hoffmann, will you be  
4 testifying today, sir?

5 MR. HOFFMANN: Yes.

6 HEARINGS EXAMINER SHELTON: Okay. So  
7 please raise your right hand. Do you swear or affirm  
8 you'll tell the truth and nothing but the truth before  
9 the Hearing Examiner today? If you will, just please  
10 state, "I will".

11 MR. HOFFMANN: I will.

12 HEARINGS EXAMINER SHELTON: Okay. Thank  
13 you, sir.

14 Please state your name and spell it.

15 MR. HOFFMANN: Name is Ray Hoffmann, R-A-Y,  
16 H-O-F-F-M-A-N-N.

17 HEARINGS EXAMINER SHELTON: And at this  
18 time did you have a presentation, sir?

19 MR. HOFFMANN: A brief introduction with a  
20 Power Point.

21 HEARINGS EXAMINER SHELTON: Please,  
22 proceed.

23 MR. HOFFMANN: Okay. So here it is on the  
24 screen. And I think that's the last slide or the  
25 beginning. Okay.

1           So, obviously, we're here today for the  
2     matter of an appeal of an administrative decision for  
3     the Newell site. There's the application number  
4     that's been entered into the record.

5           The next slide is the Appellant is  
6     appealing the Notice and Order to Correct, dated  
7     June 25, 2020, including the language that reads the  
8     delivery truck fleet business operating on the site is  
9     described in the Pierce County zoning code under the  
10    use category warehouse distribution and freight  
11    movement, and the County is making the decision it's  
12    not a permitted use in the rural separator mid-county  
13    community plan, zoning destination of the parcel.

14           Next slide.

15           The site, for background, is located at  
16    12603-31st Avenue East, and again, in the rural  
17    separator zoning.

18           Next slide.

19           And there we can see on a map where it's  
20    located in relationship to 512 and Highway 7 over to  
21    the left.

22           Next slide.

23           It's a 6.8-acre site. There's the tax  
24    parcel. The property has been -- has a single family  
25    residence on the site, a large outbuilding/shop, and a

1     graveled area just west and north of the shop. The  
2     subject property is adjacent to single family  
3     residential properties to the north and east. To the  
4     west it's 34th Ave. and single family homes west of  
5     34th. To the south is single family homes and 128th  
6     Street East. The site has direct access onto 35th  
7     Avenue East.

8             Next slide.

9             Here are some photos taken from the 34th  
10    Street right-of-way, as mentioned in the Notice and  
11    Order letter. We have some lighter versions of these,  
12    I believe, that will be introduced later.

13            So there's one of the front parts of one of  
14    the trucks that's most visible from the street.

15            And next slide.

16            And this is taken a little bit further,  
17    half a block down the street, looking back where the  
18    vehicle was and kind of looking at an angle towards  
19    them lined up there.

20            Next slide.

21            MS. LAKE: Mr. Examiner?

22            HEARINGS EXAMINER SHELTON: Yes, Ms. Lake?

23            MS. LAKE: Yes. Thank you, Mr. Examiner.

24    I'm -- this is the first that Appellants have seen of  
25    this Power Point presentation. Perhaps some of these

1 are already exhibits that were provided. So if the  
2 -- if the staff could identify if the photos they're  
3 showing as part of this Power Point are already  
4 identified as an exhibit to their Staff Report, I  
5 think that would be very helpful.

6 HEARINGS EXAMINER SHELTON: Okay. At this  
7 time, since you have interjected, I was going to wait  
8 until the introductory Power Point was provided, but I  
9 know the County and the Newells are represented by  
10 counsel.

11 So at this time, Ms. Lake, I think you're  
12 still un-muted. Would you please introduce yourself  
13 to the Hearings Examiner and to the proceedings today?

14 MS. LAKE: Thank you, Mr. Examiner.  
15 Carolyn Lake, Goodstein Law Group. I'm here on behalf  
16 of Matt and Kaylyne Newell, who are the Appellants.

17 HEARINGS EXAMINER SHELTON: Okay. Thank  
18 you, ma'am.

19 And, Mr. Owen, I think I see you on screen  
20 or do I?

21 MADAM CLERK: He's (inaudible).

22 MR. OWEN: Yes. Good afternoon, Mr.  
23 Examiner. David Owen, representing Pierce County.

24 And, with regard to the photos, I'd be  
25 happy to inquire, if you'd like, of the witness.

1 HEARINGS EXAMINER SHELTON: Okay. So at  
2 this point in time, this is just a presentation.

3 If I could ask preliminarily, are the --  
4 counsel, are you interested in providing opening  
5 statements? Mr. Owen, would there be an opening  
6 statement from the County?

7 MR. OWEN: I would -- I don't have an  
8 opening, Mr. Examiner. I would -- I would like a  
9 chance to provide a Closing Statement, maybe a  
10 discussion of whether there's any -- any post-hearing  
11 briefing. And I do have a few housekeeping matters,  
12 but they can certainly wait until after the  
13 presentation.

14 HEARINGS EXAMINER SHELTON: Okay. And then  
15 during the presentation would you be taking direct  
16 testimony from any of the witnesses or just simply  
17 allowing the witnesses on behalf of the County to  
18 testify on their own?

19 MR. OWEN: The only witness I'm aware of  
20 would be Mr. Hoffmann. I'm sure that his presentation  
21 will be thorough and adequate, but if I do have any  
22 follow-up questions after the presentation, I would  
23 like a chance to inquire.

24 I don't know if there are other folks who  
25 are hoping to testify, neighbors, or if Ms. Lake has

1 witnesses, I just don't know that, but I would like a  
2 chance to follow-up with anybody who does testify.

3 HEARINGS EXAMINER SHELTON: Okay. So at  
4 this point, he is essentially testifying as far as  
5 providing the opening.

6 As far as addressing individual photos and  
7 where they might be in the administrative record, did  
8 you want to do that during the presentation by -- by  
9 Mr. Hoffmann?

10 MR. OWEN: Well, that was my housekeeping  
11 matter and I guess I could just ask now. I would ask  
12 that the Staff Report with the accompanying exhibits  
13 be admitted as, you know, an exhibit to this -- to  
14 these matters or to these proceedings. And I don't  
15 know if Ms. Lake has any objections to that, but if  
16 you're willing to -- to admit that, I guess now would  
17 be the time for those objections.

18 HEARINGS EXAMINER SHELTON: So the motion  
19 will be for the Staff Report, which would include this  
20 introductory Power Point; is that correct?

21 MR. OWEN: Well, uh, I would ask that the  
22 Staff Report be admitted, along with the exhibits, be  
23 admitted as an exhibit, and then I guess the Power  
24 Point I would ask be admitted as a hearing exhibit.

25 And then I would ask Mr. Hoffmann, I'm not

1 asking it now, but I would ask Mr. Hoffmann if they  
2 are the same photos as was in the Staff Report that  
3 Ms. Lake received prior to this hearing.

4 HEARINGS EXAMINER SHELTON: Okay. And  
5 then, for clarification, the document that I believe  
6 you're referring to is the Staff Report. And I'm  
7 assuming that Ms. Lake has received this on behalf of  
8 the Newells. The Staff Report itself is noted as  
9 Exhibit 1, and then there are attachments to it  
10 through actually six. And then there's a revised  
11 Staff Report as Exhibit 5. So is your -- is your  
12 motion for admission for all six of the exhibits that  
13 have been previously numbered?

14 MR. OWEN: I -- I -- I would ask that  
15 everything be admitted as an exhibit, but to the -- to  
16 any extent it's already been identified as an exhibit,  
17 I would just ask that Ms. Lake has an opportunity to  
18 weigh-in on whether there's an objection to anything.

19 HEARINGS EXAMINER SHELTON: Oh, that was  
20 the next step in this proceeding, but I wanted to make  
21 sure I knew what you were moving to admit.

22 So any further comments, Mr. Owen?

23 MR. OWEN: No. Just the Staff Report,  
24 exhibits, and any -- any revised Staff Report and  
25 exhibits as well as the Power Point. Thank you.



1 HEARINGS EXAMINER SHELTON: Okay. Thank  
2 you, sir.

3 Ms. Lake, on behalf of the Newells, is  
4 there a response to the motion for admission to the  
5 Staff Report, which is actually Exhibit 1 and also 5,  
6 as revised, and then attachments, and the Power Point  
7 as a hearing exhibit?

8 MS. LAKE: Thank you, Mr. Examiner. I --  
9 let me approach it this way. I think we should  
10 reserve as far as the Power Point, since Appellants  
11 have not received a copy of it and I don't know what  
12 it contains, so I'm not in a position to comment on  
13 its admissibility. I don't think there's a difference  
14 between hearing exhibits and regular exhibits, so  
15 that's why I'd ask to reserve ruling on that.

16 And I have one clarification, and that  
17 -- or one clarifying question before I respond to  
18 whether I object or not. And that is that the  
19 Appellant provided to the Hearing Examiner and to the  
20 County's attorney its -- its response to the Staff  
21 Report, essentially a supplemental history of the  
22 property and the site, along with the accompanying  
23 exhibits. So I would have no objection to the  
24 County's Staff Report, contingent upon the County not  
25 having any objection to the material that we submitted

1 in response.

2 HEARINGS EXAMINER SHELTON: So, Ms. Lake,  
3 is there a motion to admit the history and  
4 attachments, dated February 17th, that was delivered  
5 -- filed and delivered to the Hearing Examiner's  
6 office yesterday afternoon? So is that motion before  
7 the Hearing Examiner?

8 MS. LAKE: It is, Your Honor. Thank you.

9 HEARINGS EXAMINER SHELTON: Okay. Thank  
10 you, ma'am.

11 Mr. Owen? Uh, Mr. Owen?

12 MR. OWEN: I have no -- oh, I'm sorry. Go  
13 ahead.

14 HEARINGS EXAMINER SHELTON: No, I now --- I  
15 can see you. You're on-line. Proceed, sir.

16 MR. OWEN: I -- I have no objection to the  
17 response.

18 I would like a chance to respond, maybe  
19 just in my closing. I think there were some -- some  
20 -- a few things incorrect as far as dates and times,  
21 but about (the rest of his sentence dropped off.)

22 HEARINGS EXAMINER SHELTON: I missed that  
23 last sentence, I think, Mr. Owen.

24 MS. LAKE: So did I.

25 MR. HOFFMANN: No objection. Am I -- am I

1 cutting out?

2 HEARINGS EXAMINER SHELTON: Yeah. A little  
3 bit, yes, sir.

4 MR. OWEN: Okay. I will stop my video.  
5 That may help.

6 HEARINGS EXAMINER SHELTON: Okay. Okay.  
7 So at this point in time, I will grant the County's  
8 motion to admit the Exhibits 1 through 6, 1 being the  
9 initial Staff Report, 5 being the revised, and also  
10 admit into evidence the essentially rebuttal and  
11 additional documents which in-filled a lot of the  
12 history which the Examiner appreciates, filed by Ms.  
13 Lake on behalf of the Newells. So those are now part  
14 of the public record.

15 As far as the introduction, introductory  
16 Power Point, I will at this point allow that as a  
17 hearing exhibit, just to set the stage, but  
18 recognizing that any documents that I will be relying  
19 upon in my decision would need to be contained in the  
20 exhibits that have been filed, moved and filed  
21 accordingly by both parties.

22 So at this time, Mr. Hoffmann, would you  
23 please proceed with just an introductory Power Point  
24 so everyone on-line has a general sense of what the  
25 concerns are in this matter today?

1 MR. HOFFMANN: Yes. Thank you, Mr.  
2 Examiner.

3 Next slide.

4 So the County staff has reviewed the  
5 administrative appeal and finds that the appeal should  
6 be denied and that the statements of (inaudible) and  
7 the Notice and Order to Correct dated June 25th, 2020,  
8 be upheld.

9 So this -- the slides are available to be  
10 reviewed later in the discussion here.

11 The meat of the matter really is the  
12 inquiry was regarding adding a new use to the site.  
13 Originally it was coming in that there was an  
14 expansion of the contractor's use on the site. And  
15 there was a letter from the County from the prior  
16 owners, the Malyons, in December of 2004, written to  
17 them from the County, granting non-conforming rights  
18 for a portion of the site to be a contractor yard.  
19 And the inquiry came -- the inquiries came in in March  
20 and September of 2019.

21 And the second one that was created, case  
22 inquiry 67725, still shows as its line inquiry about  
23 expansion of contractor's yard, but the issue came up  
24 that neighbors were inquiring about whether a new use  
25 has been entered to the site. So the County had

1 determined that indeed those large trucks that are  
2 lined up that are in the photo are more of a trucking  
3 operation, as defined in our code, than a contractor's  
4 yard, which is typically equipment that's in support  
5 of something like a landscape contractor or somebody  
6 that's doing preparation for home building and things  
7 like that. So there's a distinction between the two  
8 uses in our code.

9 So that sort of sets the stage for the  
10 -- the appeal. I'm open for questions.

11 HEARINGS EXAMINER SHELTON: At this time,  
12 Mr. Owen, did you have any follow-up questions of  
13 -- of Mr. Hoffmann, given that brief introduction and  
14 summary of the issues before the Examiner?

15 MR. OWEN: Yes, just a few. And, Mr.  
16 Hoffmann, do you have the zoning code with you? Are  
17 you able to --

18 MR. HOFFMANN: I do.

19 MR. OWEN: I'm sorry?

20 MR. HOFFMANN: Yes, I have it open.

21 MR. OWEN: Okay. And can you either read  
22 or describe the definition of the trucking use that  
23 you're talking about?

24 MR. HOFFMANN: Yes. I'll go down here to  
25 -- and this is Title 18A, zoning, .33.I, warehousing,

1 distribution, and freight movement.

2 "Warehousing, Distribution, and Freight  
3 Movement Use Type refers to the large scale  
4 warehousing and distribution of manufactured or  
5 processed products for one or more businesses, the  
6 large scale distribution of raw, manufactured, or  
7 processed products for one or more businesses at a  
8 central location, and the central dispatch and  
9 servicing of a delivery truck fleet, where no  
10 reloading (transfer facility), warehousing, or  
11 consolidation of materials takes place on site.  
12 Materials may be stored inside a building or in  
13 outdoor storage areas."

14 MR. OWEN: And just looking at the  
15 definition of a contractor yard, and because it is so  
16 short, maybe -- maybe you could read that off as well?

17 MR. HOFFMANN: You mean the -- in the use  
18 type levels?

19 MR. OWEN: Yeah, in 18.8.32.

20 MR. HOFFMANN: 33, okay. I'm scrolling up  
21 to that.

22 MR. OWEN: I believe it's --

23 MR. HOFFMANN: And this is capital B of  
24 this Subchapter. Under the heading "Contractor Yards.  
25 Contractor Yards Use Type refers to an area for

1 construction or contracting business offices, interior  
2 or outdoor storage, repair, or maintenance of heavy  
3 equipment, vehicles, or construction supplies and  
4 materials."

5 MR. OWEN: So, typically, when -- when  
6 there's a contractor yard, is that for storage of the  
7 contractor's own supplies and materials?

8 MR. HOFFMANN: Yes.

9 MR. OWEN: And would that include  
10 distribution of materials, for example, to other  
11 companies and other projects as a -- as like a  
12 subcontractor?

13 MR. HOFFMANN: It can.

14 MR. OWEN: Okay. And so if -- if there was  
15 say a -- I believe you said you saw dump trucks on the  
16 site?

17 MR. HOFFMANN: Uh, yes.

18 MR. OWEN: And so those were stored on the  
19 property and distributing whatever material, I don't  
20 know that we have any evidence of what the material  
21 is, but let's just say there's gravel, I don't know.  
22 Would that be, in your mind, a contractor yard or  
23 would that be more along the lines of warehouse  
24 -- warehousing, distribution, and freight movement?

25 MR. HOFFMANN: If the gravel in the trucks

1 is ancillary to a contracting business, then yes.

2 Typically a contractor yard is, to my  
3 understanding, is where they're involved in the  
4 project directly, they've been billed to come out and  
5 add fill to somebody's yard, let's say, to build it up  
6 to a little bit higher level and there -- this is  
7 where the equipment that they use lives on this site,  
8 and they have stockpiles of gravel on that site, and  
9 then they bring it out to their job sites with these  
10 particular dump trucks.

11 MR. OWEN: Would the distinction be that  
12 they are doing whatever follow-on activity with the  
13 material? In other words, if they were just  
14 delivering the material and that was the extent of the  
15 involvement, would that fall under the freight  
16 movement and distribution or would that still  
17 potentially be a contractor yard? In other words,  
18 does it need to be their job, their activity, on  
19 whatever site something is going to?

20 MR. HOFFMANN: It has been my understanding  
21 that you're not in business as a contractor yard just  
22 to deliver a product. You're doing something with the  
23 product. You're -- you're spreading it out, you're --  
24 you're creating something with it.

25 MR. OWEN: Okay. I just wanted to kind of



1 drill down a little bit into the distinction between  
2 the two.

3 And there was some mention earlier in the  
4 record of -- of an expansion of a non-conforming use.  
5 Does that have anything to do with why we're here  
6 today?

7 MR. HOFFMANN: Uh, that was an original  
8 inquiry that came in, but we are not hearing that  
9 matter today. It's about introducing a separate use,  
10 a new use to the site.

11 MR. OWEN: Okay. And -- and that use would  
12 be the distribution and freight movement?

13 MR. HOFFMANN: Right, with the large trucks  
14 that are noted in the photos.

15 MR. OWEN: Okay. And the photos in your  
16 Power Point, are those the same that were in the Staff  
17 Report provided to Appellant?

18 MR. HOFFMANN: Correct. They are.

19 MR. OWEN: And do you recall when you took  
20 those?

21 MR. HOFFMANN: December 24th, 2019.

22 MR. OWEN: And where were you when you took  
23 those photos?

24 MR. HOFFMANN: From the right-of-way of  
25 34th -- I don't have that in front of me. Is that

1 34th Street or Avenue? 34th Street.

2 MR. OWEN: Did you -- did you enter  
3 Appellants' property at all?

4 MR. HOFFMANN: I did not.

5 MR. OWEN: Okay. Are those photos modified  
6 in any way?

7 MR. HOFFMANN: The ones that I've shown are  
8 not. There was a request to take the same photos and  
9 lighten them. I think those will be introduced later  
10 in the -- in the hearing.

11 MR. OWEN: Oh, no, I don't -- I don't think  
12 any other photos are being introduced.

13 MR. HOFFMANN: Okay.

14 MR. OWEN: So -- and when you took those  
15 photos, did you observe any activity on the site?

16 MR. HOFFMANN: No.

17 MR. OWEN: Okay. Do you have any other  
18 observations that lead you to believe that this is a  
19 distribution, warehousing, freight movement use versus  
20 a contractor's yard?

21 MR. HOFFMANN: It was just my observation  
22 of the type of trucks sitting on this site.

23 MR. OWEN: Okay. And if the photos are a  
24 little hard to see, could you describe those trucks to  
25 us?

1           MR. HOFFMANN: Yeah. They seem to be sort  
2 of, well, obviously, a semi front. I'm not sure of  
3 their exact gross vehicle weight. That's why I said  
4 18 GVW or bigger. These look bigger. And I'm not  
5 sure of the terminology of, you know, from one truck  
6 to another, because I'm not in that business, but they  
7 seem to be very long, over, you know, 20 to 30-ish  
8 feet long. And they have sort of a metal C shape, I  
9 think, I believe, with an open top. I can't see from  
10 down low where I was but, you know, long and big  
11 enough to be carrying some sort of aggregate.

12           MR. OWEN: And in the Staff Report you  
13 provided a few print-outs of maybe some U.S.  
14 Department of Transportation company descriptions.  
15 Can you describe what -- what you found doing some  
16 research? Did that bolster your opinion?

17           MS. LAKE: Excuse me, if -- can I ask that  
18 if you're referring to an exhibit in the Staff Report,  
19 it be identified, as a courtesy?

20           MR. OWEN: Absolutely. And I'm sorry.

21           MS. LAKE: Thanks.

22           MR. OWEN: With regard to Staff Report  
23 Exhibits I through P -- and, if Counsel prefers, we  
24 can just look at each one independently -- did those  
25 contribute to your opinion on the use?

1 MR. HOFFMANN: Let's see, um, I had that up  
2 just a minute ago with the exhibits. So these are the  
3 exhibits where there was a website advertising or  
4 noting the business.

5 HEARINGS EXAMINER SHELTON: Just for  
6 clarification, these are all contained, it would be my  
7 understanding, in the County's Exhibits 3A and 3B; is  
8 that correct, or at least in overall Exhibit 3?

9 MR. OWEN: Yes. These would be Exhibits 3I  
10 through P. And, I'm sorry, I neglected to say 3  
11 earlier.

12 HEARINGS EXAMINER SHELTON: Yeah, that -- I  
13 made the assumption correctly then. Thank you.  
14 Please proceed then, Mr. Hoffmann.

15 MR. HOFFMANN: I'm pulling those up too.  
16 Give me just a moment here. Yeah, so Exhibits I  
17 through P?

18 MR. OWEN: Yes.

19 MR. HOFFMANN: Yeah, so it's been a few  
20 days since I've looked at these. One of these was,  
21 um, noting a contractor's license. And there's  
22 another website that was advertising Newell Brothers  
23 Trucking. And the common theme is they seem to be  
24 using the word (inaudible). So it sort of lent itself  
25 to (inaudible) for a delivery business.

1 MR. OWEN: Okay. I understand.

2 MS. LAKE: I apologize. My audio cut-off.  
3 So I heard "used the word," and I didn't hear  
4 anything.

5 MR. OWEN: Mine did too. Mr. Hoffmann, can  
6 you repeat the answer? I'm sorry.

7 MR. HOFFMANN: Okay. When I looked at  
8 these websites, some of them were from like Washington  
9 State Labor. It had a registration number and it was  
10 listing them as Newell Brothers Trucking. In Exhibit  
11 O it said Newell Brothers Trucking. Maybe that's the  
12 one I was referring to. And then some were  
13 advertising the company that's in business. And there  
14 was some U.S. Department of Transportation  
15 registration numbers.

16 And, again, on some of these they were  
17 listed as a trucking company. So that's what lent  
18 myself to believe that the business is more involved  
19 in delivery fleet trucking and using this site to kind  
20 of perch and park the trucks between deliveries and  
21 not really what you think of associated with a  
22 contractor's yard.

23 MR. OWEN: Okay, I understand.

24 And did you have an opportunity to review  
25 the materials provided by Appellant, by Ms. Lake, just

1 I think yesterday?

2 MR. HOFFMANN: I did read through them,  
3 yes, see what they were. I didn't have time to read  
4 each one in full detail.

5 MR. OWEN: Okay. And did the -- there were  
6 a few letters provided. Were you -- let's see, one  
7 from, I think it's -- their Exhibit A-32 and their  
8 Exhibit A-34, a letter from a Pacific Civil &  
9 Infrastructure, as well as a letter from Northwest  
10 Cascade. Did you review those letters?

11 MR. HOFFMANN: I did not word-for-word.

12 HEARINGS EXAMINER SHELTON: Excuse me. If  
13 I could interject.

14 MR. HOFFMANN: I'm trying to pull it out.

15 HEARINGS EXAMINER SHELTON: It would be  
16 Exhibits -- attachments to the Newell presentation  
17 under 31 and 32. Mr. Hoffmann?

18 MADAM CLERK: I don't think he has them.

19 HEARINGS EXAMINER SHELTON: Mr. Hoffmann,  
20 do you have --

21 MR. HOFFMANN: No, I don't have it.

22 MR. OWEN: That's okay. If -- perhaps if  
23 they're presented, then I can ask a follow-up  
24 question.

25 It sounds like Mr. Hoffmann has not had a

1 chance to review those, so that's okay.

2 At this point I don't have any other  
3 questions for Mr. Hoffmann. Thank you.

4 HEARINGS EXAMINER SHELTON: Okay. Mr.  
5 -- Mr. Hoffmann, did you have any follow-up comments  
6 you'd like to make that you may have thought of just  
7 now or may have been triggered by Mr. Owen's questions  
8 to -- to finish off your Staff Report?

9 MR. HOFFMANN: Nothing at the moment.  
10 Thank you.

11 HEARINGS EXAMINER SHELTON: Okay. Thank  
12 you, sir.

13 Ms. Lake, did you have any questions of Mr.  
14 Hoffmann on essentially Cross Examination?

15 MS. LAKE: (No answer).

16 HEARINGS EXAMINER SHELTON: I'm sorry, Ms.  
17 Lake, did you hear me, ma'am?

18 MS. LAKE: (No answer).

19 It's that phrase we've come to know so  
20 well, "I'm on mute".

21 HEARINGS EXAMINER SHELTON: Did you -- did  
22 you hear my question, whether or not you had any  
23 questions on essentially Cross Examination of -- of  
24 Mr. Hoffmann?

25 MS. LAKE: I do. Thank you.

1 HEARINGS EXAMINER SHELTON: Okay. Please  
2 proceed.

3 MS. LAKE: Thank you. Thank you, Mr.  
4 Hoffmann. Can you turn to County's Exhibit 3E,  
5 please?

6 MR. HOFFMANN: County's Exhibit 3?

7 MS. LAKE: 'E'.

8 MR. HOFFMANN: Is this in what we provided  
9 in our exhibits?

10 MS. LAKE: It is.

11 MR. HOFFMANN: Okay. I had that open.

12 MS. LAKE: Sure.

13 MR. HOFFMANN: It's going to take me a  
14 moment to --

15 MS. LAKE: If it helps, it's a letter  
16 signed by you, dated January 6, 2020, if that helps  
17 you find it.

18 MR. HOFFMANN: January 6th, 2020?

19 MS. LAKE: Um hum.

20 MR. HOFFMANN: Okay. And this one  
21 -- January 6th, 2020, to Mathew and Kaylyne Newell?

22 MS. LAKE: Correct. Do you recognize this  
23 exhibit?

24 MR. HOFFMANN: Um hum.

25 MS. LAKE: Do you recognize this exhibit?



1 MR. HOFFMANN: Yes.

2 MS. LAKE: And I'm going to draw your  
3 attention to the bottom of the page. And in your  
4 letter you make two different descriptions. Right?  
5 You do -- you include the description from the code  
6 regarding contractor's yards; is that correct?

7 MR. HOFFMANN: Um hum.

8 MS. LAKE: And then, followed by that, you  
9 include language from actually the code and which  
10 describes warehousing, distribution, and freight  
11 movement. Correct?

12 MR. HOFFMANN: Um hum. Correct.

13 MS. LAKE: Okay. And it's helpful that you  
14 provided these explanatory notes under each of those  
15 described uses. Do you recall that, those notes?

16 MR. HOFFMANN: I have them up, yes.

17 MS. LAKE: Okay. And so -- and it's true  
18 that you've described contractor's yards as -- under  
19 your explanatory note, can you read what the key  
20 significant aspects are that you described there?

21 MR. HOFFMANN: I'll read the explanatory  
22 note under contractor yard.

23 MS. LAKE: Thank you.

24 MR. HOFFMANN: Yeah. "The key difference  
25 with truck use in this category is to support the

1 delivery of construction materials used in conjunction  
2 with specific construction projects."

3 MS. LAKE: So if the trucks used on-site  
4 were used in this way for delivery of construction  
5 materials used in construction -- in conjunction with  
6 specific construction projects, you would agree it  
7 would fit the contractor yard use. Correct?

8 MR. HOFFMANN: Correct.

9 MS. LAKE: And then, conversely, on page  
10 two of your letter, Exhibit 3E, you include an  
11 explanatory note for the fleet use; is that right?

12 MR. HOFFMANN: Correct.

13 MS. LAKE: And can you read that, please?

14 MR. HOFFMANN: "Delivery trucks within this  
15 category involve delivery/distribution of materials,  
16 raw or processed, from one vendor to another."

17 MS. LAKE: Okay. Thank you. So, as I  
18 listened to the questions from Mr. Owen, your  
19 attorney, let's see, it was -- and in your -- and in  
20 your Direct testimony, you indicated that you  
21 determined that the Newell truck use fell into the  
22 freight movement, based upon observing the parked  
23 vehicles. Is that -- was that your testimony?

24 MR. HOFFMANN: Correct.

25 MS. LAKE: So when you observed the parked

1 vehicles, could you tell whether they had been used to  
2 deliver materials to a construction yard?

3 MR. HOFFMANN: Could not tell that, no.

4 MS. LAKE: Could you tell whether they had  
5 been used to deliver materials, raw or processed, from  
6 one vendor to another?

7 MR. HOFFMANN: Could not tell that.

8 MS. LAKE: Thank you.

9 Prior to your enforcement action, Mr.  
10 Hoffmann, did you do research on the history of the  
11 site?

12 MR. HOFFMANN: Yes.

13 MS. LAKE: And, in fact, it's included in  
14 your Staff Report that this site has a history of a  
15 non-conforming use. Correct?

16 MR. HOFFMANN: Correct.

17 MS. LAKE: And what would you describe that  
18 non-conforming use as?

19 MR. HOFFMANN: It's described in County  
20 Planner Stefan Kamieniecki's letter at the time from  
21 December of 2004. And I don't -- excuse me, I don't  
22 have the letter up in front of me, but he granted  
23 non-conforming use of a contractor yard.

24 HEARINGS EXAMINER SHELTON: And for our  
25 references today, that's -- if I could just --

1 MS. LAKE: And were you aware that the  
2 contractor -- oh.

3 HEARINGS EXAMINER SHELTON: Ms. Lake? I'd  
4 like to just clarify that --

5 MS. LAKE: Um hum, yes.

6 HEARINGS EXAMINER SHELTON: -- Mr.  
7 Hoffmann, that would be my understanding. It's a  
8 December 13th, 2004 letter to the Malyons from Mr.  
9 Kamieniecki. Is that the one you're referring to?

10 MR. HOFFMANN: (No answer).

11 HEARINGS EXAMINER SHELTON: You're frozen  
12 in time.

13 MS. LAKE: Was that a question of -- was  
14 that a question to me or Mr. Hoffmann?

15 HEARINGS EXAMINER SHELTON: Oh, I was  
16 asking Mr. Hoffmann because he's -- he's --

17 MS. LAKE: Thank you.

18 HEARINGS EXAMINER SHELTON: Is that -- Ms.  
19 Lake, is that the letter that you were referring to?

20 MS. LAKE: It is, Your Honor. It's  
21 included as Exhibit A2.

22 HEARINGS EXAMINER SHELTON: Yeah. That's  
23 included as Exhibit 3A is my understanding. So I know  
24 we're all literally on the same page.

25 MS. LAKE: Um hum.

1 HEARINGS EXAMINER SHELTON: Okay. Mr.  
2 Hoffmann, we have that under 3A. Please proceed.

3 MR. HOFFMANN: Excuse me, 3A?

4 HEARINGS EXAMINER SHELTON: That's the  
5 exhibit number for the letter dated December 13th that  
6 Ms. Lake is addressing, I think. I just want to  
7 confirm that with you.

8 MS. LAKE: That's correct.

9 MR. HOFFMANN: The letter to the Malyons,  
10 the prior owner?

11 HEARINGS EXAMINER SHELTON: On  
12 December 13th, 2004.

13 MR. HOFFMANN: Yes.

14 HEARINGS EXAMINER SHELTON: Good. Please  
15 proceed.

16 MR. HOFFMANN: And I'm going to, excuse me,  
17 read the letter?

18 MS. LAKE: Oh, not necessary.

19 MR. HOFFMANN: Oh.

20 MS. LAKE: But we do -- you do agree that  
21 it established a non-conforming use of a contractor  
22 yard use, correct?

23 MR. HOFFMANN: Correct.

24 MS. LAKE: Okay. And could I then ask you  
25 to turn to Exhibit -- this would be Appellants'

1 Exhibit 28. Do you have a copy of that? If not, I  
2 can screen-share that.

3 MR. HOFFMANN: Can you screen-share it,  
4 please?

5 MS. LAKE: Sure. Let me see if I have  
6 permission. I do. Okay. Hang on one second. They  
7 didn't teach us this in law school.

8 Oh, there we go. Okay. Are you able to  
9 see? Not yet?

10 MR. HOFFMANN: Uh, no.

11 MS. LAKE: Okay. Hold on.

12 MR. HOFFMANN: Now I see it.

13 MS. LAKE: There you go. Okay. Thank you.

14 HEARINGS EXAMINER SHELTON: So, just for  
15 reference, what exhibit is that?

16 MS. LAKE: All right. Thank you, Mr.  
17 Examiner. This is part of the Exhibit 6, admitted,  
18 and it's under Tab 28.

19 HEARINGS EXAMINER SHELTON: Thank you,  
20 ma'am.

21 MS. LAKE: Um hum.

22 So -- so, Mr. Hoffmann, do you see that  
23 this is signed by Boyd Malyon, who has been identified  
24 as the prior owner of the property at the time that  
25 the grandfathered use status was approved. And do you

1 see that the paragraph three? Mr. Malyon is stating  
2 that the work that he did on-site included, but was  
3 not limited to, storing dump trucks to haul materials  
4 in support of construction projects.

5 MR. HOFFMANN: Yes, I see that.

6 MS. LAKE: Okay. And would you agree that  
7 that activity is part of a construction yard use?

8 MR. HOFFMANN: Yeah, that would be in  
9 keeping with contractor yard, dump trucks, hauling  
10 materials in support of construction projects.

11 MS. LAKE: Okay. Thank you.

12 Could I next have you take a look at -- and  
13 I'll screen-share this as well -- we're going to move  
14 to Exhibit 6, Appellants' materials, Tab No. 32. And  
15 are you able to see the letter before you?

16 MR. HOFFMANN: Yes.

17 MS. LAKE: On the screen?

18 MR. HOFFMANN: Um hum.

19 MS. LAKE: Which is Exhibit 13. Okay. All  
20 right.

21 I'll let you take a minute to read that  
22 letter.

23 MR. HOFFMANN: There are some items on the  
24 right blocking. I'm trying to move my screen to the  
25 left.

1 MS. LAKE: Is that covered?

2 MR. HOFFMANN: Yeah, a little bit. The  
3 Zoom is overlapping it a bit.

4 "I'm the owner of Pacific Civil &  
5 Infrastructure, Inc."

6 "... the last 5 years on a variety of  
7 projects..."

8 "Their work on the above listed projects  
9 consisted of dump trucking services including hauling  
10 aggregates and exporting dirt in and out of jobsites.  
11 Newell Brothers provides construction trucks and  
12 trailers and side dumps with experienced construction  
13 job drivers who understand the complexities of such  
14 job sites. PCI engages Newell Brothers' services for  
15 these specific job duties."

16 Yes, I have read the letter.

17 MS. LAKE: Okay. And would you agree that  
18 the activity described in this letter fits the  
19 description of a contractor yard use?

20 MR. HOFFMANN: From what they are  
21 describing in the letter, it sounds like there's  
22 specific jobs that the -- the dump -- the trailers and  
23 side dumpsters -- they call them side dumps -- with  
24 experience, yeah, that the trucking mentioned in the  
25 letter is in support of a project, construction



1 project or projects.

2 MS. LAKE: Well, you would agree that  
3 that's contractor yard use, correct?

4 MR. HOFFMANN: That would fit under a  
5 contractor yard use, yes.

6 MS. LAKE: Can I have you take a look at --  
7 open up the next exhibit. It's under Appellant 6- Tab  
8 No. 34. I'll give you a minute to read that one.

9 MR. HOFFMANN: Okay. Um, yeah. I'll  
10 scroll down a bit.

11 "To Whom It May Concern: My name is Clint  
12 Myers and I am the Vice-President of Construction..."

13 "NWC has completed dozens of projects with  
14 Newell Brothers in the past 5+ years. They are a dump  
15 truck company in the business of importing aggregates  
16 and hauling direct in/out of project sites all over  
17 the south Puget Sound area. Newell Brothers drivers  
18 are experienced in the specific nature of heavy/civil  
19 constructions sites, as this is the only type of work  
20 that they have ever performed for us. Newell Brothers  
21 only operates dump truck/trailers and side dump trucks  
22 that are specifically designed for this type of dirt  
23 work."

24 Yes, I've read the letter.

25 MS. LAKE: Okay. Would you agree that the

1 activity described in this letter, performed by Newell  
2 Brothers, fits the -- the contractor yard use?

3 MR. HOFFMANN: Because they are providing  
4 aggregate goods to specific job sites, yes.

5 MS. LAKE: Mr. Hoffmann, do you have any  
6 evidence in your exhibits or in your testimony or in  
7 your possession that the Newell Brothers' trucks  
8 involved, quote, "delivery of distributions from one  
9 vendor to another"?

10 MR. HOFFMANN: No, I do not have any  
11 evidence to that effect.

12 MS. LAKE: Let me look through my notes.  
13 Mr. Examiner?

14 HEARINGS EXAMINER SHELTON: Yes, ma'am.

15 MS. LAKE: At this point -- I'm going to  
16 stop sharing. At this point I have no further  
17 questions for Mr. Hoffmann, but may have. If the  
18 County has completed its information, then I believe  
19 it's appropriate at this time for a half-time  
20 -- half-time motion to grant --

21 MR. OWEN: I do have some follow-up  
22 questions.

23 HEARINGS EXAMINER SHELTON: Yes, I was  
24 going to provide for that. I think Ms. Lake was  
25 certainly acknowledging that might be the next step.

1 So prior to any preliminary motions or half-time  
2 motions, Mr. Owen, please proceed.

3 MR. OWEN: Thank you, Mr. Examiner.

4 So, Mr. Hoffmann, and I'm glad that we got  
5 a chance to look at those letters and the Declaration  
6 and -- and this does really go to the heart of the  
7 appeal here today.

8 Looking at what is described in those  
9 letters, and then looking at the definition of  
10 contractor yard use type, which you earlier read to be  
11 an area for construction or contracting business  
12 offices, interior, or outdoor storage, repair, or  
13 maintenance of heavy equipment, vehicles, or  
14 construction supplies and materials. So it's a place  
15 for storage, repair, or maintenance. And it -- and it  
16 sounds like, from those words, the activity going on  
17 is delivery of materials to a job site. And so I'm  
18 confused -- and I know you just saw these today, but  
19 I'm confused as to how that can be considered a  
20 contractor yard use --

21 MR. HOFFMANN: (Inaudible).

22 MR. OWEN: -- as opposed to distribution  
23 and freight movement, which it sounds like that's what  
24 they do. Do you need some time to -- to have a look  
25 at those letters again? I know that you just saw them

1 really today for the first time.

2 MR. HOFFMANN: Um, this is directed at me?

3 MR. OWEN: Yes.

4 MR. HOFFMANN: Yeah. Because a  
5 contractor's yard is typically where the materials  
6 emanate, begin at that site. I mean, they have to  
7 arrive on-site from somewhere else originally, but a  
8 contractor yard will typically order, you know, like  
9 150 cubic yards of gravel. It will sit on their site  
10 in a pile. And then they will go to specific job  
11 sites with 1- or 2-ton trucks and work on specific  
12 projects.

13 MR. OWEN: And -- and when you say  
14 "specific projects," the fact that it's a specific  
15 project, but for another company, that doesn't change  
16 your analysis of whether they're simply distributing  
17 materials to other companies rather than contractors  
18 storing their own materials?

19 MR. HOFFMANN: The contractor yard use  
20 allows the outdoor storage of materials, but you could  
21 -- you could have a contractor yard that has trucks  
22 that's engaged in specific projects and that they  
23 transport the material to the job site. So I guess  
24 necessarily the -- the aggregates would not need to  
25 originate from a pile stored on that site, but the

1 contractor yard use allows that ability.

2 MR. OWEN: So if a company had a fleet of  
3 trucks transporting materials one -- let's say one  
4 particular type of, you know, fill dirt or gravel to  
5 multiple job sites across, let's say Western  
6 Washington, for different contractors for different  
7 jobs, not the company's own jobs, that doesn't change  
8 your conclusion?

9 MR. HOFFMANN: Again, if they're -- if they  
10 are taking aggregates to other subcontractors, then  
11 they are really only performing a delivery business.

12 MR. OWEN: And so when you read the letter  
13 from, sorry, Pacific Civil & Infrastructure and a  
14 letter from Northwest Cascade saying that they're a  
15 dump truck company in the business of importing  
16 aggregates and hauling dirt in and out of the project  
17 sites all over the Puget Sound area, wouldn't that fit  
18 with what you were just saying, that that would not be  
19 a contractor's yard? In fact, just a delivery  
20 service?

21 MS. LAKE: Objection to the form of the  
22 question; misstates the testimony.

23 HEARINGS EXAMINER SHELTON: Okay. Restate,  
24 Mr. Owen, please.

25 MR. OWEN: Having read those letters from

1 other contractors, why would that not be a delivery  
2 service rather than a contractor's yard?

3 MR. HOFFMANN: It would have to be shown  
4 that the business, the delivery business, the people  
5 that are delivering a product are also involved in the  
6 -- the project itself.

7 So if they were building a revetment next  
8 to a freeway, well, they would have -- they would have  
9 to be involved with that specific job of constructing  
10 the gravel and, you know, you know, it's their -- it's  
11 their job, so to speak.

12 MR. OWEN: And so if their job was limited  
13 to hauling aggregates and exporting dirt in and out of  
14 job sites, would that be more of a delivery or a  
15 contractor?

16 MR. HOFFMANN: In that specific instance it  
17 would fit under more a fleet delivery operation.

18 MR. OWEN: Well, and that's -- again, I  
19 want to acknowledge, you've only just seen these  
20 letters, but that's what the Pacific Civil &  
21 Infrastructure letter says that they do. Um --

22 MR. HOFFMANN: It's a fine distinction,  
23 yeah.

24 MS. LAKE: Objection.

25 MR. OWEN: And so maybe having had more

1 time to digest the fact that they simply haul material  
2 to other people's job sites, does that change your  
3 characterization of this land?

4 MR. HOFFMANN: If -- if that's all they  
5 were doing, and that wasn't real clear to me in the  
6 letter, then it would be fleet truck distribution,  
7 correct.

8 MR. OWEN: And I'll just read the pertinent  
9 part of the Northwest Cascade letter. "They are a  
10 dump truck company in the business of importing  
11 aggregates and hauling dirt in/out of project sites  
12 all over the south Puget Sound area."

13 From what I can see, that's -- well, they  
14 go on to say "this is the only type of work they have  
15 ever performed for us." In other words, that's all  
16 they did.

17 So, in that case, would you consider it to  
18 be a -- forgive me -- warehousing, distribution, and  
19 freight movement use?

20 MR. HOFFMANN: Yeah. I'm digesting it  
21 further. Again, this is the first morning that I've  
22 read the letters in-depth and I did glance at them  
23 when they were sent earlier. But, yeah, if all the  
24 business is doing is delivering the aggregates and  
25 they're -- they're not part of the whole construction

1 project, then that's a delivery business, correct, not  
2 contractor yard.

3 MR. OWEN: Okay. And then looking at Mr.  
4 Malyon's -- I'm sorry if I -- I don't know how to say  
5 that name, Malyon, his Declaration. And he states  
6 that he stored and used dump trucks to haul materials  
7 to support construction projects.

8 Is that enough information to make a  
9 determination of the use?

10 MR. HOFFMANN: "To support construction  
11 projects," so he's supporting other people's  
12 construction projects is -- is how that could be read.  
13 Correct?

14 HEARINGS EXAMINER SHELTON: Oh, could we  
15 reference that exhibit number again, please?

16 MR. HOFFMANN: Yeah. I'll pull it up.

17 MR. OWEN: Appellants' Exhibit 28 -- tab  
18 28.

19 HEARINGS EXAMINER SHELTON: Thank you, sir.

20 MR. OWEN: And I'm sorry I didn't say that  
21 up front.

22 So I guess my question was, and I'm not  
23 -- is that enough information to go on to make a  
24 determination in that particular Declaration?

25 MR. HOFFMANN: Yeah, it doesn't really



1 provide enough information.

2 MR. OWEN: Okay.

3 MR. HOFFMANN: Yeah, in my opinion.

4 MR. OWEN: But the other letters that  
5 clarify that that is the only work that is done, the  
6 -- does that bolster your determination that this is  
7 an unlawful warehousing, distribution, freight  
8 movement use?

9 MR. HOFFMANN: Yes, it does, when you point  
10 out that specific language.

11 MR. OWEN: Okay. And did you see any other  
12 evidence that would lead you to a contrary conclusion?

13 MR. HOFFMANN: No.

14 MR. OWEN: Okay. And then that's all of  
15 the questions I have. Thank you.

16 HEARINGS EXAMINER SHELTON: Okay. Thank  
17 you, Mr. Owen.

18 Based on those questions and answers, Ms.  
19 Lake, did you have any follow-up on re -- re -- Cross  
20 Examination?

21 MS. LAKE: I do. Thank you, Mr. Examiner.  
22 Mr. Hoffmann, do you know Steve Kamieniecki?

23 MR. HOFFMANN: I do.

24 MS. LAKE: Do you believe him to do  
25 thorough work in his planning activities?

1 MR. HOFFMANN: Yes.

2 MS. LAKE: Do you believe that when he  
3 wrote the letter, which is an exhibit under  
4 Appellants' exhibits, it's Exhibit 6- Tab 2. It's the  
5 December 23rd -- excuse me, it's the -- yeah,  
6 December 14th, 2004, letter in which he grants  
7 non-conforming use status for a contractor yard.

8 Do you believe that he thoroughly  
9 investigated the Malyons' use of the property before  
10 he wrote that letter?

11 MR. HOFFMANN: I cannot speak of that, due  
12 to the letter's age. I don't know what he looked  
13 -- what evidence he looked at.

14 MS. LAKE: Well, do you have any reason to  
15 doubt the Declaration by Boyd Malyon, that the use  
16 that he was undertaking was a dump truck use,  
17 delivering materials to construction sites?

18 MR. HOFFMANN: I have no reason to think  
19 otherwise.

20 MS. LAKE: Thank you. And then do you have  
21 any reason to believe that Mr. Kamieniecki's  
22 investigation in 2004, when he said that what you're  
23 doing is illegal non-conforming use is not correct?

24 MR. HOFFMANN: I did not see Mr.  
25 Kamieniecki's Declaration at that time.

1 MS. LAKE: No, that's not my question.  
2 I'll try to make it a little bit clearer.

3 Do you -- do you believe that Mr.  
4 Kamieniecki thoroughly investigated what uses were  
5 on-site at the time he wrote the letter --

6 MR. HOFFMANN: Oh.

7 MS. LAKE: -- granting the non-conforming  
8 use status for contractor yard?

9 MR. HOFFMANN: I can't see, again, what he  
10 looked at, but he's a very thorough planner. I have  
11 no reason to doubt that he did not do that.

12 MS. LAKE: Thank you.

13 So I need to go back to your words that  
14 appear on Exhibit 3E. That's your -- again, that's  
15 back to your January 6th, 2020, letter.

16 MR. HOFFMANN: Um hum.

17 MS. LAKE: It's a letter of inquiry that  
18 you sent to the property owner.

19 Was the intention of your explanatory notes  
20 under each one of those description of uses, was that  
21 intended to give guidance to the property owners, so  
22 that whatever is written in the code is made a bit  
23 clearer?

24 MR. HOFFMANN: Correct.

25 MS. LAKE: And do you believe your

1 explanatory notes to be accurate?

2 MR. HOFFMANN: Yes.

3 MS. LAKE: So when I look at Exhibit 3E on  
4 the first page, with your explanatory note under the  
5 contractor yard, when it says "The key difference with  
6 truck use in this category is to support the delivery  
7 of construction materials used in conjunction of  
8 specific construction projects," I'm not seeing -- I'm  
9 seeing that you are talking about how the truck is  
10 used to deliver pro -- products in support of a  
11 construction project. I don't see any words there  
12 that say and then you have to get out and actually  
13 construct on that project.

14 MR. HOFFMANN: Correct. It could have been  
15 clearer or gone on to say that too.

16 MS. LAKE: You think that's what's  
17 required?

18 MR. HOFFMANN: I'm going off of what  
19 historically the County has been billing as contractor  
20 yards as a use type.

21 MS. LAKE: What is the -- Mr. Hoffmann, in  
22 your experience as a Planner, are you familiar with  
23 general contractors and subcontractors?

24 MR. HOFFMANN: Yes, to a certain degree.  
25 I'm not in the construction industry, but --

1                   HEARINGS EXAMINER SHELTON: One moment,  
2 please. Ms. Lake, do you anticipate much more time  
3 for Mr. Hoffmann? Because, if so, we need to change  
4 the -- the disk. We're right at the end of the first  
5 disk. So if you could wrap this up in about  
6 30 seconds, I'd say go ahead. If not, we'll take a  
7 short recess to reset the -- the recording. So --

8                   MADAM CLERK: She can have five minutes.

9                   MS. LAKE: Thank you. I think we'll need  
10 to reset.

11                  MADAM CLERK: She can have five minutes.

12                  HEARINGS EXAMINER SHELTON: Yeah, you have  
13 five minutes, if you'd like that, or we can just reset  
14 right now.

15                  MS. LAKE: I -- we should probably reset.  
16 Thank you.

17                  HEARINGS EXAMINER SHELTON: Okay. Thank  
18 you, ma'am. So we'll take a short recess. The  
19 recording equipment is off as we're changing disks.

20   (End of disk one.)

21   (Beginning of disk two.)

22                  HEARINGS EXAMINER SHELTON: Okay. We're  
23 back on the record and there had been an  
24 acknowledgment by Kathleen that we've -- some  
25 individuals were not muted. I would assert that we

1 have not heard anything but, please, unless you're  
2 actually speaking, make sure you are on mute.

3 It also gave me an opportunity to -- to  
4 address an issue briefly. Mr. Hoffmann had provided  
5 some testimony on items from the Appellants' exhibits.  
6 Mr. Owen then had an opportunity to pursue Mr.  
7 Hoffmann's testimony a bit and essentially clarify it.  
8 That was, frankly, a bit unusual for clarification of  
9 testimony, but also Mr. Owen was essentially providing  
10 some leading questions to Mr. Hoffmann. I've given  
11 great latitude in that and, frankly, will continue to  
12 do so, if need be, if there's any testimony from --  
13 based on the Appellants' notebook from individuals.

14 Certainly, Mr. Hoffmann has not had a  
15 previous chance to review it, because although the  
16 Hearing Examiner code requires that Appellant  
17 documents be filed at least five days prior to  
18 hearing, which would give the County an opportunity to  
19 review it and -- and to determine what approach to  
20 take, these were just provided yesterday afternoon.

21 There's been no objection by the County,  
22 because the County certainly wanted to make sure that  
23 this case proceeds timely, since it's been continued a  
24 couple of times and I felt the same way. But just  
25 some latitude there, if this is the first opportunity

1 for a witness to observe certain documents. So I  
2 wanted to make a record of that.

3 And now, Ms. Lake, if you'd like to  
4 continue questioning Mr. Hoffmann on a re-examination,  
5 looking at the, essentially the -- Mr. Hoffmann's  
6 memory regarding the historical approach to  
7 contractor's yard. So, Ms. Lake, please proceed.

8 MS. LAKE: Thank you, Mr. Examiner.

9 So I think we're at the point, Mr.  
10 Hoffmann, where I was asking you about a general  
11 versus a subcontractor; is that correct?

12 MR. HOFFMANN: Correct.

13 MS. LAKE: And is a general -- let me ask  
14 it a different way.

15 Is every -- in your experience as a  
16 Planner, do all subcontractors do physical work on the  
17 site or do they -- can they contribute to a  
18 construction project by delivering materials to the  
19 site?

20 MR. HOFFMANN: They can contribute to a  
21 project, yes.

22 MS. LAKE: A subcontractor can?

23 MR. HOFFMANN: Yeah. There's usually a  
24 general contractor and then subs that are hired for  
25 specific parts of projects.

1 MS. LAKE: And is delivery of aggregate  
2 used as part of a construction project? That would be  
3 a fair thing for what a subcontractor does, correct?

4 MR. HOFFMANN: Correct.

5 MS. LAKE: And you'd agree that the work  
6 described in Northwest Cascade's letter and in the  
7 Pacific Civil & Infrastructure letter, which are  
8 Appellants' Exhibits 6- Tab 32, and 6- Tab 34,  
9 describe subcontractor work. Correct?

10 MR. HOFFMANN: Correct.

11 MS. LAKE: Do you know Dan Buhl, Mr.  
12 Hoffmann?

13 MR. HOFFMANN: I do.

14 MS. LAKE: And -- and who is he and how do  
15 you know him?

16 MR. HOFFMANN: He is a Senior Planner with  
17 our current planning section. So I work in the same  
18 office with him.

19 MS. LAKE: And he would be familiar with  
20 administering the contractor yard code. Correct?

21 MR. HOFFMANN: Correct.

22 MS. LAKE: So I'm going to do another  
23 screen share here and refer to Appellants' Exhibit  
24 -- it's Exhibit 6, under tab 7. And this is an  
25 exhibit that's been admitted.



1           Do you see the -- I'll direct your  
2 attention to first, you know, e-mail strings, they  
3 start with current.

4           MR. HOFFMANN: Um hum.

5           MS. LAKE: And then they go backwards.

6           So do you recognize this as Dan Buhl's  
7 Pierce County Planning e-mail address?

8           MR. HOFFMANN: Are you showing it on the  
9 screen?

10          MS. LAKE: Oh, shoot I am. I'm showing it  
11 to myself only. I'll screen share. Here we go, a  
12 little bit of a lag.

13          MR. HOFFMANN: Okay. I see it.

14          MS. LAKE: Okay. And do you recognize that  
15 as the typical Associate Planner signature block  
16 e-mail from Dan Buhl?

17          MR. HOFFMANN: Correct. He is now a Senior  
18 Planner, not an Associate Planner, but that's the only  
19 difference. We're using a little bit different  
20 signature now under the COVID, but that is it. That's  
21 him.

22          MS. LAKE: Okay. Have you had an  
23 opportunity to take a look at this e-mail?

24          MR. HOFFMANN: I have not read it  
25 word-for-word, but I will do that right now, if you

1 wish.

2 HEARINGS EXAMINER SHELTON: And you do not  
3 need to read it out loud, sir.

4 MR. HOFFMANN: Okay, sorry.

5 HEARINGS EXAMINER SHELTON: Okay.

6 MS. LAKE: True.

7 MR. HOFFMANN: Okay. I've read the e-mail.

8 MS. LAKE: Okay. And I will -- okay.

9 Now, are you able to see Mr. Buhl's, Dan Buhl, Pierce  
10 County Planner's reply?

11 MR. HOFFMANN: I can see it.

12 MS. LAKE: Okay.

13 MR. HOFFMANN: Okay. I've read the e-mail.

14 MS. LAKE: So, Mr. Hoffmann, would you  
15 agree that Mr. Buhl has experience in administering  
16 the Pierce County Code, including the contractor yard  
17 use?

18 MR. HOFFMANN: Yes.

19 MS. LAKE: And do you agree that a fair  
20 reading of this e-mail is Mr. Buhl's opinion that the  
21 dump truck use complies with the contractor yard use  
22 on the site?

23 MR. HOFFMANN: Yeah. He is speaking  
24 specifically to being questioned about a contractor's  
25 yard and he did give an accurate answer.

1 MS. LAKE: And when you say he gave an  
2 accurate answer, gave an accurate answer that you'll  
3 see that Mr. Newell was very careful to describe  
4 exactly what he does. He operates Newell Brothers  
5 Trucking, which is a dump truck company. He doesn't  
6 have a contractor's license. Will the -- you know,  
7 will the zoning that's there work for the dump truck  
8 company under the existing non-conforming use of a  
9 contractor's yard?

10 MR. HOFFMANN: Um hum.

11 MS. LAKE: And Mr. -- you agree that Mr.  
12 Buhl says yes, that would be an allowed use?

13 MR. HOFFMANN: Correct.

14 MS. LAKE: That does fall -- and you don't  
15 disagree with that; is that correct?

16 MR. HOFFMANN: Correct.

17 MS. LAKE: All right.

18 I'm going to open up next, screen share  
19 Appellants' Exhibit 8. So it's Appellants' Exhibit 6-  
20 Tab 8. And I'll let you take a look. It's a further  
21 exchange between Mr. Dan Buhl, the County Planner, now  
22 a Senior Planner, and Mr. Newell.

23 MR. HOFFMANN: Okay. It's up on the  
24 screen.

25 MS. LAKE: Okay. And reading back through

1 the e-mails during -- I'll direct your attention to  
2 Mr. Newell's question on September 14, 7:08  
3 -- 7:08 a.m.

4 MR. HOFFMANN: It's sort of restating the  
5 other e-mail.

6 MS. LAKE: Right. Did you -- and I would  
7 agree with you. And do you agree that this is further  
8 confirmation that Mr. Buhl gave to Matt Newell that  
9 his dump truck business would be able to continue to  
10 operate on the Malyon site under the non-conforming  
11 use determination?

12 MR. HOFFMANN: They may have had some  
13 conversation that didn't make it into the e-mail  
14 regarding all what the dump truck company involves,  
15 but a lot of the question was, since he was taking  
16 over the site, about continuously run as the same  
17 business so that they didn't drop the nonconforming  
18 rights. It seems like that that was a large part of  
19 the inquiry as well.

20 But I didn't answer your question, did I?  
21 What?

22 MS. LAKE: No. Thanks for recognizing  
23 that.

24 MR. HOFFMANN: To run his excavating. So  
25 Dan's response is accurate.

1 MS. LAKE: And so, could Mathew be any  
2 clearer, I wonder, when he states "If I purchase this  
3 land with the shop and the house for my dump truck  
4 business" -- my dump truck business, sorry -- "Newell  
5 Brothers, is this non-conforming status transferable  
6 to me?"

7 And you'll agree that Mr. Buhl said, "Yes,  
8 it is," correct?

9 MR. HOFFMANN: Correct.

10 MS. LAKE: And you don't have any reason to  
11 disagree with Mr. Buhl?

12 MR. HOFFMANN: No.

13 MS. LAKE: And would you agree that he  
14 understands and knows how to administer the  
15 contracting yard code provisions. Correct?

16 MR. HOFFMANN: Correct.

17 MS. LAKE: Just a couple more questions.

18 Pacific -- going back to Exhibit 6- Tab 32,  
19 which is the Pacific Civil & Infrastructure letter.  
20 Is Pacific Infrastructure, Pacific Civil &  
21 Infrastructure in the first -- in the second sentence  
22 they described themselves as "...in the business of  
23 complex heavy-civil, infrastructure and industrial  
24 construction..."

25 Does that describe a general contractor to

1     you or does it describe a vendor to you?

2                 MR. HOFFMANN:   Excuse me, the -- the very  
3     first sentence or two?

4                 MS. LAKE:    Yeah.

5                 MR. HOFFMANN:

6                 HEARINGS EXAMINER SHELTON:   Ms. Lake, could  
7     you please restate the question?

8                 MS. LAKE:    Certainly.

9                 So, looking at how the owner of Pacific  
10    Civil & Infrastructure, PCI, looking at how they  
11    describe their business, "We engage in the business of  
12    complex-heavy civil, infrastructure and industrial  
13    construction throughout the Northwest," does that  
14    description fit under the definition of contractor or  
15    vendor in your mind, Mr. Hoffmann?

16                MR. HOFFMANN:   Yeah, it sounds like more  
17    than just a vendor, the way that statement was  
18    written.

19                MS. LAKE:    So it sounds like a contractor,  
20    right?

21                MR. HOFFMANN:   It could fit under that,  
22    yeah.

23                MS. LAKE:    And then the letter goes on to  
24    describe the Newell Brothers as a subcontractor.  
25    Right?

1 MR. HOFFMANN: Correct.

2 MS. LAKE: And then the letter gives three  
3 examples of specific projects, specific construction  
4 projects. Correct?

5 MR. HOFFMANN: Correct.

6 MS. LAKE: And it goes on to describe that  
7 the dump truck services "provides construction trucks  
8 and trailers and side dumps with experienced  
9 construction job drivers who understand the  
10 complexities of such job sites".

11 And I think by "job sites," it's fair to  
12 say he means construction job sites, doesn't he? Is  
13 that your interpretation?

14 MR. HOFFMANN: Correct.

15 MS. LAKE: So does the description here of  
16 the Newell Brothers sound like a -- that they  
17 participate in contracting or that they are a vendor?

18 MR. HOFFMANN: They're a participant in the  
19 process and/or listed as a subcontractor. So that  
20 would make it more contracting.

21 MS. LAKE: Okay. So now, moving to --  
22 this, again, is Appellants' Exhibit 6- Tab 34,  
23 Northwest Construction.

24 Kind of the same questions, Mr. Hoffmann.  
25 The writer describes they're Vice President of

1 Construction at Northwest Cascade, "a heavy/civil  
2 construction company..."

3 And they go on to say that "provides ...  
4 construction services".

5 Does that description of Northwest Cascade  
6 sound more like a contractor or a vendor?

7 MR. HOFFMANN: Yeah, one of the key phrases  
8 here: "NWC has completed dozens of projects with  
9 Newell Brothers in the past 5+ years."

10 MS. LAKE: Um hum.

11 MR. HOFFMANN: To "in/out of project  
12 sites," not to just another area where they're stored  
13 for redistribution. Yeah, in that context it's  
14 contracting, yeah.

15 MS. LAKE: And when you say "it's  
16 contracting," do I take it you agree that Northwest  
17 Cascade is a construction company and that Newell  
18 Brothers is a subcontractor to them as part of their  
19 dump truck company?

20 MR. HOFFMANN: It doesn't really  
21 specifically say subcontracting in this letter, but  
22 that could be inferred.

23 MS. LAKE: Okay. I'm going to stop there,  
24 Mr. Examiner.

25 HEARINGS EXAMINER SHELTON: Okay. Thank



1     you, ma'am.

2                 Mr. Owen, as I indicated earlier, one,  
3     you'd have an opportunity for essentially Redirect,  
4     but also an opportunity to go over these exhibits with  
5     Mr. Hoffmann, if you choose to do so, only because  
6     this is the first time he's had a chance to take a  
7     look at them.

8                 So, Mr. Owen, did you have any follow-up on  
9     the testimony Mr. Hoffmann had just provided?

10                MR. OWEN: No follow-up, but I think my  
11     earlier Redirect adequately addressed those letters.  
12     Thank you.

13                HEARINGS EXAMINER SHELTON: Okay. Thank  
14     you, sir.

15                At this time, Mr. Hoffmann, I believe that  
16     would conclude your testimony, that would have been  
17     Direct and Cross and Redirect and Recross, but this is  
18     not exactly a courtroom, so there's certainly an  
19     opportunity for further testimony as representing  
20     Pierce County, if you choose to do so.

21                MR. HOFFMANN: My --

22                HEARINGS EXAMINER SHELTON: Mr. Hoffmann?

23                MR. HOFFMANN: Yeah. Respond to that?

24                HEARINGS EXAMINER SHELTON: Yes, please.  
25     It's probably a yes or a no.

1 MR. HOFFMANN: Yes, I'm available for  
2 further questions, yeah.

3 HEARINGS EXAMINER SHELTON: Okay. So  
4 you're still under oath. At this point in time I  
5 think Ms. Lake and Mr. Owen have concluded your  
6 questions, but you may be needed later in these  
7 proceedings. So thank you, sir.

8 MR. HOFFMANN: Thank you.

9 HEARINGS EXAMINER SHELTON: Mr. Owen, were  
10 there any other witnesses on behalf of Pierce County?

11 MR. OWEN: I don't have any other witnesses  
12 -- witnesses that I intend to call. I don't know if  
13 there are members of the public that wish to address  
14 the proceedings?

15 HEARINGS EXAMINER SHELTON: Okay. And  
16 there's -- I do have a list of individuals who are  
17 currently present and --

18 MADAM CLERK: Witness one is just a phone  
19 number and then someone identified, it just said  
20 "iPhone".

21 HEARINGS EXAMINER SHELTON: Okay. So I  
22 should know this, but who is Kathleen Larrabee?

23 MS. LARRABEE: Mr. Examiner, you shouldn't  
24 know this. I'm the Resource Manager for PALS.

25 HEARINGS EXAMINER SHELTON: Okay.

1 MS. LARRABEE: And I am -- I am here just  
2 to observe, so don't pay any attention to me at all.

3 HEARINGS EXAMINER SHELTON: I will pay  
4 attention to you only to say yes, I should have known  
5 who you were. So thank -- thank you, ma'am. I  
6 appreciate that.

7 MS. LARRABEE: Thank you.

8 HEARINGS EXAMINER SHELTON: So we do have  
9 the -- I guess the phone number "12533" is not the  
10 number. Is that someone who's on-line?

11 MADAM CLERK: Yeah. That's all that  
12 they're signed in there as.

13 HEARINGS EXAMINER SHELTON: Let's see.  
14 Let's see who they are. Is someone there in the  
15 audience or in the virtual hearing room who registered  
16 -- registered under "12533" who is currently muted?

17 (No answer).

18 MADAM CLERK: I've asked them to un-mute.

19 HEARINGS EXAMINER SHELTON: I've noticed  
20 we've asked to un-mute.

21 MADAM CLERK: (Inaudible).

22 HEARINGS EXAMINER SHELTON: Bottom of the  
23 list.

24 MADAM CLERK: They are not connected to  
25 audio, though.

1           HEARINGS EXAMINER SHELTON: Oh, no audio.  
2    Okay. Uh, I see two individuals, two men on the  
3    screen. I'm assuming neither one of you are "12533"  
4    or the "iPhone". If -- could you please just -- since  
5    I see you, if you're -- if you're muted, please  
6    un-mute and just tell me who you are.

7           MADAM CLERK: They're not connected to  
8    audio.

9           HEARINGS EXAMINER SHELTON: Oh, not  
10   connected to audio?

11          MADAM CLERK: Yeah, they didn't sign in  
12   with their audio. It looks like they only signed in  
13   with their video.

14          HEARINGS EXAMINER SHELTON: Okay. We -- we  
15   can't hear you. Can you send them a text or  
16   something?

17          MADAM CLERK: Um, no. They have to --

18          HEARINGS EXAMINER SHELTON: Or a chat?

19          MADAM CLERK: They have to join audio on  
20   the bottom of the screen. I don't have the chat box  
21   or anything to set it up.

22          HEARINGS EXAMINER SHELTON: Audio, did you  
23   want to talk?

24          MADAM CLERK: I don't have a way to get  
25   ahold of them.

1 HEARINGS EXAMINER SHELTON: Can I -- can  
2 they sign out and sign back in? Check.

3 MADAM CLERK: I mean, they can try. I  
4 don't know if they can even hear us or not. It's when  
5 you sign in, you have to sign in with video and audio.  
6 They just signed in with one.

7 UNIDENTIFIED FEMALE SPEAKER: Okay.

8 HEARINGS EXAMINER SHELTON: That's all of  
9 the information we have from them is concerning.

10 MADAM CLERK: Yeah. I don't know who. I  
11 don't have their names.

12 HEARINGS EXAMINER SHELTON: Okay. He's  
13 trying.

14 UNIDENTIFIED FEMALE SPEAKER: Sounds like  
15 he won't be able to, though. He has to actually sign  
16 in with audio.

17 HEARINGS EXAMINER SHELTON: Okay.

18 MADAM CLERK: You can add it later, but I  
19 don't --

20 HEARINGS EXAMINER SHELTON: So he'd have to  
21 -- can he sign back in?

22 MADAM CLERK: He can, but he has to select  
23 audio.

24 HEARINGS EXAMINER SHELTON: Okay.

25 MADAM CLERK: So he doesn't have to sign

1 back in. He can select it (inaudible) but --

2 MS. LAKE: Is there a phone number he can  
3 call in? I'm just trying to be helpful.

4 MS. LARRABEE: And I -- I would say -- I'm  
5 so sorry to butt in again, Kathleen Larrabee. I'm not  
6 positive this is one of the neighbors, but I kind of  
7 suspect it is. Um, and it would be, I think very  
8 beneficial, to hear what they have to say. So I would  
9 love for us to figure out a solution to the problem.

10 MADAM CLERK: They signed out.

11 UNIDENTIFIED FEMALE SPEAKER: Yeah, they've  
12 signed out.

13 HEARINGS EXAMINER SHELTON: Okay. So  
14 they've signed out. So that might be the first step  
15 in that direction.

16 And while we're at this juncture, I did  
17 have a question, Ms. Lake and Mr. Owen, as to the  
18 -- the -- this could have been brought up in closing,  
19 but a question regarding the burden of proof in this  
20 proceeding.

21 As I reviewed the Hearing Examiner code,  
22 Chapter 1, Section 22090, appeals, looking at Section  
23 G, burden of proof, it is an appeal of an enforcement  
24 action. Apparently the initial burden is on the  
25 County to prove by a preponderance of the evidence

1 that the use, activity, or development is not in  
2 conformance with the regulations.

3 So, first of all, is that everyone's  
4 understanding as to the County's burden initially?

5 MR. OWEN: Yes, Your Honor -- or Mr.  
6 Examiner.

7 HEARINGS EXAMINER SHELTON: Thank you, sir.  
8 And Ms. Lake?

9 MS. LAKE: I agree, thank you.

10 HEARINGS EXAMINER SHELTON: Okay. And then  
11 it's also my understanding if part of the appeal is  
12 alleging the application of an exemption, then the  
13 Appellant would have to prove that by the same burden  
14 -- preponderance of the evidence. So is that also  
15 everyone's understanding?

16 MR. OWEN: Yes.

17 MS. LAKE: That would be true, if the  
18 County met its initial burden, yes.

19 HEARINGS EXAMINER SHELTON: Yes, ma'am.  
20 Yes, ma'am.

21 Okay. It looks like no one else is signed  
22 in. If they do sign in momentarily, I'll try to  
23 address that seamlessly, if at all.

24 Mr. Hoffmann, are you still present? Okay.  
25 He said he would be available for questions, so I

1     assume that he will be, maybe not right at the moment.

2             And Mr. Owen has no further testimony at  
3     this point; is that correct?

4             MR. OWEN: That's correct.

5             HEARINGS EXAMINER SHELTON: Okay. So, Ms.  
6     Lake, at this point in time, on behalf of the  
7     Appellant, would you like to make perhaps any opening  
8     statement, if you choose, or would you like to call  
9     witnesses? Essentially you have the floor, ma'am.

10            MS. LAKE: Thank you.

11            Mr. Examiner, at this time we'd move to  
12     have the Hearing Examiner grant the appeal. The  
13     testimony of the one witness has not met the County's  
14     burden of proof. As the Examiner just pointed out,  
15     they have not shown by a preponderance of the evidence  
16     that this use on-site is a fleet delivery freight  
17     movement use.

18            Mr. Hoffmann's testimony, I think it's real  
19     clear, he was very much trying to be helpful, and was  
20     helpful no matter who is asking the questions. But  
21     the bottom line is what lives on is his description  
22     contained in the County's Exhibit 3-E where he  
23     differentiates how you determine a truck use, whether  
24     it is a contractor yard use or whether it is a vendor  
25     use. And despite attempts to lead him otherwise, Mr.



1 Hoffmann did come back, each time, to describe that  
2 the uses described in the general contractor's letter  
3 described expressly that the Newell Brothers Trucking  
4 were engaged in contractor work. That their truck use  
5 was, quote, "used to support the delivery of  
6 construction materials used in conjunction with  
7 specific construction projects". There's just no  
8 other way to read that.

9 When asked expressly if whether Mr.  
10 Hoffmann had any evidence in his possession that would  
11 support the use of the Newell Brothers as a fleet  
12 delivery, he said no, and he was exactly honest and  
13 he's exactly correct.

14 We also know that from -- we also know from  
15 the exhibits submitted that Mr. Malyon, the former  
16 property owner, he was engaged in exactly this type of  
17 use, dump truck business. He used -- it's exactly the  
18 same use as what Mr. Newell is doing. Mr. Newell did  
19 the -- and, excuse me, and that use by Mr. -- by the  
20 Malyons were determined by Steve Kamieniecki to be a  
21 non-conforming use, contractor yard use.

22 We also know that another Planner, Dan  
23 Buhl, responded expressly to Mr. Newell's due  
24 diligence when Mr. Newell couldn't be any clearer  
25 about what its use was. I have a dump truck business.

1 I'm not -- I don't have a contractor's license. I use  
2 my dump trucks. Will this fit within the  
3 non-conforming use of the contractor's yard specific  
4 to this tax parcel? And we see from Exhibits  
5 -- Exhibit 6- Tabs 7 and 8, that that Planner did due  
6 diligence and determined exactly what the  
7 non-conforming use was and determined that, yes, Mr.  
8 Newell's use would fit within that category.

9 So, Mr. Examiner, I'd ask you to find that  
10 as a preliminary half-time measure, that the County  
11 has not met its burden to show by a preponderance of  
12 the evidence that the Newells do not conform to the  
13 non-conforming use on the site.

14 HEARINGS EXAMINER SHELTON: Okay. Thank  
15 you, ma'am.

16 And then prior to proceeding, I think we  
17 now have a name to the -- to the -- to the gentleman  
18 on the screen. Mr. Barney Phillips. Can you hear me,  
19 sir?

20 MADAM CLERK: They still didn't sign in  
21 with their audio.

22 HEARINGS EXAMINER SHELTON: Okay. We still  
23 don't have audio, Mr. Phillips. Mr. Owen?

24 MR. OWEN: Yes.

25 HEARINGS EXAMINER SHELTON: Okay. Looks

1     like I think Mr. Phillips is a neighbor. It's my  
2     understanding he has signed in, but no audio. So  
3     recognizing that his testimony as an interested party  
4     should be enabled, but I'm not sure what to do  
5     virtually since he's not on-line, with audio.

6             But, Mr. Owen, just as a moment in time to  
7     address Ms. Lake's Motion to Dismiss, did you have any  
8     response?

9             MR. OWEN: Yes, absolutely.

10            In the first place, this appeal seems to  
11     have a lot of moving part. There's the prior Code  
12     Enforcement action, questions about expansion of the  
13     non-conforming use. And as we, I think we all agreed  
14     now that none of that is relevant, what we're looking  
15     at today is whether the current use on the property as  
16     a contractor's yard as -- as previously approved by  
17     the County, as a legally established non-conforming  
18     use or if, in fact, it's warehouse, distribution, and  
19     freight movement. And even Appellants' own exhibits  
20     identified trucking material to other projects. The  
21     Declaration of Mr. Malyon, the prior property owner,  
22     makes that clear, that that's what he was doing.

23            The letter from Pacific Civil &  
24     Infrastructure, as well as the Northwest Cascade  
25     letter, they all established that that is what's going

1 on. And I think the evidence in the record is quite  
2 clear. I don't think there's any question as to what  
3 is happening on the property.

4 I think the only question we have here is  
5 how to interpret that -- how to interpret the code as  
6 it applies to that activity. And we've drilled down  
7 significantly into some words, contractor, vendor,  
8 subcontractor, but what we really need to look at is  
9 what is the activity on the site.

10 You know, maybe they are subcontractors.  
11 They could have different properties. They could have  
12 a contractors yard or perhaps a warehouse distribution  
13 area. And people's words in a letter and e-mail,  
14 they're now being put under a magnifying glass and  
15 with good reason. We need -- we do need to figure out  
16 what people's prior intent was or what they gave  
17 approvals for.

18 But, very clearly, the approved use was a  
19 contractor's yard. And the fact that maybe Mr.  
20 Hoffmann said something to the effect of the key  
21 difference with trucking use in this category is to  
22 support the delivery of construction materials used in  
23 construction with specific construction projects, that  
24 doesn't support this appeal. That that's words in a  
25 -- in a letter from I'm not sure how long ago. Nor

1 does looking back at what was in Mr. Buhl's head three  
2 years ago.

3 We don't necessarily know how dump truck  
4 company was described or how it was interpreted, but  
5 what we do have is a description of the activity, the  
6 activity going on on the property today, from  
7 Appellants' own exhibits.

8 Frankly, they do a better job of providing  
9 that evidence than -- than, you know, a few photos of  
10 some dump trucks. I don't think anybody disagrees  
11 with that it's delivery of aggregate materials to job  
12 sites, job site, other than Appellants' own jobs. The  
13 question is whether that is a contractor's yard or it  
14 is just not simply not a contractor's yard, and I  
15 think there's ample evidence. Thank you.

16 HEARINGS EXAMINER SHELTON: Okay. And  
17 then, just summarizing, you're stating within the  
18 record you believe there's ample evidence to, at least  
19 at this point, defeat the Motion to Dismiss based on  
20 the County's inability to prove by a preponderance of  
21 evidence; is that my understanding?

22 MR. OWEN: Well, my recollection is that  
23 Appellants' exhibits have been admitted.

24 Likewise, the Staff Report has been  
25 admitted with its exhibits then.

1           And, in addition to Mr. Hoffmann's  
2     testimony, but really focusing on Appellants' letters  
3     from those two contractors and -- and Mr. Malyon's  
4     Declaration, yes, absolutely, there's evidence in the  
5     record.

6           HEARINGS EXAMINER SHELTON:   Okay.   And, Ms.  
7     Lake, did you have any rebuttal to the County's  
8     opposition to the Motion to Dismiss?

9           MS. LAKE:   (No answer).

10          MR. OWEN:   I hate to do it but, Ms. Lake,  
11     you're muted.

12          MS. LAKE:   And I was so brilliant.   I'll  
13     start over.

14          We have evidence in the record and the  
15     evidence in the record.   The only evidence in the  
16     record is that that the Newell Brothers are acting as  
17     a subcontractor.   There are zero letters from vendors  
18     saying that Newell Brothers is a vendor that delivered  
19     to me, another vendor.

20          What we have, 100%, is two letters from  
21     obvious contractors describing the construction work  
22     that the Newell Brothers do as a subcontractor, which  
23     puts them squarely in the definition expressly  
24     described by Mr. Hoffmann as this is the type of truck  
25     use that qualifies as a contractor yard, delivering

1 materials in support of a contractor project,  
2 construction project. That's exactly and that's the  
3 only evidence we have.

4 In addition to that, we have two other  
5 Planners that weighed in on this question. We have  
6 Steve Kamieniecki in 2003, when he looked at the  
7 Malyon's use, Mr. -- I'm going to say Boyd, just to  
8 not trip over his name. Boyd indicated that his use  
9 was dump trucks delivering materials to a site. Mr.  
10 Kamieniecki determined in 2004 that that fit within  
11 the contractor yard definition.

12 Then, in 2018, or in 20, um, um -- in 2018,  
13 prior to the Newells purchasing the property, we have  
14 Dan Buhl, a second Planner with Pierce County  
15 Planning, saying yes, your dump truck use does fit  
16 within the non-conforming -- non-conforming contractor  
17 yard use. That's two.

18 The evidence in the record also shows a  
19 third one. And I draw Mr. Examiner's attention to the  
20 County's own Staff Report, page three of nine. This  
21 is in June, June 24, 2019. And it talks about  
22 Arbogast who is a another Planner. Arbogast had just  
23 -- and I'm quoting from page three of nine of the  
24 County's revised Staff Report -- "Arbogast had  
25 discussed with staff whether the site is in compliance

1 with the non-conforming use right letters written by  
2 Steve Kamieniecki, dated December 13, 2004." And it's  
3 defined as Exhibit 3A. "This led to a discussion  
4 amongst staff that the current truck traffic is in  
5 compliance with this letter as a contractor yard."

6 And then it goes on to say: "Has the  
7 contractor yard expanded?" But that's a third  
8 Planner. And the way it's described in the County's  
9 own Staff Report, it says that "this discussion among  
10 staff, the current truck traffic is in compliance with  
11 this letter as a contractor's yard." So that's now  
12 three.

13 And then we have the testimony of Mr.  
14 Hoffmann, who's the fourth Planner. And -- and an  
15 only fair characterization of those testimonies is  
16 that he -- when he reads the letter and the words  
17 under my questioning, he agrees it's a contracting  
18 use. When he reads the letter under the County's  
19 leading questions, he equivocates a bit, but it  
20 remains we have at best three-to-one that this is a  
21 contractor use and not a vendor fleet truck delivery  
22 use.

23 So the purpose of these half-time motions  
24 is to not waste people's time and money. And the  
25 County simply has not met the simplest burden. And



1 the overwhelming evidence is that they have not met  
2 their burden by a preponderance of evidence. In fact,  
3 they have no evidence that this is a fleet, a fleet  
4 use, from one vendor delivering to another vendor.

5 HEARINGS EXAMINER SHELTON: Okay. Thank  
6 you, Ms. Lake.

7 MADAM CLERK: It looks like they're signed  
8 on.

9 MR. PHILLIPS: Can you hear us?

10 HEARINGS EXAMINER SHELTON: Yes. Thank  
11 you.

12 MR. PHILLIPS: Hey.

13 HEARINGS EXAMINER SHELTON: Have you been  
14 able to hear all of the proceedings?

15 MR. PHILLIPS: Yes. Yes, we did.

16 HEARINGS EXAMINER SHELTON: Okay. And I'm  
17 not sure either one of you are, but are you both  
18 planning on just observing or would either one of you,  
19 or both of you, like to testify today before the  
20 Hearing Examiner?

21 MR. PHILLIPS: I would like to testify.  
22 This is Tom. He lives right next to the creek where  
23 the trucks are parked and I live right across --

24 HEARINGS EXAMINER SHELTON: One moment.  
25 One moment. Let's not get to testimony yet. So let's

1 -- Tom can answer for himself.

2 Tom, did you want to testify today, sir?

3 MR. FREUDENSTEIN: No, I -- I think I'm  
4 okay.

5 HEARINGS EXAMINER SHELTON: Okay. If you  
6 change your mind, although this is a recorded  
7 proceeding, it's not a court of law, relatively  
8 informal in some ways, more formal in others.

9 So I will at this point, Ms. Lake, note  
10 your motion. I will take it under advisement at this  
11 point, given Mr. Owen's response, and also given now  
12 the opportunity to hear testimony. So Mr. --

13 MR. PHILLIPS: Phillips.

14 HEARINGS EXAMINER SHELTON: -- Phillips.  
15 And, I'm sorry, Tom, what was your last name, sir?

16 MR. FREUDENSTEIN: Freudenstein.

17 HEARINGS EXAMINER SHELTON: Okay. Both of  
18 you gentlemen, in case you both testify, please raise  
19 your right hand. Do each one of you swear or affirm  
20 that you will tell the truth before the Hearing  
21 Examiner and only the truth? If so, please state "I  
22 will".

23 MR. PHILLIPS: I will.

24 MR. FREUDENSTEIN: I will.

25 HEARINGS EXAMINER SHELTON: Okay. Thank

1     you.

2                 Mr. Phillips, and Tom, if you do choose to  
3     testify, which you have every right to do, you would  
4     then be opening yourself up to perhaps Cross  
5     Examination by the Appellants' attorney. Also, Mr.  
6     Owen, representing Pierce County, could -- could ask  
7     you further questions. It's certainly not going to be  
8     a time to argue about the case, but perhaps clarifying  
9     testimony.

10                So, Mr. Phillips, at this time would you  
11     please state your name and please spell it?

12                MR. PHILLIPS: Barney Phillips,  
13     B-A-R-N-E-Y, P-H-I-L-L-I-P-S.

14                HEARINGS EXAMINER SHELTON: And would you  
15     please state your residence address?

16                MR. PHILLIPS: 12418-34th East.

17                HEARINGS EXAMINER SHELTON: And at this  
18     time you're under oath. And would you please provide  
19     any testimony you think would be helpful for the  
20     Examiner, myself? Were you here during my  
21     introduction at the beginning of the proceedings?

22                MR. PHILLIPS: Yes.

23                HEARINGS EXAMINER SHELTON: Okay. So a  
24     this time I'm the Deputy Hearing Examiner. Please  
25     make any comments that you would like, sir.

1 MR. PHILLIPS: Okay. I've lived in this  
2 house since 1983. And Boyd Malyon was running his out  
3 -- his business at that time. He -- he was a low  
4 impact person, because of one dump truck and one  
5 backhoe. He hauled stuff, beauty bark, lava rock,  
6 dirt, and gravel from his property to job sites that  
7 he worked for. And that is not what the Newells are  
8 doing. They have no material whatsoever on their  
9 -- their property at all. And all they have is empty  
10 trucks.

11 They start at 4:00 o'clock in the morning.  
12 The trucks run for 20 Minutes at a time. They're  
13 extremely loud. And you have -- when you go from one  
14 truck to 14 trucks, it's a horrible amount of noise  
15 for everybody in the area. And I can hear the  
16 vehicles all of the way into my back bedroom. They  
17 actually have, like especially the side dumpers,  
18 they're so, so loud that they actually have like a  
19 vibration that penetrates the house.

20 And I know Tom has talked about that also  
21 to me. My neighbors, unfortunately, they couldn't  
22 join. They wanted to testify today about the noise.  
23 It goes on until late at night. Late at night they  
24 have a fuel truck comes in that fuels all of the  
25 trucks. Several hundreds of gallons of fuel is

1 transferred from the truck, from the fuel truck to the  
2 trucks, which I am concerned about the possibility of  
3 a fuel leak or an accident with the hoses, I've seen  
4 that happen before, and spewing diesel fuel all over  
5 the ground. It's just gravel. It's not like most  
6 contractors or trucking companies that have concrete  
7 to catch the fuel or any -- anything from the vehicles  
8 into a collection bin. So that it does not penetrate  
9 the ground, that's a huge concern.

10 Another concern is the creek which is a  
11 part of Clover Creek.

12 HEARINGS EXAMINER SHELTON: Before -- Mr.  
13 Phillips, like I said earlier, as an Examiner I can  
14 ask questions to clarify.

15 MR. PHILLIPS: Sure.

16 HEARINGS EXAMINER SHELTON: You just said  
17 fuel trucks come in each night. Is there any  
18 particular time that they come in to refuel?

19 MR. PHILLIPS: It's right around 8:00, 8:00  
20 o'clock. And sometimes they're there at 9:00 o'clock.  
21 He's come in as late as 10:00 o'clock at night.

22 HEARINGS EXAMINER SHELTON: Okay. Thank  
23 you, sir. Please proceed.

24 MR. PHILLIPS: And -- and the activities at  
25 the property goes on seven days a week, 365 days a

1 year pretty much. And it never ends. If they're not  
2 working on the weekends hauling or doing a job  
3 somewhere, then they're repairing vehicles.

4 The creek is part of Clover Creek, which I  
5 talked to the Nisqually Indian Tribe. They are  
6 concerned because they share jurisdiction with --

7 MS. LAKE: Mr. Examiner, I know that you're  
8 being giving a lot of latitude, especially with an  
9 unrepresented witness, but I -- in order to represent  
10 my client correctly, I need to point out that this  
11 type of testimony is irrelevant as far as the  
12 description of use. And certainly any testimony  
13 regarding what a tribal member might recommend, as  
14 well as other neighbors, is hearsay.

15 HEARINGS EXAMINER SHELTON: Okay. And, Ms.  
16 Lake, I -- I agree.

17 Mr. Phillips, you need to remember that  
18 your testimony can only be your own observations, not  
19 what someone has told you, not what you've read, but  
20 your own direct observations of what you've observed  
21 on the site. So please proceed, sir.

22 MR. PHILLIPS: Okay. So my observation is  
23 the extreme noise for myself, my family.

24 The amount of dust that is thrown up during  
25 the summertime. I do not have air conditioning. I

1 cannot keep my house clean because of the amount of  
2 dust thrown up by the vehicles during the summer.  
3 There has been two occasions where they've been  
4 working on vehicles and they've had them running for  
5 extended periods of time. And if you know anything  
6 about vehicle exhaust, you know it's heavier than air.  
7 It finds a spot where there is no air flow. And I  
8 have walked into accumulations of exhaust gas in my  
9 driveway one time and at the mailbox another time.  
10 And these are -- these are things that have happened  
11 here and they continue to happen.

12 I would invite anybody to come out at 4:00  
13 o'clock in the morning and start listening to how loud  
14 these vehicles are. It's horrendous.

15 HEARINGS EXAMINER SHELTON: Mr. Owen, do  
16 you have any direct questions of Mr. Phillips?

17 MR. OWEN: No, I don't. Thank you.

18 HEARINGS EXAMINER SHELTON: Mr. Phillips,  
19 just a clarification. How -- you've described what  
20 you've observed. How long has that been going on?

21 MR. PHILLIPS: When -- when he first moved  
22 in, he had five vehicles, five trucks, five dump  
23 trucks. He has since added, I believe he has a total  
24 of about 13 now, plus the Malyon Company is working  
25 out of the same property. So that's a 14th truck.

1 And since he's added all of these additional vehicles,  
2 especially a side dump, dumper, the noise has gone up  
3 dramatically.

4 HEARINGS EXAMINER SHELTON: Okay. So when  
5 you -- you say all of these vehicles, including the  
6 side dumper, is that all included in what you've  
7 indicated was the 13 total at this point?

8 MR. PHILLIPS: Yes. If you -- if you add  
9 Malyon's dump truck, that's 14.

10 HEARINGS EXAMINER SHELTON: And are there  
11 any -- any way you can identify these trucks as to  
12 ownership, any signage on the side of the trucks or  
13 --

14 MR. PHILLIPS: Yes. They all say -- well,  
15 Malyon has his name on the truck. Newells has their  
16 names on the truck. Newell Trucking during the  
17 summer, early summer I believe, there were several  
18 other trucking companies that were parking their  
19 vehicles on the site. There was Parker & Wolfe and a  
20 couple of other ones that were also coming and going  
21 constantly. And they would leave their vehicles  
22 overnight, sometimes over the weekends. Parker &  
23 Wolfe would leave theirs there for a very long period  
24 of time, like a few months. Those would be, like in  
25 the picture of the yellow truck, that was one of those



1 other trucking companies.

2 HEARINGS EXAMINER SHELTON: Okay. Thank  
3 you, sir. Any further questions?

4 MR. OWEN: I guess I do have one follow-up  
5 question, if I may?

6 HEARINGS EXAMINER SHELTON: Yes, Mr. Owen.

7 MR. OWEN: Did you state that no loading of  
8 the trucks takes place on-site?

9 MR. PHILLIPS: That's correct, no loading  
10 of any trucks takes place on-site.

11 MR. OWEN: And any material handling takes  
12 place on the site?

13 MR. PHILLIPS: No, nothing there.

14 MR. OWEN: Okay. Thank you.

15 HEARINGS EXAMINER SHELTON: Ms. Lake, did  
16 you have any questions of Mr. Phillips?

17 MS. LAKE: (No answer.)

18 MR. OWEN: And I am so sorry to do this  
19 again. You may want to un-mute.

20 MS. LAKE: Thank you for that.

21 HEARINGS EXAMINER SHELTON: Thank you. I'm  
22 not doing very well.

23 MS. LAKE: Thank you for your time today  
24 and your being here today.

25 You indicated that the yellow truck that

1 belonged to other people, you said that was there in  
2 the summer; is that right?

3 MR. PHILLIPS: There were several of them.

4 MS. LAKE: Okay. And they're not there  
5 today, are they?

6 MR. PHILLIPS: Not since he has gotten so  
7 many trucks they can't park there any more.

8 MS. LAKE: Okay. So, no, they're not there  
9 and they haven't been there for several months; is  
10 that right?

11 MR. PHILLIPS: Correct.

12 MS. LAKE: Okay. And when you say you were  
13 there when Boyd owned the property and ran his  
14 business, you said he hauled dirt. And did I hear you  
15 say he hauled lava, lava rock?

16 MR. PHILLIPS: Lava rock, yes. It's a red  
17 type of a rock that they use for decoration.

18 MS. LAKE: Okay. And -- and that wasn't  
19 generated on his site, right?

20 MR. PHILLIPS: He would have it -- he would  
21 bring it in.

22 MS. LAKE: Um hum.

23 MR. PHILLIPS: And dump it and then he  
24 would haul it to customers.

25 MS. LAKE: Okay. And, in fact, you said

1 that he would haul it, to use the word job sites that  
2 he worked for; is that right?

3 MR. PHILLIPS: Some -- yeah, sometimes he  
4 would haul it to a job site as far as -- as far as I  
5 know, that's what he did it with it.

6 MS. LAKE: Right. Right. And, yeah, and  
7 job sites, as you mean it were construction sites.  
8 Right?

9 MR. PHILLIPS: It could have been private  
10 companies or private parties that purchased the gravel  
11 -- the gravel, the dirt, or the lava rock from him.

12 MS. LAKE: Um hum. And it also could have  
13 been construction sites. Right?

14 MR. PHILLIPS: It could have been anybody.

15 MS. LAKE: And when you say that the trucks  
16 are fueled -- and I obviously don't expect you to be  
17 100% familiar with the Pierce County Code -- would you  
18 say that what Mr. Newell does with his trucks is that  
19 it's outdoor storage of heavy equipment and vehicles?

20 MR. PHILLIPS: He's storing them for a  
21 trucking company now.

22 MS. LAKE: Yeah. So you'd agree that it's  
23 -- he's using the property to store, repair, and  
24 maintain heavy equipment vehicles or construction  
25 supplies and materials. Right?

1 MR. PHILLIPS: No construction supplies and  
2 materials that I've ever seen.

3 MS. LAKE: Right. Yeah. It was in -- I  
4 probably didn't say it very artfully, but it's in the  
5 conjecture. But it's storage, repair and/or  
6 maintenance of heavy equipment vehicles or  
7 construction supplies and materials. So he doesn't do  
8 the construction supplies and materials, but you would  
9 agree that the Newells' trucks on the site are storing  
10 and maintaining the heavy equipment and vehicles.  
11 Correct?

12 MR. PHILLIPS: Yes, just like any trucking  
13 company would.

14 MS. LAKE: Right. I don't -- let's see.  
15 Yeah, I don't have any further questions.

16 HEARINGS EXAMINER SHELTON: Okay. Thank  
17 you, ma'am.

18 MR. OWEN: I do have a direct follow-up  
19 question to one of Mr. Lake's questions. Is that  
20 okay?

21 HEARINGS EXAMINER SHELTON: Yes. Mr. Owen?

22 MR. OWEN: Thank you. Just -- Ms. Lake was  
23 asking you about a particular activity being storage,  
24 repair, and maintenance of heavy equipment vehicles.  
25 So in that vein, could I ask you, would you say that

1 it's the central dispatch and servicing of a delivery  
2 truck fleet?

3 MR. PHILLIPS: Are you asking me that?

4 MR. OWEN: Yes. Yes.

5 MR. PHILLIPS: I would think that he  
6 -- they're being dispatched to someplace else every  
7 morning or every evening when they -- they line up the  
8 jobs that they're going to be sending them to.

9 MR. OWEN: And do they service the vehicles  
10 there, that you can see?

11 MR. PHILLIPS: Oh, yeah.

12 MR. OWEN: Okay. Thank you very much.

13 HEARINGS EXAMINER SHELTON: And, Ms. Lake,  
14 any follow-up questions?

15 MS. LAKE: No.

16 HEARINGS EXAMINER SHELTON: Oh, okay.

17 MS. LAKE: No thank you, Your Honor.

18 HEARINGS EXAMINER SHELTON: Thank you,  
19 ma'am.

20 Mr. Phillips, before we leave you, did you  
21 have any follow-up comments you'd like to make, any  
22 summary you'd like to make? This is suitable for that  
23 at this time. And then Mr. Tom can answer or can  
24 testify in a moment, if he chooses.

25 Mr. Phillips, any -- any further comments

1     you'd like to make?

2                   MR. PHILLIPS:  Nothing except that I don't  
3     think anybody would appreciate having the amount of  
4     noise that we have to deal with.

5                   HEARINGS EXAMINER SHELTON:  Okay.  I  
6     appreciate that.

7                   MR. PHILLIPS:  (Inaudible.)

8                   HEARINGS EXAMINER SHELTON:  I appreciate we  
9     can't talk about anybody, but you've made it very  
10    clear your observations and I appreciate that, sir.

11                   MR. PHILLIPS:  Thank you.

12                   HEARINGS EXAMINER SHELTON:  Tom, I don't  
13    want to try to -- or, Ms. Lake, did you have a  
14    comment?

15                   MS. LAKE:  Yeah.  I have one more question  
16    I wanted to ask -- ask the witness, please.

17                   HEARINGS EXAMINER SHELTON:  Yes, ma'am.

18                   MS. LAKE:  Has the, um, has the Newell  
19    Trucking business changed from when it came on-site in  
20    2019?

21                   MR. PHILLIPS:  They've more than doubled in  
22    size.  And the -- when they first came in with the  
23    five trucks, it was pretty low impact.

24                   MS. LAKE:  Um hum.

25                   MR. PHILLIPS:  And now that they've

1 -- they've got 13 trucks that he owns there on-site,  
2 he -- it's changed dramatically, as far as the noise.

3 MS. LAKE: Okay. And I appreciate that  
4 there may be more trucks there, but has the use of  
5 those trucks changed at all from when the Newell  
6 Brothers, when they moved on to the site in 2019?

7 MR. PHILLIPS: I don't know if you could  
8 say it's changed. Or you could say it -- I mean, it  
9 could go either way, because I don't remember the  
10 trucks really leaving that early in the morning or  
11 starting up and running for such a long period of time  
12 as they are now. That part has changed.

13 MS. LAKE: So my question is, um, specific  
14 to use. So the trucks have been used the same way  
15 there. They go on to the site. They're stored there.  
16 They leave in the morning and they come back at night.  
17 That type of use hasn't changed since it first  
18 started; is that correct, the times when --

19 MR. PHILLIPS: That part, that part really  
20 hasn't, no.

21 MS. LAKE: Thank you.

22 HEARINGS EXAMINER SHELTON: And, Mr. Owen,  
23 any follow-up?

24 MR. OWEN: No, thank you.

25 HEARINGS EXAMINER SHELTON: Oh, okay. Mr.

1     Phillips, thank you very much, sir.

2             MR. PHILLIPS:   Thank you.

3             HEARINGS EXAMINER SHELTON:   And I'm glad  
4     you were arduous in getting on-line.

5             So, Tom, I'm sorry, I can't pronounce your  
6     name, but did you have any statements you'd like to  
7     make?  You're currently sworn, so if you had a  
8     presentation of your observations, that you think  
9     would be helpful for me to make this decision, this  
10    would be your opportunity.

11            MR. FREUDENSTEIN:   Only that I live just a  
12    little bit closer than Mr. Phillips does, so I have  
13    experienced the same thing and I concur.

14            HEARINGS EXAMINER SHELTON:   Okay.  I'm  
15    sorry.  Let's take this one step at a time.

16            Please state your full name and spell it,  
17    sir.

18            MR. FREUDENSTEIN:   Tom Freudenstein, T-O-M,  
19    F-R-E-U-D-E-N-S-T-E-I-N.

20            HEARINGS EXAMINER SHELTON:   And did you get  
21    that?

22            MADAM CLERK:   No.

23            HEARINGS EXAMINER SHELTON:   Okay.  Please  
24    respell your last name, a little slower, sir.

25            MR. FREUDENSTEIN:   F-R-E-U-D-E-N-S-T-E-I-N.



1                   HEARINGS EXAMINER SHELTON:   Okay.   Thank  
2   you, sir.   And your current address?

3                   MR. FREUDENSTEIN:   12423-34th Avenue East.

4                   HEARINGS EXAMINER SHELTON:   And is that  
5   Tacoma or what?

6                   MR. FREUDENSTEIN:   Tacoma.

7                   HEARINGS EXAMINER SHELTON:   And just for  
8   the record, Mr. Phillips, you have the Tacoma address.  
9   And what zip code do you have, both of you?

10                  MR. PHILLIPS:   98446.

11                  HEARINGS EXAMINER SHELTON:   446?

12                  MR. PHILLIPS:   Yes.

13                  HEARINGS EXAMINER SHELTON:   Okay.   And I'm  
14   making that because I'm assuming you may want a copy  
15   of my decision, so that's where we will send it.

16                  MR. PHILLIPS:   Oh, thank you.

17                  HEARINGS EXAMINER SHELTON:   So, Tom, please  
18   proceed, sir.

19                  MR. FREUDENSTEIN:   Well, I was just going  
20   to say that I did concur in everything that Barney has  
21   said.   However, my house, we share a common property  
22   line with the Newells, so I'm exposed a little bit  
23   more than he is.

24                  My -- my biggest concern of all is the  
25   early morning rumbling with the ground shaking when

1 the trucks fire up and -- and idle to warm up. And  
2 then, like he said, the dust in the summertime. Those  
3 are the two biggest issues for -- for myself.

4 HEARINGS EXAMINER SHELTON: Okay. Thank  
5 you, sir.

6 Mr. Owen, did you have any follow-up  
7 questions for Mr. Freudenstein?

8 MR. OWEN: No, thank you.

9 HEARINGS EXAMINER SHELTON: Ms. Lake, did  
10 you have any follow-up questions for Mr. Freudenstein?

11 MS. LAKE: Um, thank you.

12 Just when you say you would agree with Mr.  
13 Phillips' testimony, you'd also agree that the use of  
14 the trucks, how they are used on-site, hasn't changed  
15 from when the Newells moved on until now. Correct?

16 MR. FREUDENSTEIN: Correct.

17 MS. LAKE: Thank you. I don't have any  
18 other questions.

19 HEARINGS EXAMINER SHELTON: Okay. Thank  
20 you, ma'am.

21 MS. LAKE: So, Mr. Examiner, if -- if since  
22 the taking of the testimony came after the half-time  
23 motion, may I add a few comments?

24 HEARINGS EXAMINER SHELTON: Yes, ma'am.

25 MS. LAKE: Thank you. We would just add

1 that the testimony of the neighbors, you know, we  
2 understand, you know, we understand that sometimes  
3 uses aren't compatible, but we also understand that  
4 the code does allow for a non-conforming use. And the  
5 evidence from this most recent testimony, if anything,  
6 confirmed that, the use. I'm not talking about  
7 intensity. I'm not talking about an expansion,  
8 because the Pierce County Prosecuting Attorney said  
9 that expansion was not part of this hearing. We're  
10 talking strictly about the use. And the use that they  
11 described is the same as what Boyd Malyon did before  
12 when he got the grandfathered use status.

13 The other really significant thing that  
14 both of the neighbors talked -- testified to is that  
15 the use that, Mr. Newells' use of the trucks hasn't  
16 changed from day one. And the reason why that's  
17 important is -- and the County's own Staff Report,  
18 page three of nine, on July 11, 2019, Jason Arbogast,  
19 Code Enforcement Officer, closed case number 65632.  
20 "The trucks observed have been found compliant with  
21 Mr. Kamieniecki's letter and the current zoning."

22 Now, the testimony of these neighbors, they  
23 don't like it, but their testimony was the use hasn't  
24 changed. And the County has not introduced any  
25 evidence of a change in use. Their own county

1 department said that the Newell trucks are compliant  
2 with the non-conforming use on July 11th of 2019, and  
3 there's simply no evidence to -- that the -- that  
4 there's been a change.

5 And what we see here, and I think the  
6 exhibits submitted and Appellants' Exhibit No. 3,  
7 demonstrate pretty clearly that the neighbors  
8 complained. There was a sympathetic county council  
9 person and staff did their darnedest to come up with  
10 some way to recast the operations on-site as something  
11 other than a contractor's yard. And the plain fact of  
12 the County's own investigation through 2013, 2019,  
13 when they dismissed their previous case against Mr.  
14 Newell, nothing has changed. The only thing that's  
15 changed is their attempt to recast the definition of  
16 what's going on there. But the fact of the matter is  
17 the use hasn't changed and it remains compliant with  
18 the code and Mr. Kamieniecki's letter, exactly as  
19 Jason Arbogast found in July of 2019.

20 HEARINGS EXAMINER SHELTON: Okay. Thank  
21 you, ma'am.

22 And, Mr. Owen, did you want another  
23 opportunity to comment, given Mr. Phillips' and Mr.  
24 Freudenstein's testimony came after the motion and  
25 after your rebuttal or your response?

1 MR. OWEN: Sure. Well, more just to  
2 address what Ms. Lake was stating. This is a nuanced  
3 analysis of a particular use of a piece of property.  
4 And Mr. Arbogast closed the case from one perspective,  
5 from one complaint, through a particular lens. And  
6 this -- this is from another lens. This is from  
7 another perspective. This is a different analysis.

8 And, further, just because the use hasn't  
9 changed from what Mr. Malyon was doing, from what Mr.  
10 -- from what the Newell Brothers started off doing,  
11 doesn't mean it's the correct use for the property.  
12 That doesn't -- uh, that doesn't set aside the  
13 evidence that we have before -- before you today that,  
14 again, even their own letters state that they are  
15 delivering aggregate materials to job sites other than  
16 their own jobs.

17 I think maybe an argument could be made  
18 that if there were -- if it was their own jobs, I  
19 think we'd still have a fairly nuanced analysis, but  
20 that would be stronger in the opponent's favor. But  
21 this is most definitely a central dispatch and  
22 servicing of a delivery truck fleet. Thank you.

23 HEARINGS EXAMINER SHELTON: Okay. Thank  
24 you, sir.

25 That's perfect timing, because we're now at

1 the time limit for this disk. So we will now take  
2 another short recess. And please make sure everyone  
3 is muted so Ms. Larrabee doesn't have to jump in here  
4 and help us all out.

5 So we're in a short recess.

6 (End of disk two.)

7 (Beginning of disk three.)

8 HEARINGS EXAMINER SHELTON: And you might  
9 have noticed that I was doing some scrambling here,  
10 because the County tech had a question, because Ms.  
11 Lake had it noted in her presentation certain exhibits  
12 and noted as one, at least, as being No. 6. I've gone  
13 back through and the question was whether or not that  
14 was referencing the County's Exhibit No. 6. And  
15 looking at the County's Exhibit No. 6, that just is  
16 the notice provisions and the continuations. So I've  
17 been able to clarify, to her satisfaction and mine,  
18 that my notes were correct, that Ms. Lake had been  
19 addressing the exhibits filed by the Appellant, not  
20 the Exhibit No. 6 filed by the County. So if you  
21 wondered what I was doing here, that's -- that's all.

22 So, Ms. Lake, you're not moving, are you?  
23 Can you hear me? Okay. Ms. Lake is frozen.

24 MS. LAKE: I can hear you. I just don't  
25 have my video. Okay, there I go.

1 HEARINGS EXAMINER SHELTON: Oh, I'm sorry.

2 MS. LAKE: Thanks.

3 HEARINGS EXAMINER SHELTON: Okay. At this  
4 time I'm going to deny the Motion to Dismiss at this  
5 stage of the proceedings. At this point I think  
6 there's enough of a question that I have as to the  
7 actual use of, not just the general -- general use,  
8 but the actual specific use on the property. And I  
9 would now proceed to request the Appellant to make a  
10 presentation.

11 So, Ms. Lake, please proceed.

12 MS. LAKE: Thank you. All right. I would  
13 call Matt Newell.

14 HEARINGS EXAMINER SHELTON: Mr. Newell,  
15 Matt Newell?

16 MS. LAKE: And Matt has un-muted. Thank  
17 you.

18 HEARINGS EXAMINER SHELTON: Mr. -- there  
19 you are. You need to make some sort of noise so we  
20 can get you on camera.

21 MR. NEWELL: Okay.

22 HEARINGS EXAMINER SHELTON: Mr. -- there  
23 you are, Mr. Newell. Good afternoon.

24 MR. NEWELL: Good afternoon.

25 HEARINGS EXAMINER SHELTON: I assume you've

1     been able to be an observer of the entire proceedings;  
2     is that correct?

3                 MR. NEWELL:    I have.

4                 HEARINGS EXAMINER SHELTON:   And please,  
5     before we begin, please raise your right hand.

6                 Do you swear and affirm that you'll tell  
7     the truth and nothing but the truth before the  
8     Examiner today?   And if you will, please just state "I  
9     will".

10                MR. NEWELL:    I will.

11                HEARINGS EXAMINER SHELTON:   Thank you, sir.  
12     And, again, this is somewhat backward, but Ms. Lake,  
13     at this point, please proceed.

14                MS. LAKE:    Thank you.   And I just have a  
15     few questions.   We've made some reference to  
16     Appellants' Exhibit 6, and within that tab, tab A7 and  
17     A8.   Are you familiar with those e-mails that you  
18     exchanged with Planner Dan Buhl?

19                MR. NEWELL:    Yes.

20                MS. LAKE:    Okay.   And what was the purposes  
21     -- purpose of your questions put to Dan Buhl?

22                MR. NEWELL:    I simply wanted to do all of  
23     my due diligence to make sure that my purchase was  
24     within line with what the property could have.

25                MS. LAKE:    And does Exhibit 7 and 8



1 accurately depict what the manner, the information  
2 that the Planner, the County Planner, conveyed to you?

3 MR. NEWELL: Yes.

4 MS. LAKE: Were you very specific about the  
5 type of use that you have, that is a dump truck use,  
6 and it's not -- you don't have a contractor's license?

7 MR. NEWELL: Yeah, I was abundantly clear.

8 MS. LAKE: And equally abundantly clear, do  
9 you believe that the County Planner affirmed to you  
10 that your dump truck business does fit within the  
11 non-conforming use status at that time?

12 MR. NEWELL: Yes, absolutely.

13 MS. LAKE: Did you rely on that information  
14 from the County Planner about whether your dump truck  
15 business fell within the existing non-conforming use?

16 MR. NEWELL: Yes.

17 MS. LAKE: Before you decided to purchase  
18 the property?

19 MR. NEWELL: Yes.

20 MS. LAKE: If -- and have you operated the  
21 Newell Brothers Trucking with the same use from when  
22 you purchased it to today?

23 MR. NEWELL: Yes, just exact, same use.

24 MS. LAKE: And how long have you been in  
25 the subcontracting business through Newell Brothers

1 Trucking?

2 MR. NEWELL: How long have I been doing it?  
3 I mean, since high school, but as far as five plus  
4 years with Newell Brothers.

5 MS. LAKE: Okay. And part of the exhibits  
6 which you submitted were Appellants' Exhibit 6- tabs  
7 30 and 31. 30 is a work order addendum to an annual  
8 subcontract.

9 MR. NEWELL: Um hum, yep.

10 MS. LAKE: Can you describe what that is?

11 MR. NEWELL: It's a contract that I -- I  
12 won with Pacific Civil & Infrastructure. Like they'll  
13 want me to, uh, subcontract aggregates going to the  
14 job and placing them on the job, um, whether you're  
15 building a road or -- so I'm delivering aggregates,  
16 buying the aggregates, and delivering it and then  
17 exporting dirt to different inert dump sites.

18 MS. LAKE: And so when you deliver the  
19 aggregate to PCI, are you delivering to a contractor  
20 or to a vendor?

21 MR. NEWELL: A contractor.

22 MS. LAKE: And there's nothing equivocal  
23 about that answer, right?

24 MR. NEWELL: No, they're -- they're a  
25 heavy-civil contractor.

1 MS. LAKE: And, likewise, Exhibit A30  
2 within Appellants' No. 6, it refers to the work order  
3 as an addendum for subcontracted work to be utilized  
4 on the referenced project. Correct?

5 MR. NEWELL: I'm sorry, that was what  
6 Exhibit?

7 MS. LAKE: Same line at 30A. I'm sorry if  
8 I got ahead of you. The PCI --

9 MR. NEWELL: Yes.

10 MS. LAKE: -- work order.

11 MR. NEWELL: Um hum.

12 Under the very first paragraph -- and  
13 you're not -- you're not delivering to PCI for them to  
14 vend or sell it to somebody else. Correct?

15 MR. NEWELL: No they applicate it right to  
16 the job --

17 HEARINGS EXAMINER SHELTON: Okay. Ms.  
18 Lake?

19 MS. LAKE: -- for the construction.

20 HEARINGS EXAMINER SHELTON: Ms. Lake, if I  
21 could interrupt?

22 MS. LAKE: Yes.

23 HEARINGS EXAMINER SHELTON: Where is the  
24 -- exactly which portion of Exhibit 30 was Mr. Newell  
25 addressing? You mentioned it, but I didn't -- I can't

1 see where it was.

2 MS. LAKE: Oh, thank you, Your Honor, for  
3 asking. It's underneath the chart that has the  
4 contractor's service provider charted information on  
5 page one.

6 HEARINGS EXAMINER SHELTON: Yes, ma'am.

7 MS. LAKE: It's the first typed paragraph  
8 that starts off "this work order is Addenda for  
9 services of subcontractor work anteriorly to be -- to  
10 be utilized on the referenced project."

11 HEARINGS EXAMINER SHELTON: Okay. Thank  
12 you. I thought that was it, but I wanted to confirm.  
13 I'm sorry for interrupting. Please proceed.

14 MS. LAKE: Sure. Thank you. And under  
15 Exhibit 6 of Appellants, and then Tab 31, this is  
16 information on Northwest Cascade letterhead. Do you  
17 see that?

18 MR. NEWELL: Yes.

19 MS. LAKE: And what's it called right  
20 underneath the letterhead?

21 MR. NEWELL: Subcontract.

22 MS. LAKE: Right. And as you go through  
23 the document, does it describe the -- who does -- how  
24 does it describe Northwest Cascade? Is it described  
25 as a vendor or a contractor?

1 MR. NEWELL: Contractor.

2 MS. LAKE: And Newell Brothers, how are you  
3 described in this contract?

4 MR. NEWELL: Subcontract.

5 MS. LAKE: Is Northwest Cascade a  
6 contractor or a vendor?

7 MR. NEWELL: Contractor.

8 MS. LAKE: When you deliver the materials  
9 to Northwest Cascade, let's take a look at page two of  
10 that same Exhibit A-31. It's -- is it accurate that  
11 this subcontract between yourself, Newell Brothers,  
12 and Northwest Cascade says to furnish and perform all  
13 work for the construction of the West Hill reservoir  
14 project; is that correct?

15 MR. NEWELL: That's correct.

16 MS. LAKE: Okay. So is it a fair statement  
17 that when you delivered aggregate to this construction  
18 project, it was used for this construction project?  
19 That was the purpose of your delivery for  
20 construction?

21 MR. NEWELL: That's correct.

22 MS. LAKE: And, in fact, you didn't deliver  
23 aggregate to the contractor for them to resell or vend  
24 to any other party. Correct?

25 MR. NEWELL: Correct. They just applicate

1 it to the job.

2 MS. LAKE: Okay. And, likewise, under  
3 Appellants' Exhibit 6- Tab 32, Pacific Civil &  
4 Infrastructure, is there any question that that's a  
5 construction business?

6 MR. NEWELL: That's a construction  
7 business.

8 MS. LAKE: And is -- is it accurate, as  
9 they described, that you provide subcontracting on a  
10 variety of specific construction projects, three of  
11 which they identify here?

12 MR. NEWELL: That's correct.

13 MS. LAKE: And in the second-to-the-last  
14 paragraph, where they say Newell Brothers provide  
15 construction trucks and trailers and site down  
16 experienced construction job drivers.

17 Do you agree that that's an accurate  
18 description of your work?

19 MR. NEWELL: That's very accurate.

20 MS. LAKE: Okay. Did you have  
21 conversations with Jason Arbogast in response to a  
22 citizen complaint?

23 MR. NEWELL: Yeah, he -- he showed up on  
24 the property.

25 MS. LAKE: Okay.

1 MR. NEWELL: I think that's him.

2 MS. LAKE: Yeah. I'm going to draw your  
3 attention to Appellants' Exhibit 6- Tab 11. Do you  
4 have that in front of you?

5 MR. NEWELL: Yep.

6 MS. LAKE: Okay. All right. And so was he  
7 -- was the -- was one of the stated purposes is to  
8 investigate your use on the site? Is that what you  
9 understood his investigation was?

10 MR. NEWELL: Yeah, that was my  
11 understanding.

12 MS. LAKE: And does Exhibit 11 and  
13 Exhibit 12 -- Tab 11 and Tab 12 within Appellants'  
14 Exhibit 6, are those e-mail messages where you're  
15 trying to be responsive to Mr. Jason Arbogast?

16 MR. NEWELL: Yes.

17 MS. LAKE: And, in fact, did you forward to  
18 Jason the due diligence you had performed through the  
19 e-mails you had with Dan Buhl, County Planner?

20 MR. NEWELL: I did.

21 MS. LAKE: And do you remember his visit as  
22 being approximately -- approximately May of 2019?

23 MR. NEWELL: (No answer).

24 MS. LAKE: Well, let me -- let me state it  
25 another way. In the county Staff Report they indicate

1 that Jason Arbogast, Code Enforcement Officer, visited  
2 the site and took photos on May 17, 2019. Do you have  
3 any reason to dispute that?

4 MR. NEWELL: I don't.

5 MS. LAKE: And the Staff Report goes on, on  
6 page three of nine of the revised Staff Report from  
7 the County, that on July 11th, 2019, a couple of  
8 months after he'd been to your site --

9 MR. NEWELL: Um hum.

10 MS. LAKE: -- that Jason Arbogast, Code  
11 Enforcement Officer, closed the case and found that  
12 the trucks observed were compliant with Mr.  
13 Kamieniecki's letter in zoning. You're aware of that  
14 determination?

15 MR. NEWELL: I am.

16 MS. LAKE: And your use of your trucks  
17 on-site has not changed prior to July 11th, 2019?

18 MR. NEWELL: That's exactly, it's the same.

19 MS. LAKE: If the -- if the County somehow  
20 determined that your use does not fit within the  
21 grandfathered status that was awarded to the prior  
22 property owner, would that result in any -- would you  
23 incur any costs as a result of that decision?

24 MR. NEWELL: Yeah. I mean, I don't know  
25 what I'd do. Yeah.



1 MS. LAKE: How would it affect your  
2 operation in which you -- what would be the steps that  
3 you would have to take in response to a change  
4 determination from the County?

5 MR. NEWELL: Well, I'd have to -- it would  
6 all depend on what the change would be, but if -- I  
7 guess, can you clarify the question?

8 MS. LAKE: Yeah. Would you incur any cost  
9 if you had to move your business or relocate it?

10 MR. NEWELL: Oh, yeah, totally. It would  
11 be -- I mean, I was figuring maybe like a \$1.6 million  
12 or up to \$3 million, you know, change.

13 MS. LAKE: If the County -- and the County  
14 has stated on the record here that expansion of the  
15 use is not on the table here.

16 MR. NEWELL: Um hum.

17 MS. LAKE: But let's presume that the  
18 County said well, we're going to restrict the size and  
19 scope of your operation. Would that negatively impact  
20 your ability to keep the size of contracts that you  
21 currently have with contractors for construction and  
22 contracting jobs?

23 MR. NEWELL: Yes, it would.

24 MS. LAKE: And that would result in  
25 presumably less income, because you're on smaller

1 projects; is that correct?

2 MR. NEWELL: Yes, correct.

3 MS. LAKE: When you did your due diligence  
4 with the County Planner, Dan Buhl, was that done  
5 before you purchased the property?

6 MR. NEWELL: Yes, it was. I want to say  
7 roughly -- I mean, I don't have it right in front of  
8 me, but I want to say six months.

9 MS. LAKE: Okay.

10 MR. NEWELL: Or five months, excuse me.

11 MS. LAKE: Thank you. And included within  
12 Appellants' Exhibit 6- Tab 9, is the Closing Statement  
13 from First American Title Company?

14 MR. NEWELL: Yes.

15 MS. LAKE: Is that -- okay. And does that  
16 accurately reflect the purchase price of nearly  
17 \$1 million dollars for the property?

18 MR. NEWELL: Yes.

19 HEARINGS EXAMINER SHELTON: I'm sorry. Ms.  
20 Lake? Ms. Lake?

21 MS. LAKE: Yeah.

22 HEARINGS EXAMINER SHELTON: Could you  
23 direct me to the appropriate tab? I didn't hear that.

24 MS. LAKE: Sure. I apologize. It's  
25 Appellants' Exhibit 6- Tab 9.

1 HEARINGS EXAMINER SHELTON: Okay. No, I  
2 don't think you need to apologize. Exhibit 6, 9. I  
3 have it. Thank you, ma'am.

4 MS. LAKE: Okay. Thank you.

5 And this settlement statement reflects that  
6 the closing occurred on January 29th, 2019, correct?

7 MR. NEWELL: Correct.

8 MS. LAKE: So that was about, as you say,  
9 about four -- four to five months after you consulted  
10 with the County Planner about what use was allowed.  
11 Those e-mails are dated September 4th, the last  
12 e-mail?

13 MR. NEWELL: Right.

14 MS. LAKE: Do you remember -- I'll have you  
15 turn to Exhibit 6- Tab 20. And do you recognize this  
16 as a "Notice and Order to Correct" sent to you by  
17 Pierce County Planning?

18 MR. NEWELL: Yeah, I'm trying to look it up  
19 here.

20 MS. LAKE: Okay. And let me -- let me  
21 screen -- let me screen share here. Bear with me  
22 while I open it up. I'm going to share. All right.  
23 It should appear.

24 MR. NEWELL: Okay.

25 MS. LAKE: Do you recognize this letter on

1 the screen?

2 MR. NEWELL: Yes.

3 MS. LAKE: Okay. And is this the Notice  
4 and Order to Correct you received from Pierce County?

5 MR. NEWELL: Um hum.

6 MS. LAKE: Regarding the subject property,  
7 the property subject to this appeal?

8 MR. NEWELL: Yes.

9 MS. LAKE: Sorry, I'll scroll down. And,  
10 um, in this letter, the County does not claim that you  
11 are operating a fleet delivery service, do they?

12 MR. NEWELL: No.

13 MS. LAKE: In fact, the enforcement action  
14 that they took at that time -- and this was  
15 September 6, 2019, after you purchased the property --  
16 they're claiming that you actually expanded a  
17 contractor's yard; is that correct?

18 MR. NEWELL: That's correct.

19 MS. LAKE: And the enforcement notice says  
20 that the prior owners had a contracting operation.  
21 And they, on page two, do you agree where it says  
22 "description of the confirmed violation," and --

23 MR. NEWELL: Yes.

24 MS. LAKE: And the word here, tell me if  
25 I'm accurate, the County is the one saying that the

1 recognized contractor yard use on a portion of this  
2 parcel has been expanded without appropriate land use  
3 approval.

4 MR. NEWELL: Correct.

5 MS. LAKE: Does -- is there anywhere in  
6 this letter where they claim that you were running a  
7 fleet delivery service in September 2019?

8 MR. NEWELL: No.

9 MS. LAKE: I'm going to direct your  
10 attention to Appellants' Exhibit 6- Tab 21. And I  
11 -- I think I'm still screen-sharing. Can you see what  
12 this is? Do you recognize this as the appeal of that  
13 county enforcement action?

14 MR. NEWELL: I do.

15 MS. LAKE: And in response to that County's  
16 September 2019 enforcement of an expanded contractor  
17 yard, were you required to engage the services of a  
18 lawyer to defend yourself?

19 MR. NEWELL: I was.

20 MS. LAKE: And while very reasonable, you  
21 did incur costs; is that correct?

22 MR. NEWELL: That's correct.

23 MS. LAKE: And the County processed that  
24 appeal, as far as you're aware. I'm going to direct  
25 your attention to the next exhibit, Exhibit 22.

1 Does this accurately depict that the County  
2 went so far as to even set a hearing on your -- on  
3 your appeal of the enforcement for a expanded  
4 contractor yard; is that correct?

5 MR. NEWELL: That's correct.

6 MS. LAKE: And the notice of the hearing  
7 went out September 25, 2019.

8 I'll now direct you Appellants' Exhibit 6-  
9 Tab 23. And you -- do you recognize this as the  
10 November 2019 notice from the County that, in fact,  
11 they were rescinding the Notice and Order to Correct?  
12 They -- they rescinded your enforcement action; is  
13 that correct?

14 MR. NEWELL: That's correct.

15 MS. LAKE: Okay. And prior to the  
16 September 2019 Code Enforcement letter, which  
17 describes your operation as a contractor yard, did  
18 your use remain the same, your truck use remain the  
19 same, prior to receiving the Code Enforcement letter,  
20 as it is today?

21 MR. NEWELL: That's correct, it's exactly  
22 the same.

23 MS. LAKE: You've heard a lot of  
24 questioning today of the County Planner regarding  
25 exhibit -- the County's Exhibit 3E, which is the

1 January 6, 2020, letter, in which they are now saying  
2 that you're running a delivery fleet. Would you  
3 describe -- is it -- is it an accurate description of  
4 use of your trucks, quote, "to support the delivery of  
5 construction materials used in conjunction with  
6 specific construction projects". Is that an accurate  
7 description of your use?

8 MR. NEWELL: Yes.

9 MS. LAKE: Just one second. I'm checking  
10 my notes. I don't have any further questions.

11 HEARINGS EXAMINER SHELTON: Okay. Thank  
12 you, ma'am.

13 Mr. Newell, Mr. Owen may have questions of  
14 you, Mr. Owen on behalf of the County. Did you have  
15 any questions of follow-up with Mr. Newell?

16 MR. OWEN: Um, very briefly. Does Newell  
17 Brothers distribute products?

18 MR. NEWELL: Sorry?

19 MR. OWEN: Does Newell Brothers  
20 (inaudible).

21 HEARINGS EXAMINER SHELTON: You're breaking  
22 up a bit, Mr. Owen.

23 MR. OWEN: I'm going to move rooms. I  
24 apologize.

25 HEARINGS EXAMINER SHELTON: Okay. Thank

1     you.

2                   MR. OWEN:  I thought -- I thought cutting  
3     my video would help, but apparently not.  I'm next to  
4     my router, so this is about the best I can do.

5                   HEARINGS EXAMINER SHELTON:  Sounds good.

6                   MR. OWEN:  So just three questions.  Does  
7     Newell Brothers distribute products?

8                   MR. NEWELL:  Construction -- we take  
9     aggregates and apply them to projects, to construction  
10    projects.

11                  MR. OWEN:  Like deliver them?

12                  MR. NEWELL:  We do.

13                  MR. OWEN:  When you say "apply," you mean  
14    you deliver them, like drop it off?

15                  MR. NEWELL:  Well, we actually apply them  
16    to the project.  So like if they're building a  
17    building pad, we'll drop it off at a location so that  
18    they can doze it and we'll haul, export off of  
19    projects, that we're contracted to.

20                  MR. OWEN:  Right.  Right.  Okay.  So maybe  
21    you can deliver a product in such a way like you tilt  
22    the truck bed up and kind of pour it out slowly.  Is  
23    that what you mean by applying it versus just dumping  
24    it?

25                  MR. NEWELL:  Well, you're talking about



1 stockpiling. You're talking about application. So  
2 like if we're building a road and we're taking 5/8ths  
3 crush rock there, we're spreading the rock out on the  
4 road to bring the level of the road up to final grade.

5 MR. OWEN: Right. But that's with the dump  
6 truck, not just, for example, some kind of a grading  
7 tool?

8 MR. NEWELL: Well, in a sense it is. We're  
9 spreading it out so they don't have to grade it.

10 MR. OWEN: Understood. But with the dump  
11 truck; is that right?

12 MR. NEWELL: Dump trucks and side dumps,  
13 yes.

14 MR. OWEN: Okay. So I guess I lied. I  
15 have more than three questions because that was my  
16 first question. I'm sorry.

17 MR. NEWELL: That was a doozy.

18 MR. OWEN: I just, yeah, just want to be  
19 clear about what's going on.

20 So you have, in other words, no other  
21 equipment, not a motor grader, a blade, you know, a  
22 dozer, that kind of a thing? You just have the dump  
23 trucks and the side dumpers?

24 MR. NEWELL: Correct.

25 MR. OWEN: Okay. Are the -- are those

1 trucks dispatched from your property?

2 MR. NEWELL: My brother does that at his  
3 house.

4 MR. OWEN: Okay. But the trucks physically  
5 come and go from your property that's in question here  
6 today?

7 MR. NEWELL: Correct.

8 MR. OWEN: Okay. Are the trucks serviced  
9 there?

10 MR. NEWELL: Yes.

11 MR. OWEN: Okay. That's all of the  
12 questions I have. Pardon me. Thank you.

13 MR. NEWELL: Thank you.

14 HEARINGS EXAMINER SHELTON: Okay. Thank  
15 you. And, Ms. Lake, any follow-up questions, based on  
16 Mr. Owen's questions?

17 MS. LAKE: Just briefly. I'm reading the  
18 words of the county code definition of "contractor  
19 yard". And that's at Title 18A.33.280.B: "Contractor  
20 Yards Use Type refers to an area for construction or  
21 contracting business offices, interior or outdoor  
22 storage, repair, or maintenance of heavy equipment,  
23 vehicles, or construction supplies and materials."

24 Do you store and repair and maintain your  
25 vehicles that are related to your subcontracting dump

1 truck business on-site?

2 MR. NEWELL: We do.

3 MS. LAKE: That's all.

4 HEARINGS EXAMINER SHELTON: Okay. Thank  
5 you, ma'am.

6 Mr. Owen, any questions based on that brief  
7 Redirect?

8 MR. OWEN: No, nothing based on that.  
9 Thank you.

10 HEARINGS EXAMINER SHELTON: Okay. Mr.  
11 Newell, I appreciate your testimony today. You might  
12 need to testify further, I don't know, during the  
13 course of this hearing, so please, if you could stay  
14 in attendance.

15 MR. NEWELL: Okay.

16 HEARINGS EXAMINER SHELTON: Ms. Lake,  
17 please, do you have any further witnesses that you'd  
18 like to call?

19 MS. LAKE: I have one more question for --  
20 I apologize.

21 HEARINGS EXAMINER SHELTON: All right.

22 MS. LAKE: For Mr. Newell.

23 HEARINGS EXAMINER SHELTON: Go right ahead,  
24 ma'am.

25 MS. LAKE: Thank you. Mr. Newell, when you

1 purchased the property in January of 2019, the Closing  
2 Statement refers that you had obtained a title report;  
3 is that correct?

4 MR. NEWELL: Correct.

5 MS. LAKE: And if that title report had  
6 reflected that Pierce County had recorded a  
7 Certificate of Noncompliance, a Lis Pendens, or any  
8 kind of notice of violation, if the County had filed  
9 any of those things regarding your subject property  
10 with the County Auditor, would you have stopped the  
11 sale?

12 MR. NEWELL: Absolutely.

13 MS. LAKE: Thank you. That's all.

14 MR. NEWELL: You bet.

15 HEARINGS EXAMINER SHELTON: And, Mr. Owen,  
16 that was an extra question. If you'd like to  
17 follow-up, you certainly can.

18 MR. OWEN: Nothing based on that. Thank  
19 you.

20 HEARINGS EXAMINER SHELTON: Okay. And  
21 thank you, Mr. Newell.

22 Ms. Lake, any further testimony today?

23 MS. LAKE: No, Your Honor. Thank you.

24 HEARINGS EXAMINER SHELTON: Okay. Thank  
25 you, ma'am.

1           At this time, Mr. Owen, was there any  
2 rebuttal testimony you'd like to provide to the  
3 Examiner?

4           MR. OWEN: I don't have any rebuttal  
5 testimony. Thank you.

6           HEARINGS EXAMINER SHELTON: Okay. And at  
7 this point, is Mr. Phillips still present?

8           MR. PHILLIPS: Yes, I am.

9           HEARINGS EXAMINER SHELTON: Okay. At this  
10 point in time we're -- I'm just about ready to close  
11 the public hearing until we have final argument. Did  
12 you or Mr. Freudenstein have any further comments  
13 you'd like to make today?

14          MR. PHILLIPS: I don't.

15          HEARINGS EXAMINER SHELTON: Okay. Mr.  
16 Freudenstein?

17          MR. FREUDENSTEIN: No.

18          HEARINGS EXAMINER SHELTON: Okay. I just  
19 wanted to give you that opportunity. I'm glad you're  
20 here today.

21          So at this time, Mr. Owen, on behalf of the  
22 County, would you like to place a closing argument  
23 before the Examiner?

24          MR. OWEN: Yes. Thank you, Mr. Examiner.  
25 This is a nuanced analysis of a particular use. In

1 looking at the definition under 18A.33.280.B & I,  
2 they're -- there is admittedly overlap. There is some  
3 subtlety here.

4 The only thing we're looking at today is  
5 whether the current use on the property is a  
6 contractor's yard. I'll just read it again, because I  
7 think it's very helpful. "... an area for  
8 construction or contracting business offices, interior  
9 or outdoor storage, repair, or maintenance of heavy  
10 equipment, vehicles, or construction supplies and  
11 materials". Again, that's Subsection B.

12 And that has previously been approved by  
13 the County as a legally lawfully established  
14 non-conforming use. However, the evidence shows that,  
15 in fact, the use on the property is "Warehousing,  
16 Distribution, and Freight Movement," under Subsection  
17 I that refers to the "... large scale warehousing and  
18 distribution of manufactured or processed products for  
19 one or more businesses, the large scale distribution  
20 of raw, manufactured, or processed products for one or  
21 more businesses at a central location, and the central  
22 dispatch and servicing of a delivery truck fleet,  
23 where no reloading (transfer facility), warehousing,  
24 or consolidation of materials takes place on site."

25 It goes on to say "Materials may be stored

1     inside a building or in outdoor storage areas."

2             Again, that's Subsection I of Pierce County  
3     18A.33.280. And the evidence that we've seen here  
4     today shows a particular activity. And it seems to me  
5     that we're in agreement on what that activity is.  
6     Really, the only question is what use it falls under.

7             I think there's some other questions of  
8     nomenclature, contractor, subcontractor, fleet and  
9     delivery trucking company, you know. And I don't want  
10    to get bogged down by those terms.

11            Further, it doesn't matter what a staffer  
12    told Mr. Newell. It doesn't matter what conclusions  
13    Mr. Arbogast came to previously. In fact, it appears  
14    to me that those prior comments are really through a  
15    lens of whether there's an expansion of a  
16    non-conforming use or not, which I don't think  
17    validates the fact that the use was, in fact, lawful.  
18    It's just not the lens the County was looking through.

19            That's certainly not what the County  
20    alleges now. The analysis has changed. And that  
21    change is not unlawful. Based on new information, the  
22    County can re-establish a different position.

23            Now, what matters is what is the use and  
24    what is the allowed use. And, again, we've drilled  
25    down into the word contractor, vendor, subcontractor.

1 We just need to look at the activity on the site.  
2 This company, whether it's called a subcontractor or  
3 not, engaged in the delivery of aggregate materials to  
4 job sites, job sites other than appellants' own job.  
5 And I point that out because I think that highlights  
6 the fact that it's not a contracting business office  
7 where there's some storage for their own jobs.

8 Just because the company using a particular  
9 property is called a contractor does not mean that the  
10 property -- or subcontractor does not mean that the  
11 property or rather the use engaged on their property  
12 is a contractor's yard. In this case, the property is  
13 most certainly, or rather the use on the property is a  
14 warehousing distribution and freight movement and I  
15 think that the evidence clearly establishes that.  
16 Thank you.

17 HEARINGS EXAMINER SHELTON: Okay. Thank  
18 you, sir.

19 Ms. Lake, would you like to provide a  
20 Closing Statement?

21 MS. LAKE: Absolutely, Your Honor. Here's  
22 where I don't agree with the County. I don't agree  
23 that the only question is whether it's a lawful use.  
24 The question here is has the County remained  
25 consistent with how they have categorized the use from



1 when they looked at it in 2004, to when they looked at  
2 it in 2013, to when they looked at it -- when they  
3 brought enforcement action against the Malyons when  
4 they looked at it in 2018, before the Newells bought  
5 the property, and when they looked at it in September  
6 of 2019 when Jason Arbogast looked at it.

7 So between County Planner Stefan  
8 Kamieniecki, County Planner Dan Buhl, County Planner  
9 Jason Arbogast, they all looked at the uses and they  
10 all determined that this use, the current use that Mr.  
11 -- that the Newells are doing, falls within the  
12 contractor yard and falls within the scope of the  
13 non-conforming use letter that Stefan Kamieniecki  
14 wrote. The County's own Staff Report says the entire  
15 staff came to a consensus that -- that the Newell use  
16 complied with the Kamieniecki non-conforming use  
17 letter. That's -- that's unquestioned.

18 So what the County says is well, the  
19 analysis has changed and it's more nuance now. The  
20 concept of what truck use is a contracting yard versus  
21 what truck use is a fleet use. Those are concepts not  
22 of our making. Those are concepts and definitions  
23 supplied by Mr. Hoffmann himself in that County  
24 Exhibit 3E where he says here's the key difference. A  
25 contractor yard has trucks that deliver construction

1 materials to construction -- specific construction  
2 projects. This idea that it has to be your  
3 construction project or you have to use some other  
4 equipment besides a truck has no place. That -- that  
5 is a concept that only the prosecutor, only the  
6 attorneys for the County, has argued because the words  
7 of the code don't say that and the words of the  
8 explanatory notes don't say it has to be your project.  
9 It just says the truck use is supporting the delivery  
10 of construction materials on a specific construction  
11 project, and that's exactly the evidence that we've  
12 shown.

13 In contrast, the County grasps that  
14 definition of a vendor, but they've never produced any  
15 evidence that any vendor, either to or from the Newell  
16 Brothers, is involved here. And those -- those  
17 concepts matter. Under the Pierce County Code,  
18 there's a couple of provisions. Well, first of all,  
19 let me -- the broader -- the broader concept here is  
20 that the County codes are there to provide certainty.  
21 The County codes are there so that someone can pick up  
22 the zoning code, take a look at it, do due diligence  
23 based upon the words in the code, based upon the  
24 definitions that Planners give you, and you can rely  
25 on those.

1           When the -- when the County's attorney  
2 argues well, the analysis has changed, that's just not  
3 good enough. It -- the legality of a use shouldn't  
4 change and be arbitrarily determined by talking to the  
5 fourth Planner in the history of this case.

6           The County has a, under its compliance  
7 provision, it has a concept called innocent purchaser.  
8 And that concept says we're going to make -- the  
9 County has the ability to enforce its land use codes,  
10 except if you show you're an innocent purchaser. And  
11 those provisions, we provided a copy to you, Mr.  
12 Examiner, under Appellants' Exhibit 6- Tab 23. An  
13 innocent purchase is a property owner who purchased  
14 real property and who at the time of purchase had no  
15 knowledge that the real property contained unpermitted  
16 development. Okay? It's unquestioned that the use  
17 that the Newells do -- have done is exactly the same  
18 as what the Malyons did.

19           The County provisions go on to say that if  
20 the property transfer occurred after 2011, then you  
21 have to show a couple of things in order for the  
22 innocent purchaser concept to apply to you.

23           Number one, a person will not qualify as an  
24 innocent purchaser where the County has recorded a  
25 Certificate of Noncompliance with a Lis Pendens or

1 other notice of violation of the subject property with  
2 the County Auditor. The County did no such thing.  
3 There was no such recording. No such reporting showed  
4 up on the title report when the Newells purchased it.  
5 And the transfer from the Malyons to the Newells  
6 occurred in January 2019.

7 The other requirements are that the -- the  
8 other requirements are that the purchaser had to pay  
9 fair market value for the property. And certainly by  
10 Exhibit A-9 we know that the Newells paid almost  
11 \$1 million dollars after they had done their due  
12 diligence. That is certainly fair market value. And  
13 there's no evidence to the contrary, so we know that  
14 the transfer occurred in 2019. The Newells paid fair  
15 market value for the property. The County had not  
16 recorded a Certificate of Noncompliance and the  
17 Newells not only had no knowledge that there was any  
18 kind of unpermitted use, the County did it -- the  
19 Newells did due diligence by checking with Planners  
20 and saying hey, here's exactly what I'm going to do,  
21 is it allowed within the use? And the unquestioned  
22 affirmation from the Planner said yes. So the Newells  
23 here qualify as an innocent purchaser.

24 Now, the County's response to that will be  
25 oh, well, wait a minute. It was okay when he bought

1 it, but he changed the use some time after. In fact,  
2 that's in their Notice and Order to Correct. It  
3 recognizes that there's non-conforming use on the  
4 parcel, but it then goes on to describe that sometime  
5 after the purchase, after he was on the property, the  
6 use changed. And, in fact, if we look at the Staff  
7 Report -- hold on one second -- 3-F, if we look at the  
8 County's revised Staff Report where they're responding  
9 to the position. And this is on page 7 of nine of the  
10 County's Staff Report. It says, in response to its  
11 paragraph ten, innocent purchaser, it's the County's  
12 assertion that the new delivery truck business was  
13 started by the current owners. The testimony of  
14 everybody has been consistent that the Newells' use  
15 has never changed from when they first started. Even  
16 the neighbors, who don't like the use, testified that  
17 the Newells' use never changed. So there is no change  
18 of use to support anything that would detract from the  
19 idea that the Newells purchased the property. They  
20 did so in good faith, they did their due diligence,  
21 and they're carrying on exactly the use that they  
22 investigated that the property could be used for.

23 The next --

24 HEARINGS EXAMINER SHELTON: Ma'am, just one  
25 moment. On seven of nine, which section were you just

1 referring to?

2 MS. LAKE: In?

3 HEARINGS EXAMINER SHELTON: Page seven of  
4 nine on the Staff Report?

5 MS. LAKE: Yeah, um, paragraph ten. It's  
6 called "innocent purchaser".

7 HEARINGS EXAMINER SHELTON: Yes, ma'am.  
8 Okay. Thank you. Please proceed.

9 MS. LAKE: Um hum.

10 The next -- the next offense that we have,  
11 Your Honor, is that the County is equitably estopped  
12 from taking the position that they are in this case,  
13 that their analysis has changed and that there's new  
14 information.

15 Well, number one, there is no new  
16 information. Mr. Hoffmann described that the sole  
17 observation upon which he made the determination that  
18 the trucks he observed on-site were used as a fleet  
19 business -- and this is from his initial testimony --  
20 was that his observing them on the site. And you'll  
21 recall the question was put to him did you have any  
22 evidence of -- of whether they went to vendors,  
23 whether they went to the contractors yard. Did you  
24 have any evidence of that? No, I couldn't tell you  
25 what that was.

1           So there is no new information. He didn't  
2 have any more information than what the three Planners  
3 prior to him had. Yet he reached this changed  
4 analysis as the County is arguing. Well, fortunately,  
5 there's -- there is the Doctrine of Equitable  
6 Estoppel. And the elements of Equitable Estoppel --  
7 I'm happy to submit briefing on this, Your Honor -- is  
8 that there's a statement or an act which becomes  
9 inconsistent with the claim after asserted.

10           Number two, that there's an action and  
11 reliance upon that inaccurate statement.

12           And, third, there's an injury to the  
13 relying party from allowing the first party to  
14 contradict or repudiate the prior act.

15           So let me bring that down and apply it to  
16 this situation.

17           The County has maintained that the subject  
18 property dump truck operation qualified as a  
19 non-conforming use in 2004 as to the Maylons. Again,  
20 in 2013 when the County brought enforcement action  
21 against the Maylons. And most recently in 2019, when  
22 the County first started enforcement against the  
23 Newells as a contractor yard and then rescinded it.  
24 And those are supported by Appellants' Exhibit No. 6,  
25 under tab 1, tab 2, tab 3, tab 6, tab 23, and that

1 portion of the County's revised Staff Report on page  
2 three of nine, the entry dated July 11, 2019. Jason  
3 Arbogast closed the case. The Newell trucks have been  
4 found to be compliant with Mr. Kamieniecki's letter  
5 and the current zoning.

6 So all five of the criteria for equitable  
7 estoppel is here. Number one, that Pierce County's  
8 prevailing and perpetuated statement that dump truck  
9 use qualifies as a contracting yard, including the  
10 e-mail explaining between the County Planner and Mr.  
11 Newell and now the County's inconsistent current  
12 position that the Newell use suddenly is now a fleet  
13 truck delivery service. That meets criteria number  
14 one of equitable estoppel.

15 Number -- the second element is the Newells  
16 acted in reliance upon the statement or action. And  
17 that's shown in Spades here. Mr. Newell did exactly  
18 the due diligence you would want to do, checked with  
19 the Planning Department, had it in writing from the  
20 County that his use was allowed under the  
21 non-conforming status. And based upon that, he relied  
22 on that and purchased the property at nearly  
23 \$1 million dollars expressly to carry out the dump  
24 truck use as the grandfathered use.

25 Thirdly, injury will result to the Newells



1 if it's determined that suddenly under this new  
2 analysis that definition of what he's doing out there  
3 has changed.

4 So equitable estoppel is based upon the  
5 principle that a party should be held to the  
6 representation made or a position asserted when  
7 inequitable consequences would otherwise result to  
8 another party who has justifiably and in good faith  
9 relied upon that. And here the County should be held  
10 to its express representation that the dump truck use  
11 falls within the non-conforming status and the appeal  
12 should be granted and the County's enforcement action  
13 should be equitably estopped.

14 There's also the concept of judicial  
15 -- judicial estoppel. It's another equitable doctrine  
16 that's very akin to the equitable estoppel, that bars  
17 -- a party should not be permitted to occupy  
18 inconsistent positions or take a position in regard to  
19 a matter which is directly contrary to or inconsistent  
20 with one previously assumed by him when another party  
21 relies upon it.

22 And, like I said, I'm happy to provide the  
23 additional briefing to the Examiner and for the  
24 benefit of the County.

25 So, in sum, Your Honor, this isn't even a

1 -- this is not even a close case. There's nothing  
2 -- when the County tries to talk to nuancing, what  
3 they're really saying is we changed -- we just  
4 absolutely 180 degrees changed direction on this poor  
5 property owner and now we're going to call it this,  
6 when for decades prior we called it that. The law  
7 doesn't allow for that and the facts don't support the  
8 analysis they put to it, however tortured it is.

9 And so, Your Honor, we'd ask that this  
10 property owner be relieved from yet another  
11 unjustified enforcement action and that the matter be  
12 dismissed.

13 HEARINGS EXAMINER SHELTON: Okay. Thank  
14 you, Ms. Lake.

15 MR. OWEN: And, Mr. Examiner, there were a  
16 few new concepts there. I thought I might briefly  
17 respond to the legal arguments.

18 HEARINGS EXAMINER SHELTON: Oh, by all  
19 means. You have an opportunity to, on a rebuttal, to  
20 do so. The County has the burden of proof in this  
21 matter, so certainly rebuttal is appropriate. Please  
22 proceed.

23 MR. OWEN: Okay. Thank -- thank you. I  
24 just wanted to point out that under -- this is a very  
25 long code section, so I want to get the number

1 correct. Give me a second. Under 18.25.30, which is  
2 definitions, which you can imagine is very long. It's  
3 taking me a while to scroll through.

4 MS. LAKE: Can you say that cite one more  
5 time, please?

6 MR. OWEN: Oh, yes. I'll scroll back.  
7 It's 18.25.30. And I'll use the search function.  
8 That's a lot faster.

9 Innocent purchaser, by my understanding,  
10 deals with property division, subdivision, platting  
11 regulations, or unpermitted development. And it seems  
12 to me that the notion is not applicable to use.

13 The other concept I just wanted to briefly  
14 comment on was equitable estoppel, which in -- and I  
15 don't know if you want a citation, but there is a  
16 case, it's actually relatively recent, a Pierce County  
17 case, which says equitable estoppel against the  
18 government is disfavored. And it goes on to argue  
19 which states articulate that one of the elements which  
20 an equitable estoppel is asserted against the  
21 government is that it will not impair governmental  
22 functions. And that's *Byrd* -- B-Y-R-D -- *vs. Pierce*  
23 *County*. I can give you the citation, if you'd like.

24 MS. LAKE: It's 425 P.3rd 948, Washington  
25 Court of Appeals in 2018.

1                   MR. OWEN:   Okay.   That's the one.   And  
2   that's all I wanted to say.   Thank you, Mr. Examiner.

3                   HEARINGS EXAMINER SHELTON:   Oh, thank you,  
4   sir.

5                   And, Ms. Lake, just a brief comment, if you  
6   choose, on Mr. Owen's rebuttal?

7                   MS. LAKE:   Sure.

8                   Mr. Owen is correct that for equitable  
9   estoppel to be applied against government, the -- you  
10   must also show that the estoppel is necessary to  
11   prevent a manifest injustice.   And I'd say we have  
12   that in Spades here.   A property owner invested almost  
13   \$1 million dollars, based upon the County's  
14   representation, which apparently now we're changing.

15                   And five, estoppel will not impair  
16   governmental functions.   And we know that the  
17   continued use of this site as a dump truck business  
18   contractor yard will not impair any governmental  
19   functions.   We know that because the County determined  
20   that was true in 2004 and 2018, and again in 2019.  
21   And, in fact, will give credence to the governmental  
22   function, because it means the County has integrity in  
23   applying the non-conforming use code and that they  
24   don't change their mind midstream, which I would argue  
25   is more of an impairment of governmental functions

1     than to be -- than what we're -- our position is the  
2     County needs to be consistent and they need to be held  
3     to that consistent determination upon which the  
4     property owner relied.

5                 So we're -- we don't shy away from the *Byrd*  
6     case. We embrace it. And we're happy to provide a  
7     short legal memorandum in support of all of those  
8     concepts.

9                 HEARINGS EXAMINER SHELTON: Okay. Thank  
10    you, Ms. Lake.

11                So at this time, it's about 4:20, I will  
12    close the public hearing, meaning no further  
13    testimony, no further argument. I will certainly take  
14    this matter under advisement. Under the code, I will  
15    be required to provide a written decision. But also  
16    based on the representations from counsel, I will  
17    leave the record open for a presentation on either the  
18    legal issues or essentially potentially a trial memo  
19    briefing, if you so choose, as to asserting your  
20    positions on the allegations here when you have boiled  
21    down a bit to the fact -- the factual basis of the  
22    usage, whether or not it comports with a contractor  
23    yard or a truck delivery service.

24                And certainly, if you would like to  
25    weigh-in on the equitable estoppel issues before the

1 Examiner, both judicial and equitable, that would be  
2 helpful.

3 Also, there's been a reference to that  
4 Pierce County appellate case. It looks like  
5 Washington appellate -- if you'd like, you can brief  
6 that, you certainly can, but I'll give a full  
7 opportunity to do so.

8 Today is the 18th, and given how much time  
9 both of you invested in this and how long this hearing  
10 has taken, do you know how much time you would like to  
11 have in order to present any written summary or  
12 briefing or argument on these matters? So, Ms. Lake,  
13 as the Appellant, do you have a time frame that you  
14 would like me to impose to keep the record open?

15 MS. LAKE: Thank you, Your Honor. I do. I  
16 think that the date of -- a two-week date of March 4th  
17 sounds like a great date, March 4th, to bring forth  
18 the legal arguments. And I would suggest that this  
19 isn't one of those situations where there needs to be  
20 an opening, a reply, and a rebuttal. I would suggest  
21 that both parties submit on the same date their  
22 analysis.

23 And on that point I did have a question. I  
24 had a call come in, so I missed the Examiner's  
25 description of the scope of what would be allowed.

1 And I think I heard you say it's confined to legal  
2 analysis based upon what's already in the record; is  
3 that correct?

4 HEARINGS EXAMINER SHELTON: Yeah. We're  
5 looking at the record before the Examiner.

6 MS. LAKE: Right.

7 HEARINGS EXAMINER SHELTON: What has been  
8 presented, simply either a summary or argument or  
9 picking up the various issues that you specifically  
10 addressed in your closing. So this would not be an --

11 MS. LAKE: Thank you.

12 HEARINGS EXAMINER SHELTON: -- opportunity  
13 for additional evidence to be submitted.

14 MS. LAKE: Thank you.

15 HEARINGS EXAMINER SHELTON: Mr. Owen, would  
16 two weeks be sufficient?

17 MR. OWEN: Yeah. I certainly can comply  
18 with that. I -- I did tend to favor the sort of time  
19 honored and codified in many most arenas tradition of  
20 a brief, a response, and then a reply. I think that  
21 gives everybody a fair chance to make sure that they  
22 address the other party's arguments adequately. And  
23 it gives the finder, you know, of fact the  
24 decision-maker all of the arguments. So I would  
25 prefer that. But I also understand that that may take

1 a little more time. And if -- if -- if you, Mr.  
2 Examiner, would prefer to have just statements by the  
3 parties by a certain date, I can certainly do that.

4 HEARINGS EXAMINER SHELTON: Well, at this  
5 point in time, rather than having them both submitted  
6 by March 4th, if I was going to stagger it, the County  
7 has the burden of proof to prove this beyond a -- by a  
8 preponderance. Are you suggesting that the County  
9 would provide essentially a post-trial brief, the  
10 Appellant would be able to respond, and then the  
11 County could have a rebuttal?

12 MR. OWEN: Typically, if memory serves me,  
13 we've sort of done the opposite. Since it's, you  
14 know, the Appellants' appeal, they would have both the  
15 bites at the apple. But, again, I'm happy to do  
16 whatever -- whatever makes the most sense to you.

17 HEARINGS EXAMINER SHELTON: Okay. And, Ms.  
18 Lake, do you have any preference as far as staggering  
19 this one, if the County has the burden of proof, but  
20 at the same time the Appellant has brought this before  
21 the Examiner, and perhaps there should be an  
22 opportunity for the Appellant to provide both a  
23 preliminary and then a rebuttal brief. So do you have  
24 any preference, ma'am?

25 MS. LAKE: Yeah. And it's kind of that



1 mixed burden type of thing. I think the County does  
2 have the initial burden. I think we, you know, want  
3 to assert the appropriateness of our legal analysis.  
4 That's why I'm suggesting this really isn't one that  
5 fits nicely into a staggered and submitting -- we both  
6 know what the issues are. We know what the record is.  
7 Let's just both submit on the same day.

8 HEARINGS EXAMINER SHELTON: Well, any  
9 objection to giving two different dates, one for  
10 initial briefing, as you've indicated, and then an  
11 opportunity for a second just brief rebuttal, not  
12 rewriting the entire first, but maybe have initial  
13 presentation, rebuttals? I'll have all four before me  
14 essentially at the same time and then that would give  
15 everyone an opportunity.

16 MS. LAKE: Excellent.

17 HEARINGS EXAMINER SHELTON: Is there any  
18 -- is that workable?

19 MS. LAKE: Yeah, that's agreed.

20 MR. OWEN: So you're saying we both submit  
21 on the 4th and then we both have the opportunity for a  
22 rebuttal?

23 HEARINGS EXAMINER SHELTON: Mr. Owen, I'd  
24 say probably two weeks for the initial presentation,  
25 one week for the rebuttal, if the party chooses to

1     rebut, but it's not required, but certainly none of  
2     this is required. But, if you're going to, the trial  
3     brief, post-trial brief by March 4th, and then the  
4     rebuttal by the following, which would be the 11th, I  
5     think.

6                   MR. OWEN: I understand and that works for  
7     the County. Thank you.

8                   HEARINGS EXAMINER SHELTON: Okay. So at  
9     this point I've closed the hearing. We've -- I'm  
10    leaving the matter open for analysis and presentation.

11                   And anything further before the Examiner,  
12    Mr. Owen?

13                   MR. OWEN: No. Thank you very much.

14                   HEARINGS EXAMINER SHELTON: Ms. Lake,  
15    anything further before the Examiner from the  
16    Appellants' perspective?

17                   MS. LAKE: No. Thank you for your time  
18    today.

19                   HEARINGS EXAMINER SHELTON: And I would  
20    like to thank you and Mr. Owen and frankly everyone  
21    who has appeared today. This has been a complicated  
22    matter, as is pretty obvious. And I think everyone  
23    has handled themselves very well, especially given the  
24    complication of virtual hearings, which on some hands,  
25    some situations it's helpful, because they become a

1 little more objective and not quite as emotional.  
2 But, frankly, I think the in-person opportunity is  
3 lacking, but I do appreciate how well everyone has  
4 handled this. And we will be at this time adjourned.  
5 So thank you very much.

6 (End of audio.)  
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1                                    C E R T I F I C A T E

2        STATE OF WASHINGTON)

3                                    ) ss.

4        County of Pierce        )

5            I, the undersigned Washington Certified Court Reporter,  
6        pursuant to RCW 5.28.010 authorized to administer oaths and  
7        affirmations in and for the State of Washington, do hereby  
8        certify:

9            That the foregoing transcript of taped proceedings was  
10        transcribed under my direction; that the transcript is a full,  
11        true and complete transcript of the testimony of said witness,  
12        including all questions, answers, objections, motions and  
13        exceptions, except as noted as "inaudible" herein, to the best  
14        of my ability;

15            That I am not a relative, employee, attorney or counsel of  
16        any party to this action or relative or employee of any such  
17        attorney or counsel, and that I am not financially interested  
18        in the said action or the outcome thereof;

19            That I am herewith securely sealing this transcript and  
20        delivering the same to Ms. Lake for filing with the appropriate  
21        Clerk of the Court.

22            IN WITNESS WHEREOF, I have hereunto set my hand and affixed  
23        my official seal this 30th day of September, 2021.

24                                    /s/ Catherine M. Vernon  
25                                    Certified Court Reporter, in and for  
                                     the State of Washington, residing at  
                                     University Place, WA.

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF PIERCE

---

MATTHEW and KAYLYNE NEWELL,	)	
	)	
Petitioners,	)	
	)	
	)	No. 21-2-07529-2
vs.	)	
	)	
PIERCE COUNTY,	)	
	)	
Defendant.	)	

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VERBATIM REPORT OF PROCEEDINGS  
March 25th, 2022

---

APPEARANCES:

FOR THE PETITIONERS:	CAROLYN LAKE Attorney at Law
FOR THE RESPONDENT:	DAVID OWEN Deputy Prosecuting Attorney

BE IT REMEMBERED that on March 25th, 2022, the  
above-captioned cause came on for hearing before the  
Honorable Thomas P. Quinlan, Judge of the Superior  
Court in and for the County of Pierce, State of  
Washington; the following proceedings were had, to wit:

Katrina Smith, CSR	Official Court Reporter
930 Tacoma Avenue South	Dept. 6, Superior Court
Tacoma, Washington 98402	(253) 798-7432

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## INDEX

Page No.

Court's Decision

3

1 THE COURT: Good afternoon, everybody.

2 This is the matter -- concluding the matter, at  
3 least, of Newell v. Pierce County, Superior Court  
4 Cause No. 21-2-07529-2.

5 This is in follow-up to the bench trial secondary  
6 to the land use petition matter before the Court.

7 The bottom line upfront is I'm going to grant  
8 relief in favor of the Newells for the following  
9 reasons:

10 There is no dispute the property has a prior  
11 non-conforming use, which in layman's terms is referred  
12 to as being "grandfathered in." That use was as a  
13 facility to support a business which located  
14 construction equipment, including dump trucks, and for  
15 that equipment's maintenance and repair historically.  
16 This was under a general-use zoning prior to enactment  
17 of PCC 18A.33.280, more specifically. And that use  
18 allowed a contractor's yard and associated use per the  
19 code then in effect.

20 The use of the property is and has been authorized  
21 under Pierce County Code 18A.33.280 as described as  
22 being a "contractor's yard" since at least the 1970s.

23 By current ordinance, a "contractor's yard" is an  
24 "area for construction or contracting a business  
25 office, outdoor storage, repair and maintenance of

1 heavy equipment and vehicles." Notably, "heavy  
2 equipment and vehicles" are not defined by the  
3 ordinance. Nevertheless, the plain meaning and  
4 understanding would include dump trucks.

5 The agency's explanatory note as to this  
6 particular section of the ordinance indicates that the  
7 property is meant to "support delivery of construction  
8 materials used in construction projects."

9 The unassailable testimony is that the property is  
10 used for dump trucking business, and those trucks  
11 transport materials consumed in various locations,  
12 which are construction projects.

13 As for the petitioner's use, all is well until  
14 traffic volume increased and the noise level of  
15 operations increased, which promoted neighbor  
16 complaints as to noise. This case does not implicate,  
17 however, an increase in volume of dump trucks or of  
18 noise ordinances, both of which may apply, but,  
19 nevertheless, it's not before the Court. And, thus, my  
20 decision has no force or effect on those issues should  
21 they be addressed later.

22 Initially and after neighbor complaints, the  
23 agency officials for the County opined that the  
24 petitioner's non-conforming use did not run afoul of  
25 the code. But after prompting from an elected



1        representative official, the County re-examined the  
2        issue and determined that the petitioner's use was a  
3        violation of current code and zoning. In particular,  
4        the agency found the use was that of a "Warehouse  
5        Distribution and Freight Movement" use, which is  
6        defined by the same code, but which section was enacted  
7        well after the established non-conforming grandfathered  
8        use.

9                Here, the Court concludes that the council meant  
10       exactly what it said in the opening clause of the  
11       description of use of "Warehouse Distribution and  
12       Freight Movement." That is to say, it was a warehouse  
13       and freight facility and movement of the same to and  
14       from the same. Further, the ordinance refers to "large  
15       scale warehousing and distribution" for one or more  
16       businesses at a "central location and the dispatch and  
17       servicing of a truck fleet," which is included  
18       specifically in the ordinance language.

19               Here, the testimony is clear the property is not  
20       used as a warehouse or distribution center. In other  
21       words, it's not used as a transfer facility. Dump  
22       trucks are parked and maintained there and originate to  
23       and from on their daily operations at the property,  
24       however.

25               The explanatory note relating to "Warehousing

1       Distribution and Freight Movement" indicates that it is  
2       a truck fleet operation that is or suggestive to be  
3       that of a common carrier transporting goods from or to  
4       warehouse to warehouse or from warehouse to a centrally  
5       located vendor. This is within the lens as I've viewed  
6       the law as I understand and believe applies to the  
7       case.

8             At the outset, the law allows for a pre-existing  
9       legal non-conforming use to continue in spite of a  
10      subsequent contrary zoning ordinance being inactive or  
11      approved. *Jefferson County vs. Lakeside*, which is  
12      106 Wn. App. 380, a 2001 case.

13            In reviewing the entire record de novo, I find and  
14      conclude that the pre-existing use of the property for  
15      dump truck operations is a pre-existing use that is and  
16      should be allowed to continue.

17            Moreover, I do not concur with the re-branding of  
18      the petitioner's use of that of a "Warehouse  
19      Distribution and Freight Movement" use or that such  
20      re-branding is, in fact, correct. In my considered  
21      opinion, that finding and conclusion below was in  
22      error.

23            As agreed to by the parties in their briefing, the  
24      trial court or the Court's review of an agency  
25      application of the law to a particular set of facts is

1       de novo, *Port of Seattle* 151 Wn.2d at 588, and more  
2       fully identified and described, at least in the  
3       petitioner's materials submitted to the Court.

4             Here, the challenge to the agency's decision  
5       requires the Court to construe the ordinance -- in such  
6       an instance, the Court is charged with determining the  
7       meaning and the purpose of the ordinance de novo. See  
8       *Public Utility District No. 1 of Pend Oreille County v.*  
9       *Department of Ecology*, 146 Wn.2d 778, a 2002 case.

10            In interpreting an ordinance, the fundamental  
11       objective of the Court is to ascertain and carry out  
12       the legislative body's intent. And if the ordinance's  
13       meaning is plain on its face, then the Court must give  
14       effect to that plain meaning as an expression of the  
15       legislative body's intent.

16            The Court derives the plain meaning from all that  
17       is said in the ordinance and related statutes, which  
18       disclose legislative intent about the provisions in  
19       question. *Department of Ecology v. Campbell and Gwinn*  
20       *LLC*, 146 Wn.2d 1, a 2002 case.

21            Moreover, a legislative body is presumed to be  
22       aware of its own enactments, and the Court will presume  
23       that legislative body did not intend to repeal or  
24       modify another portion of the ordinances or ordinance  
25       impliedly, unless it is provided an express list of

1 statutes to be repealed, found at *Ropo, Inc. v. City of*  
2 *Seattle* 67 Wn.2d 574, a 1965 case, which is still good  
3 law.

4 Here, there is no evidence that the council  
5 intended to modify the meaning or use of the  
6 construction yard use or description by limiting it to  
7 construction companies alone; or, to restrict dump  
8 truck operations by amending the ordinance to include  
9 that to be a common carrier within warehouses.

10 Here, the Court concludes that the council meant  
11 exactly what it said in the opening clause of amended  
12 use or the use of "Warehouse and Freight Facility" and  
13 for the movement of the same to and from.

14 In ascertaining the meaning of a particular word  
15 as used in a statute, a court must consider both the  
16 statute's subject matter and the context in which the  
17 word is used. *State v. Rhodes*, 58 Wash. App. 913, a  
18 1990 case.

19 When an undefined term is used in an ordinance,  
20 that is not a technical term and can be used to  
21 describe a variety of interests. The meaning of the  
22 term should be determined from the context in the which  
23 it is used by the statute being construed rather than  
24 unrelated statutes. *Chamberlain v. Department of*  
25 *Transportation*, 79 Wash. App. 212, a 1995 case.

1           "Each word of a statute is to be accorded its  
2 meaning." Whenever possible, statutes are to be  
3 construed so "no clause, sentence or word shall be  
4 superfluous, void, or insignificant." A court "is  
5 required to assume the legislative body meant exactly  
6 what it said and apply that statute as written."  
7 *Duke v. Boyd*, 133 Wn.2d 80, a 1997 case.

8           Further and as noted in the oral argument to the  
9 Court, the ordinance used the term "and" as opposed to  
10 "or" when referencing dispatching of the truck fleet.

11           Thus, using the plain meaning and the understood  
12 language -- excuse me, the common understanding of the  
13 words "warehousing" "distribution" and "transport" and  
14 "fleet" as well as the conjunctive word "and," it is my  
15 considered opinion that the use of the word -- that it  
16 further complicates the matter for the County in that  
17 the council used the term "and" in the ordinance, and  
18 the Court is charged, under the law, with presuming the  
19 word "and" functions conjunctively. See *State v.*  
20 *Kozey*, 183 Wash. App. 692, a 2014 case.

21           In such a construct, the conjunctive requires  
22 either large-scale warehousing or large-scale  
23 distribution either from or to a central location and  
24 the dispatch of a truck fleet from the property in  
25 order for "Warehousing Distribution and Freight

1 Movement" to apply.

2 Under these circumstances I conclude that they do  
3 not, and otherwise grant the relief requested by the  
4 petitioner.

5 I do have a previously electronically signed order  
6 granting the petitioner's relief by both of the  
7 parties. I will endorse that. I also will  
8 interlineate in that order that I have made comments on  
9 the record, and they are incorporated by reference.

10 MS. LAKE: Thank you, Your Honor.

11 THE COURT: Thank you. That concludes our  
12 proceeding. Everybody, please have a good afternoon.

13 Ms. Lake, you have a question.

14 MS. LAKE: I do have one question, Your Honor.  
15 This matter was bifurcated for the LUPA matter to be  
16 heard first and then a trial to be set on potential  
17 damages. So if Your Honor could direct a date that the  
18 parties might return for trial setting.

19 THE COURT: What do you anticipate the length of  
20 trial to be?

21 Certainly, the Newells will testify. Is there  
22 anybody else that you would expect to be testifying?

23 MS. LAKE: I imagine we would call one or two of  
24 the county planners as witnesses.

25 THE COURT: All right. Is one day sufficient for

1 trial?

2 MS. LAKE: I think so.

3 THE COURT: All right. I'll rely on Ms. Rockett  
4 to give us a day here in 60 to 90 days out, unless the  
5 statute has some kind of time frame that I'm not aware  
6 of.

7 MS. LAKE: Thank you, Your Honor. The statute  
8 does not address the timing of the trial.

9 THE COURT: All right. Thank you.

10 MS. LAKE: I don't know how counsel for the County  
11 feels. Since the matter was bifurcated and there's no  
12 discovery allowed under LUPA, I don't know if 90 days  
13 is sufficient. I'm certainly okay moving forward to  
14 September.

15 MR. OWEN: I would be agreeable either way. More  
16 time would probably be better, I would agree.

17 JUDICIAL ASSISTANT: We could schedule it for  
18 Tuesday, June 7th. Does that work?

19 MS. LAKE: Yes.

20 MR. OWEN: That works for the County, yes.

21 THE COURT: As it relates to the comments of  
22 discovery and disclosure of witnesses and what have  
23 you, I expect that the parties will be making liberal  
24 disclosures and not necessitating my involvement in any  
25 respect to that. If I need to, I will get involved.

1 We hope to have the matter heard without delay because  
2 of discovery issues.

3 With that being said, it's just an admonishment.  
4 My expectation is that everybody will cooperate.

5 Thank you for your time today and attention. And  
6 if needed, we will be seeing you in June.

7 MS. LAKE: Thank you so much.

8 MR. OWEN: Thank you, Your Honor.

9 (Proceeding Concluded.)  
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## \*\*\*\*\*CERTIFICATE\*\*\*\*\*

I, Katrina A. Smith, do hereby certify that the foregoing transcript entitled Verbatim Report of Proceedings, March 25th, 2022, was taken by me stenographically and reduced to the foregoing, and that the same is true and correct as transcribed;

That I am a certified court reporter;

That I am in no way related to or employed by any party in this matter, nor any counsel in the matter;

And that I have no financial interest in the litigation;

DATED at Tacoma this 29th day of March 2022.

*Katrina Smith*

\_\_\_\_\_  
KATRINA A. SMITH  
2390

# GOODSTEIN LAW GROUP PLLC

**November 26, 2024 - 4:54 PM**

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**Appellate Court Case Title:** Matthew & Kaylyne Newell, Appellant/Cross-Respondents v. Pierce County, Respondent/Cross-Appellant (861620)

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