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COURT OF APPEALS NO. 70515-6-I

IN THE COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

LEO MCMILIAN,

Appellant,

v.

KING COUNTY,

Respondent.

KING COUNTY'S RESPONSE TO APPELLANT'S OPENING BRIEF

DANIEL T. SATTERBERG
King County Prosecuting Attorney

CRISTY CRAIG, WSBA #27451
Senior Deputy Prosecuting Attorney
Attorneys for Respondent

King County Prosecuting Attorney
King County Courthouse
516 Third Avenue, Suite W400
Seattle, Washington 98104
(206) 477-1120

ORIGINAL

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I. INTRODUCTION

Petitioner Leo McMilian seeks review under the Land Use Petition Act ("LUPA"), RCW ch. 36.70C *et seq.*, of a decision issued by a King County Hearing Examiner (the Examiner). This is McMilian's second LUPA petition arising out of his appeal of a code enforcement Notice and Order. The first LUPA petition resulted in the Court of Appeals remanding the matter to the Examiner to determine whether a wrecking yard use had been established on the parcel at issue before 1958[1].

Because the Examiner who presided over the appeal hearing, Peter Donahue, left employment with King County following the remand, a *pro tem* hearing examiner, Examiner Stafford Smith, was assigned.[2] Donahue informed counsel for both parties of Smith's assignment by email two weeks before his departure.[3] Neither counsel objected or responded to the email in any way.

Examiner Smith carefully reviewed the administrative record and noted that the primary evidence regarding the status of the subject parcel

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[1] The certified administrative record from McMilian's first LUPA petition was incorporated into the second LUPA petition by the parties' agreement. The administrative hearing record was filed with the first LUPA petition, and is referenced here with the prefix "CP1," followed by its clerk's page number. Pleadings filed in the first LUPA will also be referenced with the prefix CP1, and all documents filed in the second LUPA, including additional evidence admitted by stipulation pursuant to RCW 36.70C.120(3), will be referenced with the prefix CP2. For ease of review, portions of the record are attached to this brief and will be referenced as appendices in addition to the clerk's designation.

[2] CP2: 949, CP2: 518-519.

[3] CP2: 949.

in 1958 was documentary.[4] After considering all of the evidence, Smith concluded that McMilian did not meet his burden to prove that a wrecking yard use existed on the subject parcel prior to 1958.[5]

McMilian appealed Examiner Smith's decision and the superior court upheld the decision.[6] Noting that "Smith's decision did not turn on the credibility of any witness" the superior court found that the relevant evidence consisted of three documents: a 1945 tax document, a 1960 aerial photograph, and the declaration of Helene Mecklenburg, who owned the parcel immediately to the north at the time, where a wrecking yard did exist (the northern parcel).[7] The superior court determined that the documents "support the conclusion that no wrecking yard existed on the subject parcel in 1958."

II. ISSUES PRESENTED

A. Can McMilian meet his burden to prove error under any of the prongs of RCW 36.70C.130(1)?

B. Is Examiner Smith's decision that no legal nonconforming wrecking yard use was established on the subject parcel supported by substantial evidence and legally correct where critical documents revealing the condition of the parcel at

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[4] Supplemental Report and Decision on Remand June 28, 2012, CP2: 67-76 attached as Appendix A.
[5] Id. at 76.
[6] Order Denying LUPA Appeal and Affirming Examiner's Order, CP2: 996-999 attached as Appendix B.
[7] The tax document, CP1: 97-99, the aerial photograph, CP1: 94-95, and the Mecklenburg affidavit CP2: 438 are attached as Appendix C.

the time area zoning was adopted show no wrecking yard use?

1. **Did Examiner Smith correctly focus his decision on evidence specific to the 1958 timeframe where McMilian's burden was to prove the existence of the wrecking yard use when the area zoning was adopted?**
2. **Does the presence of auto wreckage on the subject parcel in 2005 overcome the weight of the historical evidence where the record does not show continuous wrecking yard use since prior to 1958?**
3. **Were *pro tem* Examiner Smith's findings wholly consistent with Examiner Donahue's?**
4. **Was *pro tem* Examiner Smith's decision that a legal nonconforming wrecking yard was not established within the scope of the McMilian I remand?**

C. **Did McMilian meet his burden to prove that the administrative process was constitutional error under RCW 36.70C.130(1)(f) or an illegal process under RCW 36.70C.130(1)(a)?**

1. **The Examiner conducted a full evidentiary hearing, followed by two LUPA appeals with a remand in between. Was McMilian provided a full and fair process?**
2. **Examiner Donahue left King County employment. Did Examiner Smith's assignment comply with the King County Code and was any error in the appointment process harmless?**
3. **Did Smith's decision, which was largely based upon documentary evidence, violate due process?**

D. Having prevailed before the Examiner and the superior court should King County now be awarded reasonable attorney fees under RCW 4.84.370(2)?

III. FACTS AND PROCEDURAL HISTORY

In 2002, Appellant Leo McMilian purchased an existing auto wrecking business on a residential parcel in unincorporated King County. The auto wrecking business was a legal nonconforming use as to that parcel. Several months later, McMilian purchased an adjacent parcel immediately to the south (parcel number 332104-9038, hereinafter the subject parcel). In 2005, McMilian cleared extensive vegetation from the subject parcel without a permit, graded it, and expanded the wrecking yard onto it.[8]

In July of 2005, after King County contacted McMilian about clearing and grading complaints, McMilian applied to the King County Department of Development and Environmental Services[9] (DDES) for a clearing and grading permit. After a thorough investigation, DDES cancelled McMilian's permit application because its only purpose was the illegal expansion of McMilian's wrecking yard. DDES determined that unlike the long-existing wrecking yard on the northern parcel, no legal nonconforming use had been established on the subject parcel.

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[8] May 26, 2009 Report and Decision, CP2: 24-25 attached as Appendix D.
[9] Now known as the Department of Permitting and Environmental Review (DPER).

DDES issued a Notice and Order alleging that McMilian's activities on the subject parcel violated the King County Code. McMilian appealed to the King County hearing examiner (the Examiner). The examiner at the time was Peter Donahue. Witnesses for both McMilian and King County testified at the hearing, and exhibits consisting of county records, photographs, and maps were admitted. Examiner Donahue closed the appeal record in August of 2008.

Examiner Donahue issued his Report and Decision on May 26, 2009, upholding the Notice and Order. Among his findings were:

> 4. An auto wrecking business has long been conducted on the property directly abutting to the north, under a series of ownerships. During prior ownerships, some spillover of the auto wrecking operation occurred on the subject property, which was not owned by the prior ownerships of the auto wrecking business (it was purchased by [McMilian] after [the] purchase of the main Astro Auto Wrecking site abutting to the north). The spillover consisted of storage of some wrecked and dismantled cars and numerous junk auto parts and tires. The property was not utilized in active auto wrecking operations as was the main operation to the north.
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> . . .
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> 7. Upon their purchase of the subject property, the McMilians in or around 2005 commenced clearing of the subject property of its significant overstory and underbrush vegetation and removal of a substantial amount of auto parts, tires, a few vehicles, etc. The tree cover was so substantial that the vehicles, auto parts, etc., were not visible (at least not discernible) from aerial photographs taken prior to the time of clearing.

. . .

> 13. After the clearing and grading activity was performed onsite, the Astro Auto Wrecking business expanded substantially onto the subject site, utilizing essentially its entirety for storage of and processing of wrecked vehicles, in some areas stacking them vertically, utilizing typical wrecking yard equipment for stacking, hauling and moving wrecked vehicles and auto parts. The subject property is utilized essentially as an equal component of the previously established auto wrecking yard abutting to the north, as one whole operation. The subject property is accordingly no longer simply a spillover site for informal and minor storage and indeed dumping of parts and vehicles.[10]

The Examiner upheld all of the violations alleged in the Notice and Order, and, reasoning that any prior wrecking yard use of the subject parcel would have been trespassing, he concluded "[t]he subject property does not benefit from a nonconforming use right to an auto wrecking yard or an auto storage yard."[11]

McMilian challenged Examiner Donahue's decision. The superior court reversed the Examiner, and on further appeal the McMilian I Court reversed the superior court. In a published opinion, the Court concurred with the Examiner's conclusion that a trespasser cannot establish a legal nonconforming use, but also found that trespass could not be presumed.[12] This Court remanded the matter to the hearing examiner to make a finding, based on the existing record, as to whether McMilian had met his

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[10] App. D at CP2: 24-25.
[11] Id. at CP2: 26.
[12] See McMilian v. King County, 161 Wn. App. 581, 600-601, 255 P.3d 739 (2011).

burden to prove that a nonconforming use was established on the subject property.[13] After the matter was remanded, Examiner Donahue left employment with King County. Before Donahue left, *pro tem* hearing examiner Stafford Smith was assigned to the remand. Donahue informed counsel for King County and McMilian of Smith's assignment via email.[14] Neither party objected.

Examiner Smith reviewed the hearing record and the exhibits from the hearing and issued a decision on June 28, 2012. Examiner Smith concluded that McMilian "did not meet his burden to establish that a valid nonconforming use existed on parcel [3321049038] in 1958 prior to the adoption of King County zoning regulations."[15] McMilian appealed, alleging essentially the same issues as are before this Court.

The King County Superior Court, Judge LeRoy McCullough presiding, denied McMilian's appeal. Judge McCullough concluded that Examiner Smith's decision was supported by substantial evidence and that McMilian's due process rights were not violated.[16]

In particular, the superior court held that Examiner Smith was properly appointed, that his decision complied with this Court's mandate

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[13] Id. at 603-04.

[14] CP2: 997 ¶ 3.
[15] App. A at CP2: 75 ¶ 7.
[16] CP2: 997 ¶ 6.

on remand, that the decision did not turn on the credibility of witnesses, and that it was not an erroneous application of the law to the facts. The superior court reasoned:

> McMilian has the burden to prove that a lawful wrecking yard use existed in 1958 and that it was more than intermittent or occasional. In his testimony regarding the condition of the property when he was 10 years old Richie Horan disclaimed knowledge of property lines. Helene Mecklenburg's description of the property as fenced is not conclusive, but weighs against McMilian, and Smith's reliance on the 1945 tax form describing a residential property, and the 1960 aerial photo was proper. The aerial photograph showed no evidence of active wrecking yard use of the subject parcel. The mere possibility of wreckage under the canopy is not sufficient to establish the existence of a substantial use.[17]

IV. ARGUMENT

This Court should adopt the superior court's reasoning and hold that McMilian did not meet his burden to prove that a legal nonconforming wrecking yard use exists on the subject parcel, and that he cannot meet his burden to prove error under the standards set forth in RCW 36.70C.130(1).

A. McMilian has the burden to prove error under the RCW 36.70C.130(1) standards.

McMilian appeals the King County hearing examiner's final decision on a land use matter, therefore review is governed by the Land Use Petition Act (LUPA), RCW ch. 36.70C *et seq*. The superior court

[17] CP2: 998 ¶ 10.

reviews the hearing examiner's action based on the administrative record.[18] The party seeking review bears the burden to prove error. McMilian alleged error under every prong of RCW 36.70C.130(1). Specific standards applicable to McMilian's arguments will be discussed in the body of this brief.

B. Examiner Smith's factual conclusion that a wrecking yard use was not established on the subject parcel prior to 1958 was supported by substantial evidence, consistent with Examiner Donahue's findings of fact, and legally correct.

Nonconforming uses are not favored in Washington. The purpose of zoning ordinances is to confine certain classes of buildings and uses to certain localities. Thus, nonconforming uses are inconsistent with the public interest.[19]

McMilian's claims alleging error under RCW 36.70C.130(1)(a), the unlawful procedure prong of the LUPA statute, are not supported by any authority or the record before the Court. McMilian cannot meet his burden to prove error under RCW 36.70C.130(1)(c) because the evidence regarding the relevant time frame support Smith's decision and because

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[18] King County v. State Boundary Review Board, 122 Wn.2d 648, 672, 860 P.2d 1024 (1993); RCW 36.70C.130(1).

[19] Rhod-A-Zalea & 35th, Inc. v. Snohomish County, 136 Wn. 2d 1, 7-8, 959 P.2d 1024, 1027 (1998) (citing 1 Robert M. Anderson, American Law of Zoning § 6.01 (4th ed. 1996).

the McMilian I Court has already found that there is substantial evidence in the record to support Smith's conclusions.

"Substantial evidence" is evidence that "would convince an unprejudiced, thinking mind of the truth of the declared premise."[20] The reviewing court reviews the evidence in the light most favorable to the party who prevailed in the highest forum that exercised fact-finding authority, here King County. The process "necessarily entails acceptance of the fact finder's views regarding the credibility of witnesses and the weight to be given reasonable but competing inferences."[21] A reviewing court stands in the same position as the trial court in determining facts when the evidence is documentary and reviews the record de novo.[22] This Court should conclude that substantial evidence in the record supports Smith's decision and reject McMilian's arguments regarding potentially competing inferences.

McMilian's RCW 36.70C.130(1)(c) argument also violates the law of the case principle. In McMilian I, McMilian appealed

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[20] Nord v. Shoreline Sav. Assoc'n, 116 Wn.2d 477, 486, 806 P.2d 8 00 (1991).
[21] City of University Place v. McGuire, 144 Wash.2d 640, 652-653, 30 P.3d 453, 459 (Wash.,2001), citing State ex rel. Lige & Wm. B. Dickson Co. v. County of Pierce, 65 Wash.App. 614, 618, 829 P.2d 217 (1992).
[22] Amren v. City of Kalama, 131 Wn.2d 25, 32, 929 P.2d 389 (1997); Smith v. Skagit County, 75 Wn.2d 715, 718, 453 P.2d 832 (1969).

Examiner Donahue's decision alleging in part that it was not based on substantial evidence. This Court reasoned that "[t]he hearing examiner did not make any finding with regard to whether the wrecking yard use was established on the southern parcel *prior to 1958*, only that it 'has long been conducted' *on the northern parcel* and that some spillover had occurred onto the southern parcel."[23] The McMilian I Court remanded because "[t]here is evidence in the record that would support either a finding that the southern parcel had been used for the wrecking yard prior to 1958 or, conversely, a finding that the southern parcel had not been so used prior to 1958."[24] Thus this Court must hold that Smith's decision is supported by substantial evidence.

1. Examiner Smith correctly focused his decision on evidence specific to the 1958 timeframe.

Examiner Smith's review of the facts was not an unlawful procedure and his decision was supported by substantial evidence. Smith properly analyzed the administrative record as directed by this Court's clear mandate.

McMilian had the burden to prove that a wrecking yard use existed in 1958, when the area zoning was adopted and that the use was more than

[23] McMilian, 161 Wn. App. at 603 (emphasis in original).
[24] McMilian, 161 Wn. App. at 605-06.

intermittent and occasional at the time.[25] Examiner Smith evaluated all of the evidence in the record, and correctly focused his attention on documents relevant to 1958. Because "[a] nonconforming use is defined in terms of the use of the property lawfully established and maintained *at the time* the zoning was imposed,"[26] and because very little testimony was presented at the administrative hearing regarding the 1958 timeframe, this Court should conclude that substantial evidence supports Smith's factual conclusions.

Examiner Smith relied on a 1960 aerial photograph showing the wrecking yard parcel next to the vegetated subject parcel, and a 1945 tax record showing and describing a residence on the subject parcel. Smith also considered an affidavit by Mrs. Helene Mecklenburg, the 1958 owner of the wrecking yard to the north of the subject property, affidavits submitted by McMilian's customers, and Ritchie Horan's testimony regarding his childhood recollections of the wrecking yard.

Smith found that the affidavits were "sufficiently defective as to preclude placing reliance on them."[27] Smith noted that Mecklenberg's affidavit did not provide much detail about the use or location of wrecking

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[25] First Pioneer Trading Company v. Pierce County, 146 Wn.App. 606, 614, 191 P.3d 928 (2008); North/South Airpark Association v. Haagen, 87 Wn.App. 765, 772, 942 P.2d 1068 (1997).

[26] Meridian Minerals Co., 61 Wn.App. at 207, citing former KCC 21.04.619. (Emphasis added,) (King County Code sections referenced herein are attached as Appendix F.)

[27] App. A at CP2: 70 ¶ 12.

yard fencing, and that the other affidavits were vague, and provided no basis of knowledge regarding property boundaries.[28]

Smith considered Horan's testimony regarding his childhood memories of visiting the wrecking yard parcel, and noted that Horan "seemed to have a clear recollection of entering into some sort of building."[29] However, although Horan testified about visiting the wrecking yard office and shed, at the time he ". . . was unaware of property lines. . . "[30] Horan attempted to reconcile aerial photographs with his recollections but struggled with identifications.[31] Smith considered Horan's testimony fully, but concluded that it "hardly qualifies as a strong positive identification."[32]

Regarding the condition of the parcel in 1958 Examiner Smith concluded:

> [t]he only completely reliable item of evidence bearing on the status of parcel 9038 in the 1958 timeframe is the 1960 aerial photograph appearing at exhibit no. 21. It shows an auto wrecking yard well established on parcel 9005 with no apparent extension southward over the boundary onto parcel 9038. Further, the visual context depicted in that timeframe discloses no necessity for the existing auto salvage yard on parcel 9005 to expand beyond its boundaries. As shown in the 1960 aerial photograph, parcel 9005 itself still retained ample unused area for the

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[28] Id.
[29] App. A at CP2: 71 ¶ 17.
[30] Transcript of Richard Horan CP1, 811:20-812:3.
[31] App. A at CP2: 71 ¶ 18.
[32] Id.

placement of more vehicles, especially near its northwest corner.[33] [34]

Smith declined McMilian's invitation to speculate regarding whether wreckage could have been stored under the tree cover, concluding that it was an "improbable hypothesis." Smith properly inferred regarding the approximate height of the trees shown on the subject parcel in 1960 relative to its recently logged condition as reflected in the 1945 tax photograph.[35]

2. The condition of the parcel in 2005 does not overcome the weight of the historical evidence because the record does not show continuous wrecking yard use of the subject parcel since prior to 1958.

Smith considered evidence regarding McMilian's 2005 cleanup effort, but concluded that it was not particularly probative. The evidence of recycled materials and photographs of tires to be removed did not distinguish from which parcel they came. Hearing Exhibit No. 14,[36] detailing items recycled by McMilian's company, Astro Auto Wrecking, shed no light on whether the recycled items were removed from the wrecking yard parcel or the subject parcel as part of the clean-up effort, or if the materials were merely recycled as part of McMilian's on-going auto wrecking business.

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[33] App. A at CP2: 74-75 ¶ 3.
[34] Ritchie Horan testified that the property line between the wrecking yard parcel and the subject parcel was correct as shown on aerial photographs. CP1: 824:3-825:16.
[35] App. A at CP2: 72 ¶ 20.
[36] CP1: 104.

Testimonial evidence similarly failed to distinguish the source of the materials.[37] Furthermore, McMilian's testimony describing massive amounts of wreckage removed from the subject parcel conflicted with that of his own witness, Tim Pennington. Pennington, who McMilian hired to clear the subject parcel, acknowledged that there were just one or two cars recovered from the subject property, that there were only a few parts found spread out,[38] and a maximum of 700-800 tires.[39] Pennington's testimony was consistent with that of wrecking yard neighbors who described the subject parcel as exhibiting a tree cover twenty feet high, no visible auto wreckage prior to the 2005 clearing activity,[40] and a series of aerial photographs showing minor incursions as discussed by Examiner Smith.[41] Thus, this Court should conclude that if Examiner Smith erred in resolving McMilian's and Pennington's conflicting testimony by noting McMilian's credibility based upon his personal interest in the outcome (as compared to Pennington's lack thereof), any error was harmless and insufficient to support reversal under RCW 36.70C.130(1)(a).[42]

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[37] Transcript of Leo McMilian at CP1: 941, 942, 946, 959, 985, Transcript of Timothy Pennington at CP1: 1028.
[38] Transcript of Timothy Pennington at CP1: 1029.
[39] CP1: 1024:24-25.
[40] See Transcript of Paul Skalicky CP1: 1041:1-1055:23, Transcript of Mark Heintz CP1: 999:22-1001:2, and see June 18, 2012 Supplemental Report and Decision on Remand, App. A at CP2: 72-73 ¶ C(22) .
[41] App. A at CP2: 72 ¶ 22.
[42] McMilian also discusses Smith's assessment of the credibility of documentary evidence such as photographs. See i.e. See Amended Appellant's Opening Brief at p. 20.

3. Smith's findings did not conflict with Donahue's.

Examiner Donahue's findings regarding the use of the subject property are consistent with Smith's conclusions. Donahue found:

> During prior ownerships, some spillover of the auto wrecking operation occurred on the subject property, which was not owned by the prior ownerships of the auto wrecking business (it was purchased by [McMilian] after [the] purchase of the main Astro Auto Wrecking site abutting to the north). The spillover consisted of storage of some wrecked and dismantled cars and numerous junk auto parts and tires. The property was not utilized in active auto wrecking operations as was the main operation to the north.[43]

Examiner Donahue described the wrecking yard use as "simply a spillover site for minor and informal use," and made no finding regarding the timing of its establishment, or the credibility of any witness.[44] Donahue concluded, albeit on different grounds, that "[t]he subject property does not benefit from a nonconforming use right to an auto wrecking yard or an

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McMilian attacks the examiner's findings regarding distance and area calculations as being based on "speculation and theory" rather than the evidence. It is unclear what credibility assessment would be made of a photograph. McMilian is not questioning the photograph's authenticity or its relevance; his real complaint goes to the weight of the evidence. As the fact finder, Examiner Smith was entitled to weigh the evidence. McMilian also challenges Examiner Smith's references to distances and area calculations based on the aerial photographs claiming such information were not in evidence. But the photographs which Examiner Smith considered contain within them a scale by which to calculate distance. See CP2, 893-894. No "speculation" or "theory" was required to apply the scale to the area depicted in the photograph, just a basic knowledge of math. McMilian has not shown that review of aerial photographs requires an "expert" under ER 702.

[43] CP2: 24.

[44] CP2: 25 ¶ 13.

auto storage yard."[45] Smith's Decision does not conflict with any aspect of Donahue's.

Both examiners found that over the course of several different ownerships, some of the wrecking yard activities extended into the subject property. Both examiners found that the use expanded somewhat during Horan's ownership and substantially under McMilian's ownership. These findings were entirely consistent with the evidence. The critical difference is that Examiner Donahue made no specific findings relative to the year 1958, whereas that was the focus of Examiner Smith's findings pursuant to the remand order. This meaningful distinction is lost on McMilian who claims repeatedly that Examiner Smith's findings contradicted Examiner Donahue's. Neither the record nor any legal authority supports a finding of error under RCW 36.70C.130(1)(a).

4. Examiner Smith correctly concluded that McMilian failed to meet his burden to prove a legal nonconforming wrecking yard use on the subject parcel.

Examiner Smith's decision was correct as a matter of law. Review under RCW 36.70C.130(1)(b) is *de novo*. Under RCW 36.70C.130(1)(d) McMilian must prove that the decision below was clearly erroneous.[46]

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[45] CP2: 26 ¶ 3.

[46] RCW 36.70C.130(1)(d), First Pioneer Trading Co., Inc. v. Pierce County, 146 Wn.App. 606, 613, 191 P.3d 928, 931 (2008) (citing City of Univ. Place v. McGuire, 144 Wn.2d 640, 647, 30 P.3d 453 (2001)).

In this case the Court should conclude that Examiner Smith's decision was legally and factually correct.

One who asserts a prior legal nonconforming use bears the burden to prove that (1) the use existed before the county enacted the zoning ordinance; (2) the use was lawful at the time; and (3) the use was never abandoned or discontinued for over a year.[47] The use must have been more than intermittent or occasional prior to the change in the zoning legislation.[48] Whether McMilian met his burden is a question of law.[49]

A nonconforming use is defined in terms of the property's lawful use established and maintained at the time the zoning was imposed.[50] Because Examiner Smith found that no wrecking yard use existed on the subject parcel in 1958, McMilian fails to meet the first element of his burden, and thus his legal nonconforming use claim fails. McMilian has not met his burden to prove error under RCW 36.70C.130(1)(b) or (d).

5. Pro Tem Hearing Examiner Smith's Decision was within the scope of the remand.

The Court of Appeals remanded the matter to the hearing examiner to determine, based on the existing record, "whether McMilian met his

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[47] First Pioneer Trading Co., Inc., 146 Wn. App. at 614.
[48] McMilian, 161 Wn.App. at 591 (citing North/South Airpark Ass'n v. Haagen, 87 Wn. App. 765, 772, 942 P.2d 1068 (1997)).
[49] See In re Dependency of K.N.J., 171 Wn.2d 568, 574, 257 P.3d 522 (2011).
[50] Meridian Minerals Co., 61 Wn.App. 195, 207, 810 P.2d 31, 40 (1991); Miller v. City of Bainbridge Island, 111 Wn.App. 152, 164, 43 P.3d 1250 (2002).

burden to establish that the wrecking yard use was extant on the southern parcel prior to 1958."[51] Examiner Smith thoroughly analyzed the record relating to the wrecking yard use on the subject property as of 1958. In ultimately concluding that McMilian had not met his burden, the Examiner found that certain items in evidence were more relevant than others. This was precisely the purpose of the remand. Because the Examiner's decision complied precisely with the McMilian I Court's mandate it was neither an unlawful procedure under RCW 36.70C.130(1)(a) or outside the Examiner's authority under RCW 36.70C.130(1)(e).

McMilian objects to Examiner Smith's findings regarding the presumption of permission on the trespass issue.[52] In considering the question of first impression regarding whether a trespasser may establish a legal nonconforming use, the McMilian I Court discussed the role of existing common law presumptions, about which Examiner Donahue's decision was silent. Mistakenly believing that the subject parcel was unimproved at the relevant time, the Court reasoned "[b]ecause the southern parcel was vacant, open, unenclosed, and unimproved, the presumption that the southern parcel owner acquiesced in another's use of

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[51] McMilian I, 161 Wn.App. at 605.
[52] App. A at CP2: 75 ¶ 4. King County does not dispute McMilian's contention that Examiner Smith was "bound by the Court of Appeals instructions" but notes that the authority cited for support is an unpublished opinion and violates GR 14.1.

the property applies...."[53] In his review of the legal nonconforming use question, Examiner Smith noted that the subject parcel was in fact improved with a residence, and therefore concluded that the presumption of permissive use would not apply.[54] Regardless, because Smith concluded that McMilian failed to meet his burden to prove a nonconforming use, any error in Smith's findings about the presumption is harmless. This is especially true here, because this Court reviews the administrative record *de novo*.[55]

C. McMilian cannot meet his burden to prove constitutional error under RCW 36.70C.130(1)(f).

McMilian's constitutional claims are without legal support. McMilian received, and continues to receive, a full and fair opportunity to present his case. McMilian, who waived his code-based right to a speedy resolution to accommodate his attorney's schedule, and who later moved to continue hearing dates to again accommodate his attorney's schedule, has continued to fully utilize the subject parcel for wrecking yard operations throughout this process.

Procedural due process constrains governmental decision making that deprives individuals of property interests within the meaning of the

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[53] McMilian, 161 Wn. App. at 601 (internal citation omitted).
[54] App. A at CP2: 70 ¶ 13-71 ¶ 16, CP2: 75 ¶ 4.
[55] See Grader v. City of Lynnwood, 45 Wn. App. 876, 879, 728 P.2d 1057 (1986) (where superior court hears an appeal based on administrative record and findings are not required, any findings are "mere surplusage" and not grounds for reversal).

Due Process Clause.[56] It is a flexible concept and the exact contours are determined by the particular situation.[57] The essential elements are notice and an opportunity to be heard.[58] Determining what process is due requires consideration of the private property interest involved, the risk of erroneous deprivation, and the governmental interest involved.[59]

McMilian did not object to the timeliness of Donahue's 2009 Report and Decision or to Smith's appointment until after Smith's decision was issued. His theory that Donahue made a different credibility call than Smith is not supported by the record. McMilian does not show a risk of erroneous deprivation. Instead, the primary documentary record is simply insufficient to support the legal conclusion that he desires. This Court should conclude that McMilian has been afforded ample process and that he waived his procedural objections.

1. McMilian waived his code-based rights, and no authority supports the theory that due process applies time limits to post-hearing proceedings.

McMilian bases his constitutional claims primarily on the timing of Examiner Donahue's administrative appeal hearing process. Because McMilian waived applicable procedural time limits and because the

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[56] See Mathews v. Eldridge, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976).
[57] Id. at 334.
[58] Cleveland Bd. Of Educ. V. Loudermill, 470 U.S. 532, 542, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985) (quoting Mulland v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 313, 70 S.Ct. 652, 94 L.Ed. 865 (1950)).
[59] Mathews, 424 U.S. at 335.

hearing itself was set and then continued to accommodate his attorney's schedule he cannot now be heard to complain that Examiner Donahue did not comply with the hearing timelines set forth in the King County Code.[60] Furthermore, McMilian's newly raised objections to Examiner Donahue's 2009 decision are barred by LUPA and the Rules of Appellate procedure.[61]

McMilian's appeal hearing was originally scheduled at a January 24, 2008 prehearing conference.[62] The prehearing conference itself had been continued by stipulation.[63] An April 24, 2008 hearing date was set to accommodate counsels' schedules and McMilian waived his code-based rights.[64] Subsequently, McMilian requested a continuance of the hearing, again to accommodate his counsel's hearing schedule and referenced the prior waiver.[65] The requested continuance was granted. Based on this record the Court should hold that McMilian cannot now assert that the time it took to process his appeal violated his constitutional right to due process.

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[60] McMilian's Motion for Continuance, CP1: 372-374, attached as Appendix E.
[61] See RCW 36.70C.040(4); RAP 2.5(A).
[62] CP1: 139-144.
[63] CP1: 140 ¶ 5.
[64] CP1: 140 ¶ 5, App. E at CP1: 372:22-24.
[65] App. E at CP1: 372:13-14.

Systems Amusement v. State[66] and Barry v. Barchi[67] do not support McMilian's arguments. The issue in Systems Amusement was whether the plaintiff, Systems, who failed to comply with the Administrative Procedure Act or the Tort Claims Act when its tavern license application was denied, was entitled to monetary damages.[68] In rejecting Systems' theory that an independent cause of action for damages existed, the Systems Amusement court noted that "Plaintiff misconstrues the basic nature of the due process clause. The clause is a protection against arbitrary action by the state; but if a person has his day in court, he has not been deprived of due process."[69] McMilian cites Systems Amusement to support the novel theory that the remedy for a delayed decision by Donahue would be a finding that a nonconforming use exists, but the case is absolutely devoid of such a principle. Instead it supports King County's position that McMilian's full evidentiary hearing satisfied his right to due process.

The administrative process found to be a due process violation in Barry v. Barchi, is unlike the process McMilian received.[70] Barry v. Barchi involved a New York regulation specifying the standards of

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[66] Systems Amusement, Inc. v. State of Washington, 7 Wash.App. 516, 500 P.2d 1253 (1972).
[67] Barry v. Barchi, 443 U.S. 55, 99 S.Ct. 2642, 61 L.Ed.2d 365 (1979).
[68] Systems Amusement, 7 Wash.App. at 516, 500 P.2d 1253.
[69] Id. at 518.
[70] See Barry v. Barchi, 443 U.S. 55, 99 S.Ct. 2642, 61 L.Ed.2d 365 (1979).

conduct that horse trainers must satisfy to keep their licenses.[71] Under the regulation, if a post-race test revealed the presence of drugs in a horse's system, the trainer's license could be subject to an interim suspension prior to a hearing, with the opportunity for a hearing to be scheduled later.[72]

The U.S. Supreme Court held that the prehearing suspension process did not violate due process, but concluded that it was unconstitutionally applied to Barchi, the horse trainer, because his post-suspension hearing was not timely.[73] The Court noted that "[t]he fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'"[74] Because "the consequences to a trainer of even a temporary suspension can be severe," nothing in the regulation "assured a prompt proceeding and prompt disposition of the outstanding issues between Barchi and the State," and because the Court could "discern little or no state interest" in appreciable delay, the Court concluded that there was a constitutional violation.[75]

In clear contrast to Barchi, whose license was suspended without a hearing, McMilian has continued to use the subject parcel as a wrecking

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[71] Id. at 2644.
[72] Id.
[73] Id. at 2648-2649.
[74] Id. at 66 (quoting Armstrong v. Manzo, 380 U.S. 545, 552, 85 S.Ct. 1187, 14 L.Ed.2d 62 (1965)).
[75] Id.

yard throughout the long procedural history of this case. In 2008, Examiner Donahue conducted a full evidentiary hearing over multiple days that he scheduled and then continued to accommodate McMilian's attorney. McMilian presented evidence, questioned the evidence against him, and appealed two adverse decisions. The mere passage of time between McMilian's hearing and the decision on the McMilian I remand does not amount to a due process violation.

McMilian cites no authority in support of his proposition that delays in post-hearing proceedings violate due process. Likewise, no authority supports McMilian's theory that this Court may simply impose a nonconforming use decision despite facts establishing that none exists. This Court should hold that the administrative process did not violate McMilian's right to due process and that it was not erroneous under RCW 36.70C.130(1)(a) or (f).

2. No Irregularities Occurred in the Assignment of a Pro Tem Examiner to Handle the Remand.

This Court should hold that *pro tem* Examiner Smith's appointment was proper under the Code. *Pro tem* Examiner Smith was assigned to handle the remand hearing because Examiner Donahue was scheduled to leave his post at King County.[76] The record shows that

[76] Declaration of Dianne Caffiere, CP2: 518-19.

Examiner Donahue included the parties in his email notification regarding Smith's assignment.[77] It is undisputed that neither party objected or responded in any way. Smith's appointment was not an unlawful procedure, and any error was entirely harmless. There is no basis for reversal under RCW 36.70C.130(1)(a).

Examiner Smith's appointment was squarely authorized by KCC 20.24.065 which states "[t]he chief examiner may hire qualified persons to serve as examiner pro tempore, as needed, to expeditiously hear pending applications and appeals."[78] McMilian's theory that the appointment was unauthorized because the code "only permits a *pro tem* hearing examiner to **hear pending** applications and appeals"[79] is too narrow a reading of the language at issue.

First, the McMilian remand was unquestionably a pending appeal in June of 2012. The word "pending" means "not yet decided or settled; awaiting conclusion or confirmation."[80] Because the McMilian appeal was not yet decided or settled it was pending under the plain meaning of the word.

Next, McMilian argues that Smith was not assigned to "hear" the pending appeal. Although the word "hear" is often associated with

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[77] CP2: 949.
[78] See KCC 20.24.065.
[79] Amended Appellant's Opening Brief at p. 33 (emphasis added).
[80] American Heritage Dictionary, 2nd College ed., Houghton Mifflin Co., 1985.

auditory stimuli, in the legal world the word "hearing" is "frequently used in a broader and more popular significance to describe whatever takes place before magistrates clothed with judicial functions and sitting without a jury *at any stage of the proceedings subsequent to its inception.*"[81] In this case Smith was unquestionably "clothed with judicial functions" and assigned to render a decision on remand, a stage of the McMilian proceedings after its inception.

Finally, McMilian asserts that the assignment was improper because it was authorized by the County Council Chief of Staff or the interim hearing examiner, David Spohr.[82] McMilian's argument fails on three grounds. First, the evidence shows that outgoing Examiner Donahue, then the chief examiner, formally assigned the matter to Examiner Smith.[83] Second, no evidence or authority supports the conclusion that Examiner Spohr, as interim examiner, was hired to fulfill anything less than the full role of the chief examiner. Third, and as a pure practical matter, the hearing examiner is employed by and acts on behalf of the Council.[84]

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[81] Black's Law Dictionary, Rev'd 4th Ed., West Publishing Co., 1968, citing Menard v. Bowman Dairy Co., 296 Ill.App. 323, 15 N.E.2nd 1014, 1015 (1938) (emphasis added).
[82] Amended Appellant's Opening Brief at p.33.
[83] CP2: 949.
[84] KCC 20.24.020, KCC 20.24.030.

This Court should find that *pro tem* Examiner Smith was properly appointed and adopt the superior court's conclusion that "either Donahue as chief examiner, or Spohr, as interim examiner, had authority to appoint him under KCC 20.24.065." McMilian did not prove that Smith's appointment was an unlawful procedure or that it was not harmless as required by RCW 36.70C.130(1)(a). Donahue was leaving county employment and not available to make the decision. By whom *pro tem* Examiner Smith was appointed does not affect the validity of his decision.

3. Smith's Decision complied with due process.

It is well established that an agency may substitute its judgment for that of an examiner on factual questions, including the credibility of witnesses observed by the examiner and not by the agency.[85] Due process in administrative proceedings does not require that the testimony be evaluated by an officer who heard and observed the witnesses.[86] In the circumstance where the original hearing officer is no longer available it does not violate due process to reassign an administrative matter to a new officer for additional findings, especially if credibility is not a central concern.[87]

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[85] Federal Communications Comm. V. Allentown Broadcasting Corp., 340 U.S. 358, 75 S.Ct. 855, 99 L.Ed. 456 (1951).
[86] National Labor Relations Board v. Stocker Mfg. Co, 185 F.2d 451 (3rd Cir. 1950).
[87] Fife v. Director, Office of Workers' Compensation Programs, U.S. Dep't of Labor, 888 F.2d 365 (6th Cir. 1989).

In Fife v. Director, Office of Workers' Compensation Programs, U.S. Department of Labor, a black lung benefits case, Fife was originally awarded benefits, but the case was remanded after the Director appealed.[88] By the time the case was remanded, the original ALJ had left his position and so a new ALJ was assigned without notice to Fife.[89] The new ALJ issued a decision denying benefits. Fife appealed, arguing that he was entitled to notice and that the first ALJ was in a better position to assess his credibility.

The U.S. Court of Appeals upheld the new ALJ's decision. The Fife court reasoned that "questions of credibility were not controlling, and that the claimant has not made any specific arguments as to why such questions are controlling. The new ALJ, in order to address the error made by the first ALJ, simply had to evaluate the evidence under a different standard."[90] The Court concluded "[t]he chief ALJ acted well within his discretion when he appointed the new ALJ."[91]

Here, as in Fife, questions of credibility are not controlling and McMilian has not shown why they would be. Here, as in Fife, *pro tem* Examiner Smith simply had to evaluate the evidence under a different standard than Examiner Donahue did. Here as in Fife, the original

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[88] Id. at 366.
[89] Id. at 369-70.
[90] Id. at 370.
[91] Id.

examiner was leaving his position and there was no other option but to appoint a *pro tem*. McMilian, in contrast to Fife, did have notice of Smith's appointment and did not raise any objection.

McMilian has supplied no authority to support any of his due process claims. He received a full hearing. It is not shocking that his first LUPA appeal process took time, considering that it was reviewed by both the superior court and the Court of Appeals before it was remanded to the examiner. The fact that Examiner Donahue left his position at King County is not a due process violation. *Pro tem* Examiner Smith's decision should be upheld.

D. King County is entitled to reasonable attorney's fees under RCW 4.84.370(2).

A government entity may recover reasonable attorney fees on a land use appeal if it has previously prevailed before an administrative body and the superior court.[92] Because King County prevailed before *pro tem* Examiner Smith and the superior court, this Court should award reasonable attorney fees pursuant to RCW 4.84.370(2).

V. CONCLUSION

McMilian has failed to meet his burden of law to prove the existence of a legal nonconforming use. He has also failed to prove

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[92] Jones v. Town of Hunts Point, 166 Wn. App. 452, 463, 272 P.3d 853 (2011).

reversible error under the LUPA standards. This Court should affirm the hearing examiner's decision.

DATED this 20th day of December, 2013.

DANIEL T. SATTERBERG
King County Prosecuting Attorney

Respectfully submitted,

CRISTY CRAIG, WSBA #27451
Senior Deputy Prosecuting Attorney
King County Prosecuting Attorney Office
516 Third Avenue, W400
Seattle, Washington 98104
(206) 477-1120

APPENDIX A

June 28, 2012

OFFICE OF THE HEARING EXAMINER
KING COUNTY, WASHINGTON
King County Courthouse, Room 1200
516 Third Avenue
Seattle, Washington 98104
Telephone (206) 296-4660
Facsimile (206) 296-0198
Email hearingexaminer@kingcounty.gov

SUPPLEMENTAL REPORT AND DECISION ON REMAND

SUBJECT: Department of Development and Environmental Services File No. **E05G0103**

LEO AND SHERRY MCMILIAN
Code Enforcement Appeal

Location: 37307 Enchanted Parkway South

Appellant: Leo McMilian
represented by **Jean Jorgensen**
Singleton & Jorgensen
337 Park Avenue N
Renton, WA 98057
Telephone: (425) 235-4800
Email: jean@singletonjorgensen.com

Appellant: **Sherry McMilian**
PO Box 508
Maple Valley, WA 98038

King County: Department of Development and Environmental Services (DDES)
represented by **Cristy Craig**
Prosecuting Attorney's Office
516 Third Avenue W400
Seattle, WA 98104
Telephone: (206) 296-9015
Email: cristy.craig@kingcounty.gov

SUMMARY OF RECOMMENDATIONS/DECISION:

Department's Preliminary Recommendation:	Deny appeal
Department's Final Recommendation:	Deny appeal
Examiner's Decision:	Deny appeal

EXAMINER PROCEEDINGS ON REMAND:

Pre-Hearing Conference Opened:	October 4, 2011
Pre-Hearing Conference Closed:	October 4, 2011
Briefing Hearing Record Closed:	December 20, 2011

Participants at the original public hearing and the exhibits offered and entered are listed in the minutes attached to the Hearing Examiner's May 26, 2009 report for this proceeding. A verbatim recording of the hearing is available in the Hearing Examiner's Office.

FINDINGS, CONCLUSIONS AND DECISION: Having reviewed the record in this matter on remand, the Examiner now makes and enters the following:

FINDINGS OF FACT:

A. **Procedural History**

1. On September 11, 2007, the Department of Development and Environmental Services (DDES) issued a code enforcement notice and order to Appellants Leo and Sherry McMilian alleging code violations on an R-4 zoned property located in the 37300 block of Enchanted Parkway South, east of the Federal Way city limits. The notice and order cited the McMilians for operation of an auto wrecking business from a residentially zoned property, clearing and grading violations, and construction of a fence without required regulatory approvals. The McMilians filed a timely appeal of the notice and order.

2. Appeal hearings were held by King County Hearing Examiner Peter Donahue on May 13 and August 21, 2008. Mr. Donahue denied the McMilian appeal within a report and decision issued on May 26, 2009. The Hearing Examiner decision was appealed to King County Superior Court and thereafter to Division I of the Court of Appeals under file no. 64868-3-1. On May 2, 2011, Division I issued its opinion in the *McMilian v. King County*, 161 Wn. App. 581, which affirmed most of the Hearing Examiner's earlier decision but remanded a specific issue for further review.

3. The McMilian appeal involves the relationship between two adjacent tax parcels. Tax parcel no. 332104-9005 ("North Lot") has long been used as the site of an auto wrecking yard. It is uncontested that this use predates the enactment of King County zoning regulations in 1958 and constitutes a legally permitted non-conforming use. It is also uncontested that the auto wrecking use on parcel no. 9005 at some point meandered south onto at least a portion of parcel no. 332104-9038 ("South Lot"), an otherwise undeveloped 1.9-acre adjacent tract. The issue to be addressed within this supplemental report on remand from the Court of Appeals is whether the intrusion of an auto wrecking yard use onto parcel no. 9038 occurred prior to 1958 in sufficient degree to support a determination that it too is entitled to recognition as the location of a legal non-conforming auto wrecking yard use. This question is complicated by the fact that before 2000 none of the various owners of the auto wrecking business on parcel no. 9005 was also the owner of parcel no. 9038 to its south.

4. Much of the Division I opinion is occupied with an examination of the question of whether an auto wrecking yard use expansion onto parcel no. 9038 should be regarded as a license based on toleration and acquiescence. The Court of Appeals concluded that a trespasser could not act to establish a legal nonconforming use, but it declined to hold that trespassory status was a necessary implication to be drawn from the mere absence of affirmative consent. Citing earlier Washington case law, Division I held that "where the property in question is vacant, open, unenclosed and unimproved, use by an individual other than the landowner is presumed to be permissive."

5. For purposes of this supplemental report, the two critical paragraphs within the Division I opinion are the following:

> The hearing examiner did not make any finding with regard to whether the wrecking yard use was established on the southern parcel *prior* to 1958, only that it "has long been conducted" *on the northern parcel* and that some spillover had occurred onto the southern parcel. We cannot, on this basis, conclude that McMilian has met his burden to prove by a preponderance of the evidence that the wrecking yard use was established prior to 1958, as necessary to establish that a non-conforming use then existed. There is evidence in the record that would support either a finding that the southern parcel had been used for the wrecking yard prior to 1958 or, conversely, a finding that the southern parcel had not been so used prior to 1958. Accordingly, we remand to the hearing examiner for a determination of whether the wrecking yard use existed in the southern parcel prior to 1958...
>
> We remand the matter to the hearing examiner for a decision, based on the existing record, as to whether McMilian established that the wrecking yard use was extant on the southern parcel prior to 1958. If the hearing examiner determines that McMilian met his burden to prove this fact, the presumption of permissive use of the property applies, and the hearing examiner must decide whether McMilian has proved that a valid nonconforming use exists on the southern parcel.

6. This supplemental decision is based on a review of the exhibits admitted to the hearing record on May 13 and August 21, 2008, and the oral testimony received on those dates. On October 21, 2011 Examiner Donahue issued an order setting a schedule for briefing the issues on remand, in response to which the attorneys for both the Appellant and King County DDES submitted written legal arguments.

B. Evidence Specific to the 1958 Timeframe

7. There is within the record only a sparse amount of information directly descriptive of the conditions existing on parcel 9038 about the time in 1958 when the zoning code became effective. These materials consist of archived tax assessment records for parcel 9038 covering the period from 1946 through 1973, three affidavits from individuals who claimed to be familiar with the parcel during that timeframe, the oral testimony of Richard Horan, a prior owner of the auto salvage business who had also visited the site as a child, and a 1960 aerial photograph of the two properties in question.

8. Helene Mecklenburg, along with her husband, was the owner of the auto wrecking yard on parcel 9005 (North Lot) from 1957 through 1968. In 1978, when Ritchie Horan was trying to establish the existence of an nonconforming use on parcel 9005, he obtained an affidavit from Mrs. Mecklenburg describing use of the parcel in the late 1950s. Mrs. Mecklenburg's affidavit (exhibit no. 17A) states in part that, "I operated an auto wrecking yard and automobile storage facility within a fenced perimeter, under permits granted on a periodic basis by the appropriate government authorities. . .." DDES argues that the phrase "within a fenced perimeter" should be regarded as evidence that no wrecking yard activities occurred in the late 1950s on adjacent parcel 9038.

9. Twenty-seven years later, in 2005, Appellant Leo McMilian undertook to obtain affidavits supporting the existence of an nonconforming use on tax lot 9038 (South Lot). He had an attorney create a simple affidavit form that he used to solicit signatures from historic wrecking yard customers. One such affidavit (exhibit no. 17E) was signed by Bert Willard on July 21,

2005. It stated that Mr. Willard had been a client of the various wrecking yard businesses "since before 1957 and attest(s) that auto wreckage has been located" on tax parcel 9038.

10. The affidavit of Harry Horan, dated July 22, 2005, and appearing in the record as exhibit no. 17D, is somewhat more detailed. Mr. Horan's affidavit states that he was born in 1943 and visited the Mecklenburg auto wrecking business before 1957 in the company of his father, a mechanic. Harry Horan's affidavit states that, "I specifically recall visiting and observing the original office and shed that was used for the wrecking operation at that time" and "observed auto wreckage in the vicinity of the original office and shed." Then the following paragraph states that, "based on my review of real estate documentation and surveys, I can confirm that these structures and operations were located on the southern two acre parcel. . .."

11. DDES contends that the Mecklenburg affidavit should be viewed as reliable, but that the Willard and Horan affidavits should be rejected because as mere customers they had no motivation to ascertain where the property line was. Further, DDES argues that the descriptions within the affidavits are non-specific as to the nature of the use, its location and extent. On the other hand, DDES suggests that the phrase "within a fenced perimeter" in the Mecklenburg declaration establishes that there was a clear line of demarcation between parcels 9005 and 9038 and therefore no auto wreckage use on the southerly parcel.

12. The better view is that all three affidavits are sufficiently defective as to preclude placing reliance upon any of them. The problems with the Mecklenburg affidavit are that it is not focused on parcel 9038 specifically and the use of the term "fenced perimeter" does not necessarily imply the existence of a functional barrier along all of the boundaries. It may mean no more than a portion of parcel 9005 was fenced off, nor does it specify that the fence was located on the boundary. The Willard affidavit simply states a conclusion without providing any supporting details. And the Horan affidavit is substantially based on the later examination of documents rather than unassisted memory. If Harry Horan's recollection indeed was a valuable source of information, he should have been produced as a witness at the hearing and subjected to cross-examination as to the actual extent of his personal observations. The three affidavits under discussion are all fundamentally flawed documents; the findings in this report will not rely on any of them as evidential sources.

13. Exhibit no. 11 comprises four pages of tax assessor records obtained from King County archives. The top page of the exhibit contains a checklist of structural features on the property. While there may be entries from a number of different years, the bulk of the information appears to date from 1959. The top page describes a one-story single-family dwelling of cheap construction measuring 1,040 square feet, containing four rooms. It had a bathroom and a kitchen, a wood stove, and aluminum siding. The notations indicate the existence of at least two out-buildings and that the house was remodeled in 1946. There is also a curious entry in the lower left corner in which the first word appears to be "auto" and the second word begins with a "w" but is otherwise smeared and illegible. The Appellant has suggested that this entry should be understood as to referring to auto wrecking, but that seems an unlikely interpretation; the entry appears at the bottom of a column headed "plumbing."

14. The second page of exhibit no. 11 is stamped "split valuation" at the top and contains assessment entries beginning March 8, 1945, and concluding on August 30, 1972. The 1947 entry confirms that the house was remodeled. The 1947 entry also identifies the parcel size to be five acres, while the 1955 entry immediately following refines that figure to 4.88 acres. Both the building and property valuations increase steadily between 1946 and 1973, with a large jump occurring between 1966 and 1972. This jump appears to be primarily driven by general market forces.

15. The last two entries on page two are of particular interest, however. On May 25, 1972, the land assessment for tax year 1973 was $7,300, but barely three months later on August 30, 1972, that

figure had dropped to $2,150. The accompanying note indicates that a land segregation occurred in 1972. The 1972 segregation of tax parcel 9038 is confirmed on page four of exhibit no. 11, where it states that tax parcel 9038-8 was segregated from parcel 9038. This page referring specifically to the new tax parcel 9038-8 provided it with a valuation of $5,150, which is the exact difference in the valuation entries appearing on page two. Based on the relative land valuations between the two parcels, it appears that the two resulting tax lots were not equal in size and that the structures were located on the smaller parcel.

16. Page one of exhibit no. 11 also has a photograph affixed to it. Handwritten notations in what appears to be white ink identify the photograph as relating to tax lot 38 and indicate the date of photograph to be January 5, 1945. The older structure in the center of the photograph appears to be a shed sided with wooden planks. In the background to the left is a house. While there are a few trees in the distance, the area immediately around the central shed structure looks to have been recently cleared. In his testimony regarding this picture, Ritchie Horan described the terrain as "freshly logged."

17. Ritchie Horan also described visiting the auto wrecking yard property with his father in about 1966 at the age of 10 years. He seemed to have a clear recollection of entering into some sort of small building:

> And I recall going in that specific wrecking yard. And I had been in a few. But there was just a little shanty building and I remember the stove in it. And it was a kind of a manly place. The smells. And I really didn't think much of it. Other than the few times of being in it. I was unaware of property lines and unaware of any issues at that point in my life.

18. The Appellant's attorney attempted to get Mr. Horan to make a linkage between the manly smelling shack of his childhood memories and the photograph appearing on the first page exhibit no. 11. Here is how that unfolded:

> A: You showed this to me earlier.
>
> Q: Yes. I did.
>
> A: And I have a hard time with it. And I can see the topography. And after looking at it, I believe it to be the office building. There was more trees around it. This picture says it is dated '38. I didn't realize the property had been logged twice but I guess 50 years had gone by so it was logged again. But there was more trees and brush the (unintelligible). The house to the left would have been the neighbors. And that would be on the parcel we've been talking about. And that would have been the office. It looks more like a shell here so he probably did some renovations to it. It looked worse before I got rid of it. But it's hard to determine exactly, but the terrain is right.

This hardly qualifies as a strong positive identification. To begin with, Mr. Horan appears to have confused the tax lot number on the face of the photograph with the photograph's date, so he believed the photograph was to have been taken in 1938 when in fact it was taken in 1945. The photograph was inconsistent with his memory and he was struggling to reconcile the two. In addition, the confusion about the photograph's date led to a series of erroneous speculations about the state of timber growth on the parcel at various subsequent points in time. When Mr. Horan was shown the 1960 aerial photograph (it appears in the record as both exhibit no. 5A and exhibit no. 21), he was unable to accurately identify it. Before being corrected by his attorney, he identified the photo as having been taken after 1977 instead of 17 years prior to that date.

19. A xerox copy of the 1960 aerial photograph containing both tax lots 9005 and 9038 was originally offered to the record as exhibit no. 5A, but when the photograph became the focus of controversy an original certified copy was entered as exhibit no. 21. For purposes of this review, the focus will be on exhibit no. 21. It depicts the wrecking yard on parcel 9005 surrounded on the northwest and south sides by undeveloped woods and brush land, and on the east side by the public road that is now Enchanted Parkway. The only other developed area depicted in the aerial photograph lies approximately 300 feet south of the southeast corner of parcel 9005 and appears to be a homesite with about one acre actively occupied. There are a few larger trees within the northeastern quadrant of parcel 9005 and a densely wooded expanse offsite to the west. The offsite area immediately adjacent to the southern boundary of parcel 9005, as demarcated by the southern edge of the active auto wrecking yard, is also densely covered with smaller trees and brush.

20. There are no roads, cleared areas, buildings or other structures visible in the exhibit no. 21 aerial photograph in the area corresponding to tax parcel 9038 now owned by Appellant Leo McMilian. If we assume based on the exhibit no. 11 photograph that logging occurred south of the wrecking yard in about 1944 or 1945, the vegetation on parcel 9038 would be 15 or 16 years old at the time of the 1960 aerial photo. At the hearing Mr. Horan described this parcel as having been logged again in 1990, and both he and Mr. McMilian characterized the subsequent growth on that parcel some 12 years later as consisting of scrub and small saplings with trunks three inches wide or smaller. While the Appellants have attempted to explain the absence of visible human activity on parcel 9038 in the 1960 aerial photograph as the result of site-obscuring overgrowth, this appears to be an improbable hypothesis. The growth on tax lot 9038 as it appears in the aerial photograph is relatively small, and the descriptions of comparable growth at a later period in the same location support this characterization. The notion that significant auto salvage activity could have occurred on parcel 9038 during any part of the 1950s is thus contradicted by the aerial photograph and implausible under the circumstances. And if at that time there was some sort of actively used shed on parcel 9038 as currently configured, surely the roof would have been visible along with some sort of driveway approach and parking area.

21. The only reliable items of evidence in the record relating to the 1958 timeframe are the 1960 aerial photograph appearing as exhibit no. 21 and the exhibit no. 11 assessor records from the King County archives. The exhibit no. 21 aerial photograph shows two sets of buildings. On tax parcel 9005 at the southeast corner of the wrecking yard there appears to be a long rectangular building with a parking area adjacent to the public road. Further south about 300 feet there is a homesite. Neither set of structures appears to be located on what is now tax parcel 9038 owned by the Appellant. The photograph on the top page of exhibit no. 11 dated January 5, 1945 almost certainly is the homesite appearing at the southeast corner of the exhibit no. 21 aerial photograph. These buildings would have been on tax parcel 9038 before it was segregated in 1972, but are no longer part of the reconfigured tax lot 9038 now owned by Mr. McMilian.

C. <u>Inferences based on recent conditions</u>

22. Ritchie Horan owned the wrecking yard on parcel 9005 from 1977 until its sale to Mr. McMilian in 2001. Mr. Horan testified that when he purchased the wrecking yard its perimeters were bulging onto adjacent parcels, including especially parcel 9038 to the south. The aerial photographs of the site during Mr. Horan's ownership confirm that along the wrecking yard's southern boundary an overflow occurred over a number of years. This overflow included parking two large 10-foot by 60-foot trailers, which are visible south of the parcel 9005 boundary in a 1996 aerial photograph (exhibit no. 5C). Mr. Horan testified that parcel 9038 was logged in about 1990, so accordingly the 1996 aerial shows a very low level of vegetation, and in addition to the two larger trailer units some smaller vehicles are also visible along the boundary line. A 2000 aerial photograph (exhibit no. 5D) displays a larger incursion of overflow vehicles onto parcel 9038, concentrated below the parcel 9005 southern boundary at a location approximately

150 feet east of the parcel 9038 northwest corner. The intrusion of stored vehicles onto parcel 9038 in the 2000 photograph extended a maximum of about 50 feet and occupied less than 15 percent of the southerly parcel.

23. Mr. Horan claimed to have used the entirety of parcel 9038 for overflow vehicle and parts storage, but was vague as to the details and, as noted, this claim of extensive use finds no support in the relevant aerial photographs. The details are somewhat murky, but both Mr. Horan and Mr. McMilian testified that the sale of the auto wrecking business in 2001 included all the vehicles and parts wherever located. This suggests that Mr. Horan represented to Mr. McMilian that he had some right to usage of the southerly parcel, a factor could have motivated Mr. Horan at the hearing to favor Mr. McMilian's nonconforming use claim.

24. With respect to the usage of parcel 9038 in the auto wrecking yard business prior to 1958, the potentially relevant portion of Appellant Leo McMilian's testimony comprised observations made while cleaning up and reorganizing the site after its purchase. Mr. McMilian hired Timothy Pennington sometime in 2002 to help him clean up parcels 9005 and 9038, and both men testified as to their recollections of this process. Mr. McMilian's most important finds seem to have been a wheel rim with wooden spokes on it and a few sections from Model-T and Model-A Fords. Beyond that, he testified that a vast quantity of old tires and parts were excavated from the 9038 site and hauled off for disposal.

25. No systematic attempt was made to segregate the tires and auto parts removed from parcel 9038, the southern lot, from those taken from the main wrecking yard on 9005. Further, the recollections of Mr. McMilian and Mr. Pennington in this regard are strikingly different. For example, in his oral testimony Appellant McMilian testified that as "just a rough estimate I probably took 40-50,000 tires out of just one section" of parcel 9038. He estimated that the tire removal from parcel 9038 comprised about 30 percent of the total tires removed from both sites combined. But Mr. McMilian's testimony is clearly at odds with the recollection of Mr. Pennington, who estimated that the number of tires removed from parcel 9038 was in the range of 700-800 maximum. Mr. Pennington further estimated that the total quantity of metal parts and debris removed from the southern parcel was in the vicinity of 50 tons. On cross-examination Mr. Pennington disclosed that on the southern site he only encountered one complete car unit and the wreckage generally found on parcel 9038 was sporadic and spread out.

26. In terms of documenting the site cleanup performed by Mr. McMilian and Mr. Pennington from 2002 onward, there are two exhibits of particular interest. One is the so-called "mountain of tires" photograph taken by Code Enforcement Officer Al Tijerina, which appears in the record as exhibit no. 5Y. This photograph depicts a bulldozed pile of mostly tires and some debris that was collected from the two parcels and heaped somewhere, most likely on the northern part of the southern parcel. Two things are noteworthy about this picture. First, none of the tires appear to be obviously of antique vintage, and indeed many of them are clearly steel-belted radials. Second, only a few of the tires, mainly in the foreground of the picture, show obvious signs of having been buried in soil. Exhibit no. 14 is a summary report describing the weight in pounds of materials removed from the two parcels and delivered to a recycling facility. Of the 22 coded line-items the largest by far are the entries for auto bodies at over 32 million pounds and tire disposal at more than 24 million pounds. Exhibit no. 14 documents the large quantities of materials removed from the two properties collectively, but it provides no information about how much material was removed from each site individually nor the age of the materials removed.

27. Some sense of the overall site cleanup process instituted by Mr. McMilian can be derived from comparing the year 2000 aerial photograph (exhibit no. 5D) with the aerial photograph for 2002 (exhibit no. 5E). The year 2000 photograph should fairly represent the condition of the site at the end of Mr. Horan's ownership as encountered by Mr. McMilian at the time of his purchase. In it the northern half of parcel 9005 is filled with a largely haphazard clutter of vehicles and trailers.

In the 2002 photograph this upper half of parcel 9005 is beginning to show signs of rudimentary organization. The total number of vehicles has been reduced by perhaps 50 percent and those that remain have begun to be marshaled into recognizable rows. A north/south access way has also been further extended toward the top of the parcel. The detail within the 2002 aerial photograph depicting the southern half of parcel 9005 is somewhat indistinct, but it appears that two major clearings were created and at least one of them in an area where the 2000 aerial photograph showed vehicles to have been previously stored.

With regard to parcel 9038, the major differences between the 2000 and 2002 aerial photographs occur along the parcel's northern boundary adjacent to the main auto salvage yard. There a finger comprising perhaps 2,000 or 3,000 square feet that exhibited vehicle storage earlier in exhibit no. 5D now appears cleared of vehicles. It also seems that there could have been some vegetation removal just south of the boundary line and further east toward a large trailer where the density of vegetation looks thinner in the 2002 photograph than it did in 2000.

28. The details visible in the two aerial photographs are more consistent with Mr. Pennington's testimony than with that of Mr. McMilian. While there may indeed have been a scattering of parts partially buried on parcel 9038 obscured by vegetative overgrowth, there is no aerial photographic evidence of vegetative removal or disturbance outside the area immediately adjacent to the boundary between the two parcels, and even there it is concentrated largely in one spot. It is also noteworthy that Mr. Pennington was the individual primarily responsible for doing the removal work and that he would have no apparent motivation to testify that he did less work on parcel 9038 than actually occurred. Mr. McMilian, on the other hand, has an obvious incentive to exaggerate the amount of work performed on parcel 9038, and his testimony is thus less credible. Our finding is that, consistent with the aerial photographs for that time period, most of the site restoration work occurred on parcel 9005, the northern lot, with cleanup on parcel 9038 consisting of removal of fewer than 1,000 tires plus a scattering of auto parts and larger trailers. Further, with the exception of a few select items that received an inordinate amount of argumentative attention, there is no evidence that a significant quantity of materials removed from parcel 9038 can be positively identified as deposited in 1958 or before.

CONCLUSIONS:

1. Under the terms of the remand from Division I of the Court of Appeals, as the landowner the Appellant Leo McMilian bears the burden of proof to establish by a preponderance of the evidence that a valid nonconforming use existed on parcel 9038 in 1958 prior to the adoption of King County zoning regulations. According to the standard enunciated at *First Pioneer Trading Company v. Pierce County*, 146 Wn.App. 606, 614 (2008), as quoted by the Division I opinion, Mr. McMilian carries an "initial burden to prove that (1) the use existed before the county enacted the [contrary] 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 [prior to the relevant change in the zoning code]." Further, citing *N./S. Airpark Association v. Haagen*, 87 Wn.App. 765, 772 (1997), the Division I opinion requires that to establish a valid nonconforming it must be demonstrated to have been "more than intermittent or occasional prior to the change in the zoning legislation."

2. A review of the record discloses that Appellant McMilian has failed to demonstrate by a preponderance of the evidence that an auto wrecking yard use existed on parcel 9038 in 1958 before the adoption of King County zoning regulations. Having failed to demonstrate the use's existence, the further questions of whether the use was lawful at the time, or abandoned or discontinued at a later date, need not be addressed.

3. The only completely reliable item of evidence bearing on the status of parcel 9038 in the 1958 timeframe is the 1960 aerial photograph appearing at exhibit no. 21. It shows an auto wrecking yard well established on parcel 9005 with no apparent extension southward over the boundary

onto parcel 9038. Further, the visual context depicted in that timeframe discloses no necessity for the existing auto salvage yard on parcel 9005 to expand beyond its boundaries. As shown in the 1960 aerial photograph, parcel 9005 itself still retained ample unused area for the placement of more vehicles, especially near its northwest corner. Further, parcel 9038 to the south was not segregated into two portions until 1972. Thus the occupant of the homesite shown in the southeast corner of exhibit no. 21 would not likely have been indifferent to expansion of the wrecking yard beyond the perimeters of parcel 9005. While the structural data disclosed on the contemporaneous tax assessor records for parcel 9038 are probably accurate, they no doubt apply to the homesite that existed on the larger original parcel before its segregation. There is no evidence that any of the buildings referenced in exhibit no. 11 existed on tax lot 9038 after it was reconfigured in 1972.

4. Although not strictly required by this decision on remand, the 1972 segregation has a further important implication. As explained by the Division I opinion, the presumption that an uninvited use is permissive only applies if the property subject to such uninvited use is "vacant, open, unenclosed, and unimproved." But this was not the circumstance with respect to parcel 9038 before its 1972 segregation into two lots. As shown in the 1960 aerial photograph (exhibit no. 21) and substantiated by contemporaneous assessor records (exhibit no. 11), the five-acre parcel that comprised tax lot no. 9038 in 1958 was neither vacant nor unimproved. It contained a house, outbuildings, parking areas and a driveway. Thus in 1958 when a legal nonconforming use would have been required to be established, an incursion of the wrecking yard across the boundary onto parcel 9038 from parcel 9005 to its north would not have been entitled to a presumption of permission.

5. The various testimonial recollections in the record pertaining to the conditions on parcel 9038 in the 1958 timeframe are unreliable individually and collectively. They are vague, generalized, speculative and frequently self-serving. They do not constitute substantial and reliable evidence of a nonconforming use.

6. The descriptions of parcel 9038 contained in the testimony of those who performed the auto yard cleanup after Mr. Horan's sale to Mr. McMilian of the wrecking yard business in 2001, plus the few documents associated therewith, are contradictory and inconclusive at best. Mr. Pennington's testimony that only a minor amount of materials was removed from parcel 9038 is consistent with the aerial photographs and relatively untainted by self-interest. The most that can be said for Mr. Horan's testimony is that during his tenure as owner of the auto wrecking yard on parcel 9005 from 1977 to 2001 he expanded his vehicle and parts storage activity southward onto parcel 9038 in the area along the boundary between the two properties. The limited extent of this intrusion as documented in the aerial photographs suggests that it was at no time more than intermittent and occasional. But even if these expansive intrusions are deemed routine, they supply no evidence whatever of wrecking yard activity taking place on parcel 9038 prior to 1977 when Mr. Horan purchased the site.

7. Based on the evidence of record, Appellant Leo McMilian has not met his burden of proof to establish that a valid nonconforming use existed on parcel 9038 in 1958 prior to the adoption of King County zoning regulations. Accordingly, on remand, Mr. McMilian's appeal of citation no. 1 within the September 11, 2007, notice and order concerning the operation of an auto wrecking business from a residential site within the R-4 zone must be denied and the earlier May 26, 2009, decision of the Hearing Examiner reaffirmed. Regarding the proceeding as a whole, the instant supplemental decision on remand has the effect of denying the McMilian appeal in its entirety and reinstating the September 11, 2007, notice and order as modified by the conditions appended to the Hearing Examiner's May 26, 2009, report and decision, except that the compliance deadlines will be revised as provided below.

DECISION:

The appeal is DENIED. The September 11, 2007, notice and order is sustained, and the six conditions appended to the Hearing Examiner's May 26, 2009, report and decision are reaffirmed subject to the deadline modifications stated below:

1. Within condition no. 1, the deadline for scheduling a permit review meeting is revised to **July 27, 2012.**

2. Within condition no. 2, the revision and supplementation deadline is revised to **August 27, 2012.**

3. Within condition no. 3, the fence permit application submittal deadline is revised to **July 27, 2012**, and the alternative removal date revised to **September 28, 2012.**

4. The deadline within condition no. 4 for terminating the auto wrecking and auto storage yard use on parcel 9038 is revised to **August 27, 2012.**

5. Except with respect to the deadlines revised herein, all conditions contained within the Hearing Examiner's May 26, 2009, report and decision remain in effect as originally specified.

ORDERED June 28, 2012.

Stafford L. Smith
King County Hearing Examiner *pro tem*

APPEAL INFORMATION

Pursuant to King County Code Chapter 20.24, the King County Council has directed that the Examiner make the final decision on behalf of the county regarding code enforcement appeals. The Examiner's decision shall be final and conclusive unless proceedings for review of the decision are properly commenced in King County Superior Court within 21 days of issuance of the Examiner's decision. (The Land Use Petition Act defines the date on which a land use decision is issued by the Hearing Examiner as three days after a written decision is mailed.)

SLS/vsm

APPENDIX B

The Honorable LeRoy McCullough

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

LEO MCMILIAN, an individual Petitioner, vs. KING COUNTY, a Washington municipal corporation, by SHERRY MCMILIAN an individual, Respondents.	No. 12-2-23420-5 KNT ORDER DENYING LUPA APPEAL AND AFFIRMING EXAMINER'S ORDER

This matter came before this Court upon Petitioner Leo McMilian's timely LUPA appeal. The Court heard the arguments of counsel and considered the following documents:

1. The Stipulation and Order Re Record on Appeal Pursuant to RCW 36.70C.120(2) and documents referenced therein.
2. The administrative hearing record maintained by the King County Superior Court Clerk in the matter of McMilian v. King County, at 09-2-23216-4 KNT (McMilian I).
3. Opening Brief of Petitioner in Support of his LUPA Appeal;
4. King County's Response to Opening Brief of Petitioner in Support of his LUPA appeal;
5. Reply Brief of Petitioner in Support of his Second LUPA Appeal.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. In this case the Superior Court stands in its appellate capacity reviewing the final determination of the King County Hearing Examiner on a land use matter. Thus, review

Daniel T. Satterberg, Prosecuting Attorney
CIVIL DIVISION
W400 King County Courthouse
516 Third Avenue
Seattle, Washington 98104
(206) 296-9015/FAX (206) 296-0191

is governed by the Land Use Petition Act (LUPA). RCW 36.70C.030. Review is on the record. RCW 36.70C.130(1)(a). Under LUPA the reviewing court may only grant relief if the appealing party meets certain standards. RCW 36.70C.130(1). The Court considers legal issues de novo and gives deference to the construction of a law by a local jurisdiction with expertise. RCW 36.70C.130(1)(b).

2. This matter is presented for the Court's decision regarding a King County Hearing Examiner decision on remand from the Court of Appeals. McMilian v. King County, 161 Wash.App. 581, 605-606, 255 P.3d 739, 752 (2011). In McMilian I the Court of Appeals affirmed in part and reversed in part Examiner Peter Donahue's decision denying McMilian's appeal. The McMilian I court concurred with Examiner Donahue that a trespasser cannot establish a legal nonconforming use in Washington, but remanded for a decision, based upon the existing administrative record, whether petitioner had satisfied his burden to prove that a wrecking use existed on the subject parcel prior to 1958. Id.

3. In a May 29, 2012 e-mail from Peter Donahue, at that time the chief examiner, the McMilian remand was assigned to pro tem Examiner Stafford Smith. Attorneys Craig, for the King County Department of Development and Environmental Services, and Jorgensen, on behalf of McMilian, were included on the distribution list. Neither Ms. Craig nor Ms. Jorgensen responded to the e-mail. Subsequently, on June 15, 2012, Examiner Donahue left County employment.

4. Following his assignment, Examiner Smith reviewed the administrative record and concluded that McMilian did not meet his burden to prove the existence of a wrecking yard on the subject parcel prior to 1958.

5. McMilian timely appealed the decision, raising due process claims in addition to seeking relief pursuant to RCW 36.70C.130.

6. This court concludes that McMilian has not established error and does not meet the standards for granting relief described in RCW 36.70C.130(1). Pro tem Smith's decision was supported by substantial evidence. McMilian's due process rights were not violated.

7. Examiner Smith was properly appointed as a pro tem, and the court concludes that either Donahue as chief examiner, or Spohr, as interim examiner, had authority to appoint him under KCC 20.24.065.

8. Examiner Smith's decision complied with the Court of Appeals mandate to make a finding regarding the condition of the parcel in 1958, and did not exceed the scope of the mandate.

9. Smith's decision did not turn on the credibility of any witness. The relevant evidence was documentary and included a 1960 aerial photograph, the Declaration Helene Mecklenberg, who owned the property at the time, and a 1945 tax document reflecting that the parcel was zoned residential. Each of those documents support the conclusion that no wrecking yard existed on the subject parcel in 1958. Because Smith's decision did not turn on the

Daniel T. Satterberg, Prosecuting Attorney
CIVIL DIVISION
W400 King County Courthouse
516 Third Avenue
Seattle, Washington 98104
(206) 296-9015/FAX (206) 296-0191

credibility of witnesses, and was supported by substantial evidence in the record McMilian does not establish error under RCW 36.70C.130(1).

10. Neither is the court convinced that a mistake has been made in Smith's application of the law to the facts. McMilian has the burden to prove that a lawful wrecking yard use existed in 1958, and that it was more than intermittent or occasional. In his testimony regarding the condition of the property when he was 10 years old Richie Horan disclaimed knowledge of property lines. Helene Mecklenberg's description of the property as fenced is not conclusive, but weighs against McMilian, and Smith's reliance on the 1945 tax form describing a residential property, and the 1960 aerial photo was proper. The aerial photograph showed no evidence of active wrecking yard use of the subject parcel. The mere possibility of wreckage under the tree canopy is not sufficient to establish the existence of a substantial use. Thus this court concludes that McMilian did not meet his burden to prove that the examiner erred under RCW 36.70C.130(1)(d).

11. The Court's oral ruling is hereby incorporated by reference.

ORDER

Based upon the foregoing the King County Hearing Examiner's Report and Decision is HEREBY AFFIRMED. Petitioner's LUPA appeal is DENIED. The examiner's order shall remain in effect pending any additional review of this matter.

SIGNED this 14th day of June, 2013.

JUDGE LeROY McCULLOUGH

Presented by:

Cristy Craig #27451
Office of the King County Prosecuting Attorney
Senior Deputy Prosecuting Attorney

Daniel T. Satterberg, Prosecuting Attorney
CIVIL DIVISION
W400 King County Courthouse
516 Third Avenue
Seattle, Washington 98104
(206) 296-9015/FAX (206) 296-0191

Approved as to Form,
Presentation Waived:

SINGLETON & JORGENSEN, INC., PS

Jean Jorgensen, #34964
Attorney for Petitioner McMilian

Daniel T. Satterberg, Prosecuting Attorney
CIVIL DIVISION
W400 King County Courthouse
516 Third Avenue
Seattle, Washington 98104
(206) 296-9015/FAX (206) 296-0191

APPENDIX C

District 22005 | Addition TAX LOT | Section 33 Twp 21 Range 4 E.W.M. Block Tract or Lot No 38

N ½ of S ½ of SW ¼ of NE ¼ Less Rds. Tax

Permit No. | Date | Description

3 Address of Property
4 For. Owner
5 Architect
6 Original Building Cost $ | Owner-Tenant Occupied | Rental per Month $ | Estimated Rental per Month $
7 Condition of Exterior Fair Interior Fair Foundation Fair Floor Plan Good Accept Poor

BUILDING
- 1 One Family Dwelling
- Two Family Dwelling
- Store and Dwelling
- 1 No. of Stories
- 4½ No. of Rooms
- Basement
- 4½ First Floor
- Second Floor
- Third Floor
- Attic

TILE WORK FT.
- Floor-Wall Bath
- Floor-Wall Lavatory
- Floor-Wall
- Floor-Wall
- Floor-Wall Shower
- 2 Floor-Wall Kitchen
- 1 Kitchen Drain Board
- 1 None
- Unfinished

ATTIC
- Plaster
- Board
- Ceiled
- Stairway Open Closed
- Useful
- X None
- Unfinished

PORCHES
- 2 One Story
- Two Story
- 9 Unroofed
- Brick and or Concrete
- Cement Floor
- Recessed
- Glassed
- Enclosed
- X Needs
- 2 3rd floor

EXTERIOR WALLS
- Boards and Battten
- Shiplap
- Rustic
- X Siding Alum Sid
- Cedar Siding
- Shingles
- Shakes
- Stucco on Lath
- Brick Veneer
- Kind
- Stone
- Fabricated Steel
- Unfinished
- Built-Ins NONE

CLASS 1-2-3-4-5-6-7 NO. GOOD MEDIUM CHEAP
Date Built 1918 X Finished Unfinished Remodeled 1946
Effective Age 39+ Years Future Life Years
Dep. for Condition Dep. for Obs.

INTERIOR WALLS
- Plaster
- Jazz Plaster
- 4½ Ceiled
- Plywood
- Board
- Open Studs
- Painted
- Kalsomine
- 4½ Papered
- Unfinished Walls

FLOORS
- Hardwood ( )
- 9/10 Fir
- Shiplap
- Unfinished
- Linoleum

FIREPLACE No.
- Brick
- Tile Face
- Concrete
- Cobblestone
- X None
- Unfinished

INTERIOR TRIM
- Hardwood
- Mahogany
- 4½ Fir
- Unfinished

PLUMBING
- 1 No. of Fixtures ALL IN
- 1 Tub—Leg or Pem.
- 1 Toilets
- 1 Basin—Pedestal
- 1 Sink
- Shower in Tub
- 1 Hot Water Tank
- Laundry Trays
- None
- Unfinished
- Expensive
- Good
- Average
- X Cheap
- 1 D. S. Sewer Conn.
- 1 outs Water

CONSTRUCTION 4
- X Single
- Double
- Solid A.B.S.
- X Very Cheap Shacks
- Cheap
- Medium
- Good
- Special
- Bevel Corner Joints 20

CEILING HEIGHT

Basement	ft.	in.
1st Floor 8	ft.	in.
2nd Floor	ft.	in.
3rd Floor	ft.	in.
Attic	ft.	in.

BASEMENT
- Full
- Part % Con.
- To 1st Floor Joist Thick
- Frame and Concrete
- ft. ft.
- Cement Blocks
- Floor
- Recreation Room
- Garage
- Plastered
- Drain
- X None
- Unfinished

HEATING +8 1/10
- X Stove
- Pipeless Furnace
- Hot Air Furnace
- Hot Water
- Steam
- Gas
- Vapor
- Air Cond. Fan
- Stoker
- Oil Burner
- Air Cond. Complete

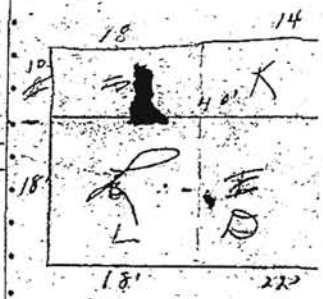
FOUNDATION
- Concrete Thick
- X Cement Blocks
- Stone or Brick
- X Wood Post Concrete Block
- Porch

EXTRA FEATURES
- Bay Window Story
- Beam Ceiling
- Cathedral Ceiling
- Dormers
- X HGNF

ROOF
- X Shingle 18x18
- X Composition
- Tile or Slate
- Tar and Gravel
- X Tar Paper 18x32

FLOOR CONSTRUCTION
- 1st Floor Joists 2 x 6
- 6 Bridged 10'
- Post Size 4 x 6
- Beam Size 4 x 8

GROUND FLOOR AREA 396 SQ. FT. SCALE 1/8" = 1'-0"
1040 D — 1959 — 500 BUS



Other Buildings	Construction	Floor	Roof	Sty.	Dimensions	S. F. Area	Factor	Value	% Dep.	Deprec.
Garage	Frame	Plat	Shin	1	18 x 18	324		$		$
2-sheds	No A/V				x			$		$
1/4 Det Gar	Sq.	Gravel	T.P.	1	28 x 32	896	F	$		$
					x			$		$

Exhibit No. 11
Item No. 8-22-03
Received 8-22-03
King County Hearing Examiner

BEST AVAILABLE IMAGE POSSIBLE

KC-00063

17945850

1. DISTRICT
LIMITS
C
CODE NO.

2. ADDITION Tax Lot 38
SECTION 33 TWP. 21 N. RANGE 4 E W M BLOCK TRACT OR LOT NO.
DESCRIPTION N 1/4 of S 1/2 of SW 1/4 of NE Less Rds

3. ADDRESS OF PROPERTY CONTRACT PURCHASER Wasem Dairy Farms 10/1945 Sig 1015
4. FEE OWNER

LAND INFORMATION

1. SIZE OF TRACT OR LOT X TOPOGRAPHY GRADE FT. 2. STREET-ROAD SURFACE
ALLEY 3. SIDEWALK SEWAGE WATER PUMP DRAINAGE
4. LANDSCAPING CONDITION 5. TREND VALUE OF LOT $ FRONT STREET
FACTOR $ SIDE STREET FACTOR $ DEPTH FACTOR $ CREDIT
6. USE 7. DISTRICT

LAND USE	SOIL TYPE	CROPS-TIMBER STAND	NO. ACRES	VALUE ACRE	VALUE
				$	$
					$
					$
					$

LAND SIZE X TOTAL $

O C	OWNER OR CONTRACT PURCHASER	DATE	FILE NO.	PRICE	MTGE.	STAMP

DISTRICT:	ROAD	SCHOOL	WATER	FIRE
	2	210		

ASSESSED VALUE LAND

LOT	$
UNIMPROVED ACRES	$
IMPROVED ACRES	$
OTHER LANDS	$
TIMBER	$
TOTAL ASSESSED VALUE 50%	$
DATE	

REMARKS

ASSESSED VALUE YEAR	AC.	LAND	DECREASE OR INCREASE IN ASSESSED VALUATION DATE	BY	REASON	LAND DECREASE	LAND INCREASE
1942	48	130	10/1942	OFH	See 1015		
1946		130	9-1-44	NS			
19							
19							
19							
19							
19							
19							
19							
19							

VACANT—KING COUNTY ASSESSOR—SEATTLE, WASHINGTON 4542 WESTERN PRINTING CO., SEATTLE

KC-00065

KC-00060

Exhibit No. 21
Item No. E05G0103
Received 5/13/08
King County Hearing Examiner

AERO-METRIC
Walker Division

I certify that this is a true and correct portion of an aerial photograph taken in 1960. This photograph was made from a negative on file in the office of Aero-Metric: Walker Division.

Date of Photography:	6/23/60
Negative Scale:	1"=1000 feet
Enlargement Scale:	1"=100 feet
Negative Numbers:	KC-60, 20-59
Work Order Number:	37491

Raylene G. Todd, Photographic Lab Supervisor

Notorized on this day 22 in the month of May,
and year of 20 07
Kathleen M. Crabtree
residing in Renton County of King.
My notary expires 10-13-2010.

KATHLEEN M. CRABTREE NOTARY PUBLIC STATE OF WASHINGTON COMMISSION EXPIRES 10-13-10

KC-00061

23689079

Tax Parcel 332104-9005
(exist. wreaking yard)

AFFIDAVIT CONCERNING REAL ESTATE IN KING COUNTY, CONCERNING LAND USE IN HISTORY

STATE OF WASHINGTON)
) ss.
County of King)

Mrs Helene Mecklenburg, BEING FIRST DULY SWORN UPON OATH DEPOSES AND SAYS:

That I am of legal age and have lived in King County, State of Washington, for ____ years; that I am familiar with the real property known as 37307 Kit Corner Road, in Federal Way, King County, Washington, whose legal description is:

The North 1/2 of the Southwest 1/4 of the Northeast 1/4 of Section 33, Township 21 North, Range 4, East W.M., lying west of Secondary State Highway No. 5D, EXCEPT the North 260 feet thereof, in King County, Washington;

that I, together with my ~~wife~~/husband was the owner of that real estate described above herein from 1957 until 1968, at which time I sold it to Jerry Busenius; that during my ownership of that land, with particular attention to the period of time prior to and during the year 1959, I operated an auto wrecking yard and automobile storage facility within a fenced perimeter, under permits granted on a periodic basis by the appropriate government authorities, including King County authorities, which permits finally became permanent after a probationary term period whose length and duration I do not now recall.

That I recall of my own knowledge that the land was used as an auto wrecking yard and storage facility until the present date, and that said use continued from my ownership and continually during my ownership, until the present date; that I sold the land to Jerry Busenius for his use and business under which I operated the auto wrecking yard and storage facility, and he continued the same use.

Further I do not say at this time, but am willing to testify under oath to the above, should the same be necessary.

Helene Mecklenburg

Helene Mecklenburg, Signed under Oath and the Penalties of Perjury, 9th November, 1978

SUBSCRIBED AND SWORN TO BEFORE ME this 9th day of November, 1978.

WILLIAM D. [illegible], NOTARY PUBLIC in and for the State of Washington, residing at Renton

KC-00071

Exhibit No. 17a
Item No. COSE00103
Received 8-21-08
King County Hearing Examiner

APPENDIX D

McMilian

May 26, 2009

OFFICE OF THE HEARING EXAMINER
KING COUNTY, WASHINGTON
400 Yesler Way, Room 404
Seattle, Washington 98104
Telephone (206) 296-4660
Facsimile (206) 296-1654
Email hearingexaminer@kingcounty.gov

REPORT AND DECISION

SUBJECT: Department of Development and Environmental Services File No. **E05G0103**

LEO & SHERRY McMILIAN
Code Enforcement Appeal

Location: 37300 block of Enchanted Parkway South, in the unincorporated Federal Way area

Appellants: Leo & Sherry McMilian
represented by **Susan Rae Sampson**
1400 Talbot Road South #400
Renton, Washington 98055-4282
Telephone: (425) 235-4800
Facsimile: (425) 235-4838

King County: Department of Development and Environmental Services (DDES)
represented by **Cristy Craig**
Prosecuting Attorney
W400 King County Courthouse
516 Third Avenue
Seattle, Washington 98104
Telephone: (206) 296-9015
Facsimile: (206) 296-0191

SUMMARY OF RECOMMENDATIONS/DECISION:

Department's Preliminary Recommendation:	Deny appeal with revised compliance schedule
Department's Final Recommendation:	Deny appeal with revised compliance schedule
Examiner's Decision:	Deny appeal with further revised compliance schedule

EXAMINER PROCEEDINGS:

Pre-Hearing Conference:	January 24, 2008
Hearing opened:	May 13, 2008
Hearing continued to:	August 21, 2008
Hearing record closed:	October 31, 2008

Participants at the public hearing and the exhibits offered and entered are listed in the attached minutes. A verbatim recording of the hearing is available in the office of the King County Hearing Examiner.

FINDINGS, CONCLUSIONS & DECISION: Having reviewed the record in this matter, the Examiner now makes and enters the following:

FINDINGS OF FACT:

1. On September 11, 2007, the Department of Development and Environmental Services (DDES) issued a code enforcement Notice and Order to Appellants Leo and Sherry McMilian, finding code violations on an R-4 zoned property located at the 37300 block of Enchanted Parkway South just east of the Federal Way city limits and north of the Pierce county line in the unincorporated Jovita area. The Notice and Order cited the McMilians with three violations of county code:

   A. Operation of an auto wrecking business from a residential site.

   B. Cumulative clearing and grading of over 7,000 square feet without required permits, inspections and approvals.

   C. Construction of a fence over six feet in height without required permits, inspections and approvals.

   The Notice and Order required compliance by correction of such violations by cessation of the auto wrecking business and removal of its associated inventory and appurtenances; application commencement for a clearing and grading permit; and application for a permit for the fence (or alternatively, demolition and removal), by November 14, 2007.

2. The McMilians filed an appeal of the subject Notice and Order, making the following claims:

   A. The operation of the site as an auto wrecking/auto storage yard is a lawful nonconforming use, established pre-dating the zoning code regulations which may now prohibit its operation on the property.

   B. The finding of the Notice and Order that the Appellants conducted clearing and grading in violation of county code is not supported by evidence, nor that the McMilians are responsible for its having been conducted.

   C. The charged fence installation has not been specified as to location or dimensions, whether its location is actually on the property, and whether the fence was constructed by the Appellants.

3. The property is a 1.9-acre parcel located on the west side of Enchanted Parkway South in the Jovita area east of Federal Way. It is a blunt wedge in shape (it would be a rectangle except for its angled frontage on Enchanted Parkway South, which runs north-northwest/south-southeast in the area). Directly abutting to the north is a parcel also owned by the Appellants that is the site of their Astro Auto Wrecking business. Abutting to the south is a relatively recently developed detached single-family residential subdivision. To the west lies a creek corridor and wooded areas.

4. An auto wrecking business has long been conducted on the property directly abutting to the north, under a series of ownerships. During prior ownerships, some spillover of the auto wrecking operation occurred onto the subject property, which was not owned by the prior ownerships of the auto wrecking business (it was purchased by Appellants after their purchase of the main Astro Auto Wrecking site abutting to the north). The spillover consisted of storage of some wrecked and dismantled cars and numerous junk auto parts and tires. The property was not utilized in active auto wrecking operations as was the main operation to the north.

5. No express permission was granted by the owners of the subject property to the prior operators of the auto wrecking business to the north to utilize the subject property for auto wrecking/auto storage purposes or any other related activity. Neither was eviction commenced.

6. A prior owner of the adjacent property, Richie Horan, testified that he was never asked to discontinue use of the property in the spillover auto wrecking/auto storage activity. He considered purchasing the subject property but never did, and speculated whether there was a possibility of adverse possession by his usage, though no adverse possession claim was ever made or asserted.

7. Upon their purchase of the subject property, the Appellants in or around 2005, commenced clearing of the subject property of its significant overstory and underbrush vegetation and removal of a substantial amount of auto parts, tires, a few vehicles, etc. The tree cover was so substantial that the vehicles, auto parts, etc., were not visible (at least not easily discernible) from aerial photographs taken prior to the time of clearing.

8. In clearing the property of vegetation, approximately 1.7 acres, or the vast majority, of the 1.9-acre property was cleared.

9. With some exceptions where the threshold is zero, not applicable here, clearing of vegetation in excess of 7,000 square feet of area must be conducted under the auspices of a clearing and grading permit.[1] [KCC 16.82.051]

10. No clearing and grading permit was obtained for the clearing activity.

11. A substantial amount of earthwork was also conducted on the property, during/after the clearing, including topping of a knob promontory by removing its upper six to seven feet of elevation, with the excess material, the spoils, pushed southerly to create fill along the southern boundary directly abutting adjacent properties, to a depth in places of approximately eight feet. Other grading conducted was to bench the property with more uniform surfaces, creating a flat upper portion on the Enchanted Parkway South frontage and then descending with a uniform bank to a lower flat bench area. Credible calculations conducted by DDES staff demonstrate that the grading project encompassed the movement of approximately 400 cubic yards of material, excavation exceeding five feet in depth and fill exceeding three feet in depth, all of which are thresholds beyond which a grading permit is required (outside of critical areas, within which there is a zero threshold; critical area issues are not raised in the subject enforcement action).[2]

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[1] In the county's permit structure, a clearing and grading permit is a combined activity permit that is utilized for either or both clearing and/or grading activity.

[2] DDES testified that its inspection observations led it to conclude that a substantial portion of the subject property had been graded by being stripped to bare earth with substantial cuts and fills to create the benching effect noted above. The Examiner finds the DDES grading witness and his work credible: his lengthy relevant work experience and demonstration of a sound methodology and persuasive conclusions based on simple mathematics, which have not been shown to be in error, are persuasive. The preponderance of the evidence in the record supports DDES' findings regarding the amounts of clearing and grading having

12. No grading permit was obtained for the subject grading activity. However, the pertinent finding of violation in the Notice and Order (violation no. 2) is stated as "cumulative clearing and grading of over 7,000 square feet." The 7,000 square foot threshold, as noted above, pertains to clearing activity; it has no direct relevance to grading permit requirements and thresholds (there is no square foot surface area threshold for grading *per se*; the thresholds are volume and depth-related). Accordingly, grading issues shall be disregarded in the disposition of the subject appeal.

13. After the clearing and grading activity was performed onsite, the Astro Auto Wrecking business expanded substantially onto the subject site, utilizing essentially its entirety for storage of and processing of wrecked vehicles, in some areas stacking them vertically, utilizing typical wrecking yard equipment for stacking, hauling and moving wrecked vehicles and auto parts. The subject property is utilized essentially as an equal component of the previously established auto wrecking yard abutting to the north, as one whole operation. The subject property is accordingly no longer simply a spillover site for informal and minor storage and indeed dumping of parts and vehicles.

14. The fence in question is one along the property's Enchanted Parkway South frontage. It was erected since 2005 (after the Appellants' purchase) and is contended by the Appellants to be necessary to be eight feet in height due to State of Washington auto wrecking license regulations as a sight-obscuring measure. There is no introduction into the record, and none apparent to the Examiner, of any indication of preemption of county building permit and fence height regulations by state law and/or administrative rule.

CONCLUSIONS:

1. Nonconforming uses are disfavored in the law. [*Andrew v. King Cy.*, 21 Wn.App. 566 at 570, 586 P.2d 509 (1978)] The burden of proving the existence of a prior nonconforming use is on the party making the claim. [*North/South Airpark v. Haagen*, 87 Wn.App 765 at 772, 942 P.2d 1068 (1997)] A claimant must make a compelling case that a nonconforming use has been lawfully established and maintained in order for it to be recognized. Here, Appellants contend that a prior owner of the main Astro Wrecking parcel abutting to the north, Richie Horan, had a sufficient possessory interest in the subject property to lawfully establish what is now contended to be a nonconforming use. In particular, they contend that Mr. Horan had permission, "or at least acquiescence," to use the parcel and that "he felt he very well may have had a claim for adverse possession." But no adverse possession claim was ever made, and indeed Mr. Horan acknowledges "that there was a question about whether I could have claimed it."

2. The assertion by Appellants that Mr. Horan also exhibited hostility in his use of the property (hostility being one of the legs of the four-legged stool upon which adverse possession must stand) is belied by the record. Mr. Horan's testimony is that, "I had been offered to purchase, you know, to purchase . . . again. And I didn't proceed. Nobody had ever asked me to move off of it. There was a question about whether I could have claimed it. And so the issue was just kind of set aside. . . ." His stance on the property hardly exhibits hostility in possession. In addition, Mr. Horan in his testimony exhibited a great deal of sensitivity about the issue of his wrecking/storage operation "bulging" over onto the subject property. This also demonstrates a

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been conducted on the subject property.

lack of hostility and attempted possession.[3] Neither is there exhibited any express permission for Mr. Horan to utilize the site. Particularly given the context of nonconforming uses being disfavored in the law, and of the allowance of nonconforming uses to continue chiefly in order to respect private property rights [*State ex rel. Miller v. Cain*, 40 Wn.2d 216 at 221, 242 P.2d 505 (1952)], the requirement that there be a lawful establishment of the nonconforming use must logically include that it had been established under due property ownership or permission, *i.e.*, not merely by trespass, criminal or not. Mere silent acquiescence (as asserted) by lack of expression of a demand to vacate is insufficient to accord Mr. Horan a possessory or permission claim which would support a conclusion of legal nonconforming rights. It belies common sense to conclude that a person who operates a land use on property not owned by that person, without permission to operate such use, and without adverse possession, has established a lawfully operated use and a property right which must then be accorded disfavored nonconforming use status.

3. The subject property does not benefit from a nonconforming use right to an auto wrecking yard or an auto storage yard.

4. Absent the possession of a nonconforming right to such uses, such uses may only be operated on the property if they conform to the zoning code applicable upon the improvement of the site in 2005 and commencement (perhaps recommencement, but only if under lawful circumstances) of auto wrecking/auto storage operations.

5. The property is zoned R-4, a residential zone in which auto wrecking and auto storage uses are not permitted.[4] (As the uses in this instance involve operations which are exterior of structures for the vast majority, they cannot qualify as home occupation uses.) Accordingly, they are not lawful uses in the R-4 zone as operated. [KCC 21A.08.060 and 21A.30.080]

6. As the charge of basic zoning violation by operation of a use not permitted in the R-4 classification in the Notice and Order is correct, it is sustained. The appeal is denied in such regard.

7. Given the failure of Appellants to prove a fundamental nonconforming use right to an auto wrecking/auto storage yard on the property, the secondary issues as to whether a nonconforming use was abandoned and/or discontinued, on the other side of the coin, whether it may be intensified from that asserted to have previously existed, are moot and need not be decided here for disposition of the appeal.

8. As the vegetation clearing conducted on the property exceeded 7,000 square feet of land area, it was required to be conducted under a clearing permit (or the clearing component of a clearing and grading permit, as DDES administers the county regulations in such regard). No such permit was obtained. Accordingly, the charge of violation by failure to obtain a permit for the clearing activity conducted on the property is sustained and the appeal denied in such regard.

9. Earthwork conducted on the property consisted of excavation in excess of five feet in depth, fill in excess of three feet in depth and earth movement in excess of 100 cubic yards, by any of such

[3] The forgoing assessment of the lack of hostility in Mr. Horan's utilization of the property is in no way to be construed as adjudicating any claim of adverse possession. Aside from the fact that no such claim has been made, insofar as the record indicates, the Examiner is without authority to adjudicate a claim of adverse possession. That would have to be brought in a court of general jurisdiction, the Superior Court.

[4] There is no disputation of their current impermissibility and impermissibility since prior to the Appellants' purchase of the two properties.

measures the grading conducted on the property was required by the county grading code, Chapter 16.82 KCC, to be done under a grading permit. As noted previously, no specific grading violation is asserted by the Notice and Order, however.

10. The subject clearing and grading was conducted after purchase of the property by the Appellants. As property owners, they are therefore responsible parties for any violations which may accrue from such activity. That holds regardless of the actual operators of equipment and/or engagement of contractors to perform the actual work.

11. The presence of the recently erected eight foot high fence on the property perimeter is not substantially disputed. The fence height in building setback areas the R-4 zone is limited to six feet. The charge of violation of the zoning code is therefore sustained as cited in the Notice and Order. The fact that an eight foot high fence is required under state law for the type of use in question under state licensure and/or other regulations is immaterial to whether or not a county permit and/or variance is required for a fence exceeding six feet in height. There is no state preemption in this regard. A county permit and/or variance is required for the fence.

12. The Appellants request that the Examiner direct the issuance of the required permits, the clearing/grading permit and the fence permit, with an implication that the county would be obligated to issue such permits forthwith. Permit administration is under DDES's administrative authority. In adjudicating the appeal of the Notice and Order, the Examiner only has authority to implement a reasonable, effective and pertinent compliance schedule if the Notice and Order is sustained. The compliance required is for the Appellants to *obtain* permits. Actual issuance of the permits necessary to be *obtained* is a matter left to the permit application, review and approval process established under the administrative offices of DDES. Should there be an impermissible hangup of such permits, presumably there are remedies available to pursue outside of this Notice and Order proceeding.

13. In summary, the charges of violation in the Notice and Order are shown to be correct and are therefore sustained. The use of the subject property as an auto wrecking/auto storage yard is unlawful and must be required to be ceased. The clearing work conducted on the property was required to be conducted under a clearing and grading permit, and no such permit was obtained. Lastly, the fence erected on the property is required to be under the auspices of a permit given its height. The compliance schedule below shall require cessation of the auto wrecking/auto storage yard and the obtainment of the necessary permits. (The Notice and Order compliance schedule is adjusted to reflect the time taken up by the appeal process.)

DECISION:

The appeal is DENIED and the Notice and Order is sustained, provided that the compliance schedule is revised as stated in the following order.

ORDER:

1. Schedule a clearing and grading permit review meeting with DDES *by no later than* **June 26, 2009**, to review any permit revision/supplementation requirements given the requirement that the auto wrecking/auto storage use be ceased on the subject property.

2. Submit any necessary revisions/supplementations to the clearing and grading permit application to DDES *by no later than* **July 26, 2009**. After submittal, all pertinent timeframes and stated deadlines for the submittal of additional information, response comments, supplementary

submittals, etc., if any, shall be diligently observed by the Appellants through to permit issuance and obtainment and final inspection approval.

3. *By no later than* **June 26, 2009**, a complete permit application (including for a variance if necessary) shall be submitted for the over-height fence constructed on the property. After submittal, all pertinent timeframes and stated deadlines for the submittal of additional information, response comments, supplementary submittals, etc., if any, shall be diligently observed by the Appellants through to permit issuance and obtainment and final inspection approval. Alternatively, the fence shall be removed *by no later than* **August 26, 2009**.

4. The auto wrecking/auto storage yard use on the subject property shall cease in the following manner: Commencing immediately, no inoperable, wrecked, junk, salvage, etc., vehicles and parts shall be imported onto the subject property. Once a wrecked vehicle or part is removed from the property, it shall not return to the property. All inoperable, wrecked, junk, salvage, etc., vehicles and parts shall be removed from the subject property *by no later than* **July 26, 2009**.

5. DDES is authorized to grant deadline extensions for any of the above requirements if warranted, in DDES's sole judgment, by circumstances beyond the Appellant's diligent effort and control. DDES is also authorized to grant extensions for seasonal and/or weather reasons (potential for erosion, other environmental damage considerations, etc.).

6. No fines or penalties shall be assessed by DDES against the McMilians and/or the property if the above compliance requirements deadlines are complied with in full (noting the possibility of deadline extension pursuant to the above allowances). However, if the above compliance requirements and deadlines are not complied with in full, DDES may impose penalties as authorized by county code retroactive to the date of this decision.

ORDERED May 26, 2009.

Peter T. Donahue
King County Hearing Examiner

NOTICE OF RIGHT TO APPEAL

Pursuant to Chapter 20.24, King County Code, the King County Council has directed that the Examiner make the final decision on behalf of the County regarding code enforcement appeals. The Examiner's decision shall be final and conclusive unless proceedings for review of the decision are properly commenced in Superior Court within twenty-one (21) days of issuance of the Examiner's decision. (The Land Use Petition Act defines the date on which a land use decision is issued by the Hearing Examiner as three days after a written decision is mailed.)

MINUTES OF THE MAY 13 AND AUGUST 21, 2008, PUBLIC HEARING ON DEPARTMENT OF DEVELOPMENT AND ENVIRONMENTAL SERVICES FILE NO. E05G0103

Peter T. Donahue was the Hearing Examiner in this matter. Participating in the hearing were Cristy Craig and Al Tijerina, representing the Department; Susan Rae Sampson representing the Appellants; and Paul Skolisky, Mark Heintz, Chris Heintz, Robert Manns, Randy Sandin, Timothy Pennington,

Richie Horan, Suzanne Paget, Bruce S. MacVeigh and Leo McMilian.

The following Exhibits were offered and entered into the record on May 13, 2008:

Exhibit No. 1	DDES staff report to the Hearing Examiner for E05G0103
Exhibit No. 2	Copy of the Notice & Order issued September 11, 2007
Exhibit No. 3	Copy of the Notice and Statement of Appeal received October 5, 2007
Exhibit No. 4	Copies of codes cited in the Notice & Order
Exhibit No. 5a	Aerial photo of subject property and surrounding area taken June 23, 1960
Exhibit No. 5b	Aerial photo of subject property and surrounding area taken May 18, 1970
Exhibit No. 5c	Aerial photo of subject property and surrounding area taken 1996
Exhibit No. 5d	Aerial photo of subject property and surrounding area taken 2000
Exhibit No. 5e	Aerial photo of subject property and surrounding area taken 2002
Exhibit No. 5f	Aerial photo of subject property and surrounding area taken 2005
Exhibit No. 5g	Aerial photo of subject property and surrounding area taken 2007
Exhibit No. 5h	Photograph of subject property depicting condition of section of subject property where subject clearing and grading took place
Exhibit No. 5i	Photograph of subject property depicting condition of boundary between adjacent parcel and section of subject property where subject clearing and grading took place
Exhibit No. 5j	Photograph of subject property depicting cars located on section of subject property where subject clearing and grading took place
Exhibit No. 5k	Photograph of subject property depicting cars located on section of subject property where subject clearing and grading took place
Exhibit No. 5l	Photograph of subject property depicting condition of boundary between adjacent parcel and section of subject property where subject clearing and grading took place
Exhibit No. 5m	Photograph of subject property looking north area from area where subject clearing and grading took place, taken by Al Tijerina on June 9, 2005
Exhibit No. 5n	Photograph of subject property looking north area from area where subject clearing and grading took place, taken by Al Tijerina on June 9, 2005
Exhibit No. 5o	Photograph of subject property depicting interior of property post clearing/grading, taken by Al Tijerina on June 9, 2005
Exhibit No. 5p	Photograph of subject property looking southwest from interior, depicting condition of property post clearing/grading, taken by Al Tijerina on June 9, 2005
Exhibit No. 5q	Photograph of subject property, looking south from interior, post clearing/grading, taken by Al Tijerina on June 9, 2005
Exhibit No. 5r	Photograph of subject property depicting fence on south border of subject parcel, taken by Al Tijerina on June 20, 2007
Exhibit No. 5s	Duplicate of 5r
Exhibit No. 5t	Photograph of subject property depicting fence surrounding auto wrecking business, taken by Al Tijerina on June 20, 2007
Exhibit No. 5u	Photograph of subject property depicting storage containers
Exhibit No. 5v	Photograph of subject property depicting vehicles and vehicle parts
Exhibit No. 5w	Photograph of subject property depicting vehicles and vehicle parts
Exhibit No. 5x	Photograph of subject property depicting wall constructed with concrete blocks
Exhibit No. 5y	Photograph of subject property depicting tire heap
Exhibit No. 6	Drawing of subject property post clearing and grading on April 8, 2005, drawn by DDES Site Development Specialist Robert Manns
Exhibit No. 7	*Not submitted*
Exhibit No. 8	King County memo from Bryan Glynn to Jim Buck re: Ritchie A. Horan dated

	March 31, 1983 (entered into the record on August 21, 2008)
Exhibit No. 9	*Not submitted*
Exhibit No. 10	*Not submitted*
Exhibit No. 11	Archived tax records for the parcel 3321049038 (entered into the record on August 21, 2008)
Exhibit No. 12	*Not submitted*
Exhibit No. 13	Case notes dated March 31, 2005 (entered into the record on August 21, 2008)
Exhibit No. 14	Vendor Activity – Summary Report for Astro Auto Wrecking dated February 13, 2008 (entered into the record on August 21, 2008)
Exhibit No. 15	*Not submitted*
Exhibit No. 16	*Not submitted*
Exhibit No. 17a	Affidavit of Helene Mecklenburg, signed November 9, 1978
Exhibit No. 17b	Affidavit of A. Richard Hilton, signed July 15, 2005
Exhibit No. 17c	Affidavit of James W. Hutchens, signed July 18, 2005
Exhibit No. 17d	Affidavit of Harry Horan, signed July 22, 2005
Exhibit No. 17e	Affidavit of Bert M. Willard, signed July 21, 2005
Exhibit No. 18	Declaration of John C. Powers, signed May 12, 2008 (entered into the record on August 21, 2008)
Exhibit No. 19	*Not submitted*
Exhibit No. 20	Letter to Bruce S. MacVeigh, Appellant's engineer, from Randy Sandin of DDES regarding clearing and grading permit application, dated January 26, 2007
Exhibit No. 21	Aerial photograph of subject property taken June 23, 1960

PTD:gao
E05G0103 RPT

APPENDIX E

BEFORE THE KING COUNTY HEARING EXAMINER

In the Matter of the Code Enforcement Appeal of: LEO and SHERRY McMILIAN, Appellants.	DDES File No. E05G0103 McMILIANS' MOTION FOR CONTINUANCE

1. Moving party. The moving parties are the appellants Leo and Sherry McMilian.

2. Relief Requested. McMilians seek a continuance due to the trial conflict of their counsel.

3. Factual Basis for Motion. This matter is set for hearing on April 24, 2008. McMilians' counsel has a case scheduled to commence in King County Superior Court on April 21, 2008. Solely at issue in the conflicting case is the quantum due for violation of a contractual clause that carries liquidated damages for breach, but opposing counsel filed a motion for trial by a jury of 12. The use of a jury makes it unlikely that the case can be completed in three days, in time to start the McMilian hearing on time.

This is appellant's first motion for continuance. They have previously waived earlier hearing due to the scheduling conflicts of counsel. When hearing was set, McMilians' counsel did raise the prospect of a trial conflict, but expected any conflict to resolve. Instead, the parties' mediation on March 24, 2008 was an extraordinary failure (party with adjudicated liability

SUSAN RAE SAMPSON, INC., P.S.
1400 Talbot Road So. o Ste. 400
Renton, Washington 98055-4282
King County (425) 235-4800 Facsimile (425) 235-4838

refused to make any offer). Opposing counsel moved for a continuance, which was denied. She then moved for reconsideration, and reconsideration was denied, so trial on April 21, 2008 appears certain.

McMilian's counsel has requested the cooperation of counsel for the County, and Deputy Prosecuting Attorney Cristy Craig has agreed.

4. Evidence in Support of Motion. This motion is supported by the signature of counsel below, attesting to the truth of the facts stated in paragraph 3; and by a copy of communications with opposing counsel discussing continuance, a true copy of which is attached.

Respectfully submitted this 2 day of April, 2008.

SUSAN RAE SAMPSON, INC., P.S.

Susan Rae Sampson

Susan Rae Sampson, WSBA #5732
Attorney for Leo and Sherry McMilian

CERTIFICATE OF DELIVERY

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT ON THE 2nd DAY OF APRIL, 2008, I CAUSED THIS DOCUMENT TO BE DELIVERED TO:

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

Peter T. Donahue, Hearing Examiner
King County Office of the Hearing Examiner
400 Yesler Way, Room 404
Seattle, WA 98104
hearingexaminer@kingcounty.gov

DATED AT RENTON, WA, THIS 2nd DAY OF APRIL, 2008.

Meredith M. Klein

MEREDITH M. KLEIN, Legal Assistant
SUSAN RAE SAMPSON, INC., P.S.

SUSAN RAE SAMPSON, INC., P.S.
1400 Talbot Road So. o Ste. 400
Renton, Washington 98055-4282
King County (425) 235-4800 Facsimile (425) 235-4838

Sue Sampson

From: Sue Sampson [ssampson@suesampson.net]
Sent: Monday, March 31, 2008 4:37 PM
To: 'Craig, Cristy'
Subject: RE: McMilian Schedule

Thank you. I am available the week of May 12 except May 14 afternoon medical appointment;all week of May 19, and all week of May 26. SueS

From: Craig, Cristy [mailto:Cristy.Craig@kingcounty.gov]
Sent: Monday, March 31, 2008 4:31 PM
To: Sue Sampson
Cc: Andrus, Deidre; Tijerina, Al
Subject: RE: McMilian Schedule

Good afternoon, Sue. On the basis of your trial conflict I cannot object. I think there is even a court rule somewhere that Superior Court cases take precedence over lower court matters. Do you have a proposal for a new date? I can agree to early to mid May.

Cristy

From: Sue Sampson [mailto:ssampson@suesampson.net]
Sent: Monday, March 31, 2008 4:25 PM
To: Craig, Cristy
Subject: McMilian Schedule

Cristy: On Friday I received notice that my superior court case that I expected to settle will be starting on time on April 21, so I am going to need a continuance of the McMilian hearing due to start on the 24th. (If I remember correctly, I did mention this possible conflict when we set our hearing date. I fully expected the case to have been settled by now; instead, mediation failed spectacularly last Monday, and the trial court refused opposing counsel's motion for continuance, and rejected her motion for reconsideration, rather vociferously with an angry-sounding hand-written order. Although the sole issue is the quantum of liquidated damages the bad guy owes my client for breach of the confidentiality clause of an employment contract, he has demanded a 12-person jury trial, so I am afraid we will not be done by the 24th. The case is Elias Bou Abboud v. Cerep, King Co, if you would like to check. The hearing examiner's rules require me to solicit your agreement. Can you agree? My other posing conflict is a 10-day-long vacation starting April 30. Thanks for your consideration. SueS

3/31/2008

APPENDIX F

20.24.010 Chapter purpose. The purpose of this chapter is to provide a system of considering and applying regulatory devices which will best satisfy the following basic needs:

A. The need to separate the application of regulatory controls to the land from planning;

B. The need to better protect and promote the interests of the public and private elements of the community;

C. The need to expand the principles of fairness and due process in public hearings. (Ord. 263 Art. 5 § 1, 1969).

20.24.020 Office created. The office of hearing examiner is created. The examiner shall act on behalf of the council in considering and applying adopted county policies and regulations as provided herein. (Ord. 11502 § 1, 1994: Ord. 263 Art. 5 § 2, 1969).

20.24.030 Appointment and terms. The council shall appoint the examiner to serve in said office for a term of four years. (Ord. 4481 § 1, 1979: Ord. 263 Art. 5 § 3, 1969).

20.24.040 Removal. The examiner or his or her deputy may be removed from office at any time by the affirmative vote of not less than eight members of the council for just cause. (Ord. 12196 § 21, 1996: Ord. 263 Art. 5 § 4, 1969).

20.24.050 Qualifications. The examiner and his or her deputy shall be appointed solely with regard to their qualifications for the duties of their office and shall have such training or experience as will qualify them to conduct administrative or quasi-judicial hearings on regulatory enactments and to discharge the other functions conferred upon them, and shall hold no other appointive or elective public office or position in the county government except as provided herein. (Ord. 12196 § 22, 1996: Ord. 263 Art. 5 § 5, 1969).

20.24.060 Deputy examiner duties. The deputy shall assist the examiner in the performance of the duties conferred upon the examiner by ordinance and shall, in the event of the absence or the inability of the examiner to act, have all the duties and powers of the examiner. The deputy may also serve in other capacities as an employee of the council. (Ord. 12196 § 23, 1996: Ord. 263 Art. 5 § 6, 1969).

20.24.065 Pro tem examiners. The chief examiner may hire qualified persons to serve as examiner pro tempore, as needed, to expeditiously hear pending applications and appeals. (Ord. 11502 § 16, 1994).

20.24.070 Recommendations to the council.

A. The examiner shall receive and examine available information, conduct open record public hearings and prepare records and reports thereof and issue recommendations, including findings and conclusions to the council based on the issues and evidence in the record in the following cases:

1. All Type 4 land use decisions;
2. Applications for agricultural land variances;
3. Applications for public benefit rating system assessed valuation on open space land and current use assessment on timber lands except as provided in K.C.C. 20.36.090;
4. Appeals from denials by the county assessor of applications for current use assessments on farm and agricultural lands;
5. Applications for the vacation of county roads;
6. Appeals of a recommendation by the department of transportation to deny the petition for vacation of a county road;

21.04.619 Nonconforming use. "Nonconforming use" means a use which was lawfully established and maintained but which, because of the application of this title, no longer conforms to the use regulations of the zone in which it is located as defined by this title. (Res. 25789 § 283, 1963).

21.04.620 Normal rainfall. "Normal rainfall" means that rainfall that is at or near the mean of the accumulated annual rainfall record, based upon the water year for King County as recorded at the Seattle-Tacoma International Airport. (Ord. 9614 § 53, 1990).

21.04.621 Noxious weed. "Noxious Weed" means any plant which when established is highly destructive, competitive, or difficult to control by cultural or chemical practices (see Chapter 17.10 RCW). The state noxious weed list in Chapter 16-750 WAC is the officially adopted list of noxious weeds by the state noxious weed control board. (Ord. 9614 § 54, 1990).

21.04.622 Off-premise directional sign. "Off-premise directional sign" means a sign not exceeding twelve square feet in area used to direct pedestrian or vehicular traffic to a facility, service or business located on other premises within one quarter (1/4) mile of the sign. (Ord. 8529 § 10, 1988).

21.04.623 On premise sign. "On premise sign" means a sign which carries advertisement incidental to a lawful use of the premises on which it is located, including signs indicating the business transacted at, services rendered, goods sold or produced on the premises, or name of the person, firm or corporation occupying the premises. (Ord. 8529 § 9, 1988).

21.04.625 Open space, required. "Required open space" means a portion of the area of a lot or building site, other than required yards, which area is required by this title, as set forth in the different classifications contained herein, to be maintained between buildings, between wings of a building as common area to be available for use by the persons specified in a planned unit development or multiple-lot subdivision, and between buildings and any portion of a property boundary line not contiguous to a required front or side yard. Open spaces are required to be free and clear of buildings and structures and to remain open and unobstructed from the ground to the sky, except for specific permitted uses and structures. (Ord. 6643 § 1, 1984: Res. 33880 (part), 1967: Res. 25789 § 284, 1963).

21.04.630 Ordinance. "Ordinance" means a legislative enactment by the council. (Ord. 1161 § 8, 1972).

21.04.632 Ordinary high water mark. "Ordinary high water mark" means the mark that will be found by examining the bed and banks of a stream and ascertaining where the presence and action of waters are so common and usual, and so long maintained in all ordinary years, as to mark upon the soil a vegetative character distinct from that of the abutting upland. In any area where the ordinary high water mark cannot be found, the line of mean high water shall substitute. In any area where neither can be found, the top of the channel bank shall be substituted. In braided channels and alluvial fans, the ordinary high water mark or substitute shall be measured so as to include the entire stream feature. (Ord. 9614 § 55, 1990).

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

LEO MCMILIAN,	)	
	)	
Appellant,	)	No. 70515-6-I
v.	)	
	)	
	)	CERTIFICATE OF
KING COUNTY,	)	SERVICE
Respondent.	)	
	)	
	)	

I, Diana Cherberg, hereby certify and declare under penalty of perjury under the laws of the state of Washington as follows:

1. I am a legal secretary employed by King County Prosecutor's Office, am over the age of 18, am not a party to this action and am competent to testify herein.
2. On December 20, 2013, I did cause to be delivered in the manner noted below a true copy of *King County's Response to Appellant's Opening Brief,* and this Certificate of Service to:

ORIGINAL

Jean Jorgensen
Singleton & Jorgensen, Inc., P.S.
337 Park Avenue North
Renton, WA 98057-5716
Email: jean@singletonjorgensen.com
[Sent via U.S. Postal Mail & Electronic Mail]

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

DATED this 20th day of December, 2013.

DANIEL T. SATTERBERG
King County Prosecuting Attorney

By: Diana Cherberg
Diana Cherberg, Legal Assistant to
CRISTY CRAIG WSBA #27451
Senior Deputy Prosecuting Attorney
Attorneys for King County