June 28, 2012

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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**
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Appellant: **Sherry McMilian**
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King County: Department of Development and Environmental Services (DDES)
represented by **Cristy Craig**
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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. <u>Procedural History</u>

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. <u>Evidence Specific to the 1958 Timeframe</u>

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**.

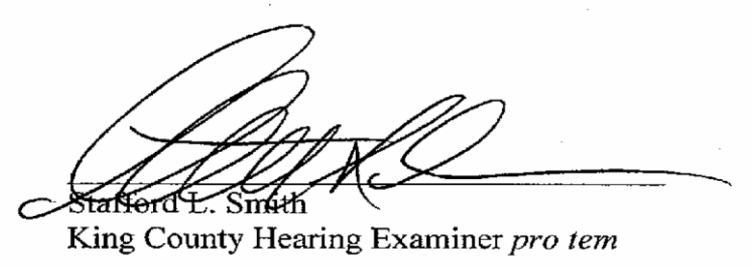
2. Within condition no. 2, the revision and supplementation deadline is revised to **August 27, 2012**.

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