January 31, 2019

OFFICE OF THE HEARING EXAMINER
KING COUNTY, WASHINGTON

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REPORT AND DECISION

SUBJECT: Department of Local Services, Permitting Division file no. **PREA180115**

LEO MCMILIAN & ASTRO AUTO WRECKING
Preliminary Determination Appeal

Location: 37307 Enchanted Parkway S, Federal Way

Appellant: Leo McMilian
represented by **Jean Jorgensen**
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King County: Department of Local Services, Permitting Division
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SUMMARY OF RECOMMENDATIONS/DECISION:

Department's Preliminary Recommendation: Deny appeal
Department's Final Recommendation: Deny appeal, but amend determination of square footage
Examiner's Decision: Deny appeal in part, grant appeal in part

EXAMINER PROCEEDINGS:

Hearing Opened: January 17, 2019
Hearing Closed: January 17, 2019

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 Hearing Examiner's Office.

After hearing the witnesses' testimony and observing their demeanor, studying the exhibits admitted into evidence, and considering the parties' arguments and the relevant law, the examiner hereby makes the following findings, conclusions, and decision.

FINDINGS:

Procedural Posture:

1. Leo McMilian owns and operates Astro Auto Wrecking, LLC at 37300 Enchanted Parkway S. (Assessor's parcel no. 332104-9005)(Property) in an R-4 zone in unincorporated King County. Appellant's Brief Regarding Burden of Proof (Appellant's Brief) at 1:23–24; Appellants' Notice and Statement of Appeal (Appeal) at 1; Ex. D-1; testimony of L. McMilian.

2. The auto wrecking yard use was established as a legal nonconforming use on this parcel in 1958. April 1, 2016 Report and Decision of the Hearing Examiner in Department of Permitting and Environmental Review File no. E0800728 (April 1, 2016 Examiner Decision), at 2, Finding 4; *McMilian v. King County*, 161 Wn. App. 581, 585, 255 P.3d 739 (2011)(*McMilian*).

3. In 1998, the Metropolitan King County Council adopted Ordinance 13130 which, in pertinent part, adopted regulations allowing expansions of nonconforming uses, structures, or site improvements. These regulations, codified at KCC 21A.32.065, authorize what is now the Department of Local Services, Permitting Division (Department) to approve an expansion of up to 10% of building square footage, impervious surface, parking, or building height pursuant to the County's code compliance process in KCC 21A.42.030. Expansions of more than 10% require a conditional use permit (CUP).

4. Of particular relevance to the matter on appeal before this Hearing Examiner are the above-referenced April 1, 2016 Examiner Decision by Hearing Examiner *pro tem* Smith and Judge Farris' March 3, 2017 Memorandum Decision and April 4, 2017 Order Granting in Part and Denying in Part Petitioners' Appeal in Snohomish County Superior Court Case No. 16-2-03408-8.[1] The relevant effects of these decisions as they relate to the matter before the Examiner were the findings that building permits were required for construction of accessory structures, including an addition to the primary building and construction of an adjacent outbuilding, and that the nonconforming use has been expanded substantially more than 10% after 1998.

5. The April 1, 2016 Examiner Decision held that building permits and related approvals are required for the accessory structures and, given the vast on-site increases over 1958 levels in both building square footage and in areas of impervious surface, a CUP must be

[1] The Hearing Examiner's Decision and Judge Farris' Memorandum Decision and Order are attached to the Department's Brief Regarding Burdens of Proof and Nonconforming Uses (Department's Brief) as Appendices A and B, respectively.

obtained for the unauthorized expansion of the nonconforming use. April 1, 2016 Examiner Decision at 10, Conclusions 8 and 9. Leo McMilian, Sherry McMilian, and Astro Auto Wrecking, LLC appealed the April 1, 2016 Examiner Decision to Snohomish County Superior Court.

6. In her March 3, 2017 Memorandum Decision, Judge Farris affirmed that increases in building square footage on the subject property exceeded the limitation set forth in KCC 21A.32.065.A.1.a, but held that this code provision could be applied prospectively only, i.e., from the time the ordinance was adopted in 1998, not the date the nonconforming use was established. Importantly, Judge Farris held that:

> While the exact increase is not known, substantial evidence supports finding it was greater than ten percent after 1998.
>
> [Measuring the expansion from the time the nonconforming use came into existence] was an erroneous interpretation of the law, but it has no effect on the ultimate outcome because … in the denial of the appeal as to the more than ten percent increase in building square footage the findings would be the same whether the increase is measured from the time the nonconforming use began or from the time the Code provision was adopted. Measuring from either time, there is substantial evidence to support a finding that there was more than a 10% increase.

Memorandum Decision at 6, 8 (emphasis added).

Citing *Rhod-a-Zalea & 35th,Inc. v. Snohomish County*, 136 Wn. 2d 1, 959 P.2d 1024 (1998), Judge Farris also held that:

> …[T]he Hearing Examiner was correct that the wrecking yard can be subject to current and future health, safety, and welfare regulations despite it being a valid nonconforming use.

Memorandum Decision at 8.

7. Judge Farris's February 9, 2018 Order of Clarification on Remand, Staying Enforcement and Staying Consolidated LUPA Appeals in Snohomish County Superior Court Case No. 16-2-03408-8 consolidated with Case No. 17-2-10044-31 (Order of Clarification)[2] directed Appellants to ask the Department to identify the permissible amount of additional building square footage on the site that would not trigger a CUP and to meet with the Department. It ordered the Department to consider any additional material presented by Appellants within 30 days of the meeting. Importantly, Judge Farris expressly found that:

> This court has made no ruling and makes no ruling regarding the application of the King County Code to individual structures on the subject property, or the permissible amount of building square footage of such structures. Those determinations are not currently before the Court,

[2] The Order of Clarification is attached to the Department's Brief as Appendix C.

> and have never been before this reviewing court. Order of Clarification at 1:23–2:2.

The Department's Determination of Building Square Footage

8. On February 9, 2018, Appellants applied for a pre-application meeting to obtain the Department's determination of the amount of building square footage on the Property in 1998. Ex. D-1. The parties met on May 1, 2018. Ex. D-1. The Department made a preliminary determination that the site contained 3,600 square feet of buildings in 1998. It used aerial photographs because no permit applications have been submitted for building expansions or site modifications. It calibrated the scale of the images so that measurements could be made. Ex. D-1; Testimony of K. LeClair. Appellants timely submitted a sequence of aerial photographs of the Property, based on which the Department revised its determination upwards. On August 1, 2018, the Department issued its determination that 4,800 square feet of structural coverage existed on the Property in 1998. Ex. D-1; Department's Brief, Appendix D.

9. The determination recognized the long-existing primary structure shown to exist in the 1958 range and additions to that structure made by 1997–1999[3], despite the lack of any record of a permit for the structure and additions, essentially giving Appellants the benefit of the doubt that the structure as it existed in 1997–1999 had been legally established. Testimony of K. LeClair; Ex. D-1.

10. Leo McMilian and Astro Auto Wrecking, LLC (Appellants) timely appealed, contending that King County failed to account for all of the structures on the Property in 1998 and that the Department bears the burden of proving that its determination is accurate. Appeal.

Burden of Proof

11. The Examiner requested briefing on the burden of proof. The Department contends that Appellants have the burden to prove the existence of any nonconforming structures. Department's Brief. Appellants contend that the Department's determination of building square footage:

> Essentially… brings us back to square one. King County has commenced a code enforcement proceeding that alleges the building square footage of structures on the parcel at issue has expanded more than ten percent from 1998, which violates the applicable code. Thus, King County bears the burden of proof.

12. Appellants' argument ignores the effect of Judge Farris' Memorandum Decision, which held that, whether measured from 1958 or 1998, there is substantial evidence to support a finding that there was more than a 10% increase in building square footage. Thus, the

[3] The best available aerial photographs are from 1997 and 1999. *See,* Ex. D-1, Figures 2 and 3. There are no legible aerial photographs available for 1998. The only 1998 aerial photograph in the record before the Examiner is contained in A-6 and is so blurry that it provides no useful information Thus, the Department averaged the square footage from the 1997 and 1999 aerial photographs. Testimony of K. LeClair; Ex. D-1.

question of whether there was a code violation has been resolved and is not before the Examiner. The question before the Examiner is the amount of building square footage that existed in 1998, a number which has not been established previously and which is needed to resolve the code violation found.

13. The County has issued no building permits for Parcel 332104-9005 since 1974. April 1, 2016 Examiner Decision at 4, Finding 12 and at 8, Conclusion 1. In that proceeding, Mr. McMilian admitted that the large outbuilding located directly west of the primary building (Building C discussed below) was constructed without permits. April 1, 2016 Decision at 8, Conclusion 1.

Site Development

14. Appellants commissioned a survey of the structures on site, which was completed on December 20, 2018. Ex. A-1; testimony of K. Anderson. It refers to the primary structure as Building A, a well house/employee break room as Building B, and a covered work area constructed to the west of Building A and attached to Building A as Building C. The square footages of these structures are 5,704, 206, and 4,169 square feet, respectively.

15. Building C and portions of Building A are not evident in the 1997–1999 aerial photographs.

16. Appellants' counsel circled an area on Figure 2 of Ex. D-1. The circled figure is contained in Ex. A-14. Mr. McMilian confirmed that the area his counsel circled is the location of Building B. Ex. 12 is an undated photograph of Building B. Testimony of L. McMilian. With the clarification provided by Mr. McMilian's testimony, Building B is evident in the 1997–1999 aerial photographs.

17. When Mr. McMilian purchased the Property in 2002, it contained a number of Attco trailers used for parts storage. Mr. McMilian constructed Building C in 2008 to replace some of the Attco trailers when their roofs began to rot. Testimony of L. McMilian.

18. Appellants contend that the Attco trailers and other storage containers used for parts storage constitute structures that should be included in the 1998 baseline building square footage. Appellants did not present this argument in the pre-application meeting with the Department. Testimony of K. LeClair. It appears that they raised their contention that the storage containers are structures for the first time at the hearing in this matter.

19. Appellants rely, in part, on the Department's answer to an interrogatory in Enforcement Case no. E05G0103/E0800728, in which the Department stated that "Every structure currently on the subject parcel requires a [building] permit, including the storage containers." Exhibit A-13 at 19:11–16. In her closing argument, Appellants' counsel also cited KCC 21A.06.1255 (which defines structures, in pertinent part, as anything permanently constructed in or on the ground) and KCC 21A.06.125 (which defines building as any structure having a roof).

20. The Department concurred that, if the Attco trailers and storage containers are permanently affixed to the Property, they are considered structures. Testimony of K. LeClair.

21. Appellants presented no evidence that any particular number of Attco trailers and/or storage containers had been continuously maintained on the Property or that it obtained any building permits for them.

22. At the conclusion of the hearing in this matter, the Department revised its determination of the square footage existing in 1998 from 4,800 square feet to 5,006 square feet to account for Building B.

23. Any Finding which should more properly be considered a Conclusion is hereby adopted as a Conclusion.

CONCLUSION:

1. Any Conclusion which should more properly be considered a Finding is hereby adopted as a Finding.

2. KCC 21A.06.800 defines nonconformance as:

> A use, improvement or structure established in conformance with King County's rules and regulations and other applicable local and state rules and regulations in effect at the time the use, improvement or structure was established that no longer conforms to King County's rules and regulations or other applicable local and state rules and regulations due to changes in the rules and regulations or their application to the subject property.

This definition is consistent with Washington case law which holds that a nonconforming use is a use that "lawfully existed" prior to a change in regulation. *Rhod-A-Zalea & 35th, Inc. v. Snohomish County*, 136 Wn. 2d 1, 6, 959 P.2d 1024 (1998)(*Rhod-A-Zalea).*

3. The nonconforming use doctrine is intended to protect only those uses that were legally established before a change in regulation. *King County Department of Development & Envtl. Servs. v. King County*, 177 Wn. 2d 636, 643, 305 P.3d 240 (2013)(*King County*).

4. The landowner has the burden to prove that: (1) the use existed prior to the [contrary] zoning ordinance; (2) the use was lawful at the time; and (3) the landowner did not abandon or discontinue the use for over a year prior to the relevant change. *McMilian*, *supra,* cited by *King County*, 177 Wn. 2d at 636.

5. When a landowner utilizes unlawful methods to establish a nonconforming use, such as not obtaining required permits, that unlawfulness precludes a subsequent finding of a lawful nonconforming use. *King County,* 177 Wn. 2d at 647–648 (failure to obtain a grading permit); *First Pioneer Trading Co. v Pierce County,* 146 Wn. App. 606, 191 P.3d 928 (2008) (failure to obtain building permits and site development review).

6. Appellants cite *McMilian* and *Van Zant v. City of Everett*, 69 Wn. App. 641, 849 P.2d 1276 (1993) for the proposition that the Department bears the burden of proof. Both cases hold that the initial burden of proving the existence of a nonconforming use is on the landowner making the assertion; however, once the nonconforming use is established, the burden shifts to the party claiming abandonment or discontinuance of the nonconforming use to prove abandonment or discontinuance. In this matter, Appellants have not previously demonstrated that the structures are legal, nonconforming structures. Thus, the burden does not shift to the Department.

7. In addition, Rule XV.E.1 of the Hearing Examiner's Rules of Procedure and Mediation provides that the moving party bears the burden of proof before the Examiner unless another rule specifies otherwise. Here, caselaw, including *McMilian* and *Van Zant* hold that, had the landowner borne its initial burden of proving that the structures in question are legal, nonconforming structures, and the County sought to discontinue or reduce the size of the structures, the burden would be on the County. However, that is not the case. As concluded above, Appellants have not previously demonstrated that the structures are legal, nonconforming structures.

8. Thus, it is Appellants' initial burden to demonstrate the square footage of structures that legally existed in 1998. Appellants have not borne that burden.

Requirement for Building Permits

9. In her closing argument, counsel for Appellants argued that Appellants could have added an unlimited number of buildings to the Property prior to 1998, and that no building permits were required. *Rhod-a-Zalea* is directly on point and holds to the contrary. The Supreme Court stated:

> The issue before this court is whether Rhod-A-Zalea's nonconforming peat mining operation is subject to police power regulations subsequently enacted for the health, safety and welfare of the community. Specifically, we are asked to determine whether Rhod-A-Zalea must obtain a grading permit as required by SCC 17.04.280.
>
> Rhod-A-Zalea argues that it is not subject to the grading permit requirement because their peat mining facility has been in operation since 1961 and the grading permit regulation was enacted in 1985. Rhod-A-Zalea's argument is not supported by established land use jurisprudence and is contrary to Washington's desired policy of phasing out nonconforming uses. Moreover, it is counterintuitive to conclude that nonconforming uses which are contrary to public interests, such as health, safety and welfare, would then be exempt from subsequently enacted public health and safety regulations.
>
> ….
>
> To accept Rhod-A-Zalea's arguments and find that this later enacted regulation does not apply to their peat operation because it is a nonconforming use would have serious repercussions for all local

> governments attempting to regulate property. Rhod-A-Zalea does not adequately speak to this concern. From their position it follows that a nonconforming restaurant would not be subject to later-enacted health codes or business license provisions; a nonconforming factory would be exempt from later-enacted noise or pollution regulations; a nonconforming animal kennel would be exempt from later-enacted licensing or health requirements; and a nonconforming adult entertainment facility would be exempt from later-enacted licensing or public health regulations. Such a result would not be in the public interest and is contrary to law. Also, to allow nonconforming uses to continue exempt from all subsequently enacted health and safety regulations would be devastating to the community's land use planning. *Rhod-a-Zalea*, 136 Wn.2d at 5, 23-24.

10. Thus, if the Attco trailers and storage containers are considered structures, Appellants have not borne their initial burden of demonstrating they were legally placed on the site. They cannot be considered as part of the 1998 baseline building square footage.

11. The Examiner also observes that Appellants are essentially attempting to re-litigate the question of whether an impermissible increase of more than 10% in building square footage has occurred since 1998.[4] That issue was decided by Judge Farris and is not before the Hearing Examiner in this matter.

12. The square footage of structures in 1998 was 5,006 square feet. Thus, an additional 501 square feet (5,006 x 10% = 500.6, rounded up to 501) can be authorized pursuant to KCC 21A.32.065.A.1.a without triggering the need for a CUP. If the aggregate building square footage exceeds 5,507 square feet, a CUP is required.

DECISION:

1. The pre-application appeal (PREA18-0115) of Leo McMilian and Astro Auto Wrecking, LLC is GRANTED in part and DENIED in part. The appeal is granted with respect to Building B. The 1998 building square footage is revised from the 4,800 square feet contained in the Department's determination to 5,007 square feet.

2. **Within 45 days** of this decision, Appellants shall either:

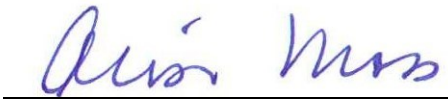
   A. Submit a building permit application to reduce the overall structural coverage on the Property to no more than 5,507 square feet. OR

   B. File a pre-application meeting request for a Conditional Use Permit (CUP) and subsequently diligently pursue and obtain a CUP and a building permit. A CUP is a Type 2 land use decision that requires the applicant to begin by filing a pre-

[4] Appellants' counsel argued that there were approximately 35 Attco trailers present in 1998. Using 560 square feet/trailer, she calculated that the trailers alone constituted buildings containing 19,600 square feet. As the survey, Ex. A-1, and Mr. Anderson's estimate of the square footage in storage containers, Ex. A-15, show that Buildings A-C together with the existing storage containers total 13,216 square feet, counsel contended that there has been a reduction in building square footage since 1998.

application meeting request before proceeding with the formal CUP application.

ORDERED January 31, 2019.



Alison Moss
Hearing Examiner pro tem

NOTICE OF RIGHT TO APPEAL

King County Code 20.22.040 directs the Examiner to make the County's final decision for this type of case. This decision shall be final and conclusive unless proceedings for review of the decision are timely and properly commenced in superior court. Appeals are governed by the Land Use Petition Act, Chapter 36.70C RCW.

MINUTES OF THE JANUARY 17, 2019, HEARING IN THE APPEAL OF LEO MCMILIAN & ASTRO AUTO WRECKING, DEPARTMENT OF PERMITTING AND ENVIRONMENTAL REVIEW FILE NO. PREA180115

Alison Moss was the Hearing Examiner in this matter. Participating in the hearing were Cristy Craig, Kevin LeClair, Jean Jorgenson, Leo McMilian, and Kenneth Anderson.

The following exhibits were offered and entered into the record:

Department-Offered Exhibits

Exhibit no. D1	Department of Permitting and Environmental Review staff report to the Hearing Examiner

Appellant-Offered Exhibits

Exhibit no. A1	Existing building as-built area survey, dated December 20, 2018
Exhibit no. A2	Aerial photograph of property, dated July 27, 1980
Exhibit no. A3	Aerial photograph of property, dated September 22, 1995
Exhibit no. A4	Aerial photograph of property, dated June 20, 1996
Exhibit no. A5	Aerial photograph of property, dated September 9, 1997
Exhibit no. A6	Aerial photograph of property, dated 1998
Exhibit no. A7	Aerial photograph of property, dated August 23, 1999**
Exhibit no. A8	Aerial photographs of property, dated April 19, 2015
Exhibit no. A9	iMap aerial photographs of property
Exhibit no. A10	*Not admitted: Letter from Department of Natural Resources to Leo McMilian with inspection water quality inspection results, dated October 12, 2000*
Exhibit no. A11	Photographs of property, dated April 21, 1994
Exhibit no. A12	Photograph of property
Exhibit no. A13	Appellant first interrogatories and request for production to respondent, dated February 5, 2016

Exhibit no. A14 Figure 2 of department staff with Appellant mark up
Exhibit no. A15 Photograph of trailers and worksheet of trailer dimensions

AM/ld

January 31, 2019

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CERTIFICATE OF SERVICE

SUBJECT: Department of Local Services, Permitting Division file no. **PREA180115**

LEO MCMILIAN & ASTRO AUTO WRECKING
Preliminary Determination Appeal

I, Liz Dop, certify under penalty of perjury under the laws of the State of Washington that I transmitted the **REPORT AND DECISION** to those listed on the attached page as follows:

☒ EMAILED to all County staff listed as parties/interested persons and parties with e-mail addresses on record.

☒ placed with the United States Postal Service, with sufficient postage, as FIRST CLASS MAIL in an envelope addressed to the non-County employee parties/interested persons to addresses on record.

☒ placed via County INTEROFFICE MAIL to County staff to addresses on record.

DATED January 31, 2019.

Liz Dop
Legislative Secretary

Anderson, Kenneth
Kenneth R. Anderson & Associates, INC, PS
Hardcopy

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