LAND USE HEARING EXAMINER

Lee Raaen
Hearing Examiner

CITY OF KENT

In the Matter of the Application of	)	No. CE-2014-2
	)	KIVA#RPP3-2140177
Patrick Roth, on behalf of	)	
Ro-Con Equipment Specialist, Inc.	)	
	)	
	)	FINDINGS, CONCLUSIONS,
For Approval of a Conditional Use Permit	)	AND DECISION

SUMMARY OF DECISION

The request for a conditional use permit to continue operation of construction/excavation/utility contracting and associated truck and heavy equipment repair at 15326 SE 272nd Street is **DENIED**.

SUMMARY OF RECORD

Hearing Date:
The Hearing Examiner held an open record hearing on the request on September 17, 2014.

Testimony:
The following individuals presented testimony under oath at the open record hearing:

Erin George, City Senior Planner
Robert Thorpe, Applicant Representative
Daryl Dahlquist
Elaine Collins
William Baker
Ronald Frederick Arth
Stacy Van Tassel
Jennifer England
John Millard

Assistant City Attorney David A. Galazin appeared for the City.

Exhibits:
The following exhibits were admitted into the record:
1. Staff Report, dated September 10, 2014
2. Distribution of Staff Report & Agenda, dated September 10, 2014

3. Notice of Public Hearing; with affidavit of posting, publication, and mailing, dated September 9, 2014; distribution list, with Declaration of Service, dated September 5, 2014; and Declaration of Service of mailing to '119' Soos Creek Mobile Home Park Residents, dated September 5, 2014, with distribution list
4. Notice of Public Hearing Ad for publication September 5, 2014, with email receipt confirmation from *Kent Reporter*, dated September 2, 2014
5. Notice of Application, with Affidavit of Posting, dated July 18, 2014; Distribution of Notice of Application, with Declaration of Delivery via mail or email, dated July 18, 2014
6. Notice of Application Ad, dated July 11, 2014, for publication July 18, 2014; with email receipt confirmation from *Kent Reporter*, dated July 11, 2014
7. Conditional Use Permit Application, Legal Description, and Code Data, received January 21, 2014
8. Applicant photos (4), undated
9. Applicant's project description and criteria responses, received June 24, 2014
10. Site Plan (Sheet SP 1.0), dated January 15, 2014; and Landscape Plan (Sheet L 1.0), dated January 7, 2014
11. Letter from Erin George to Robert Thorpe, dated March 10, 2014
12. Letter from Erin George to Robert Thorpe, Correction Letter #2, dated June 16, 2014
13. Public Comments
    a. Anonymous comment letter, received July 30, 2014
    b. Form Letter from Angela Smith, dated July 30, 2014
    c. Letter from William Lee Baker, dated July 23, 2014, with daily log of Ro-Con's Noise Curfew Offence's, and three Google Earth photos
    d. Form Letter from Rocky Marler, dated July 29, 2014
    e. Email from Rex Craig, dated August 1, 2014
    f. Email from Elaine Collins to Erin George, dated August 1, 2014, with two photos
    g. Form Letter from Francisco Ortega, dated August 1, 2014
    h. Form Letter from Elaine Collins, dated August 1, 2014
    i. Form Letter from Bernard J. Brandau, dated August 1, 2014
    j. Form Letter from Deloris J. Hougardy, dated August 1, 2014
    k. Anonymous comment letter, dated August 22, 2014, with attached letter to Mayor Cooke, dated March 11, 2009
    l. Anonymous Form Letter
    m. Email from Barbara Lorenzen, dated September 16, 2014
    n. Email from Don Lorenzen, dated September 16, 2014, with email string
    o. Email from Don Lorenzen, dated September 11, 2014
    p. Letter from Jennifer England, undated
    q. Email from Margo Lechner, dated September 12, 2014
    r. Email from Linda Burley, dated September 15, 2014
    s. Letter from Daryl Dahlquist, received September 12, 2014

t. Email from Jackie Lynn, dated September 12, 2014, with email string
u. Soos Creek Mobile Home Park form comment, dated August 15, 2014

14. Equipment photo, dated May 13, 2014
15. Letter from Robert W. Thorpe to Erin George, undated
16. Title Report (0014143-06), printed April 23, 2014
17. Declaration of Byron Gusa, dated "3rd day of 2013"
18. King County request for Grading Permit (#3014-57) SEPA review, dated August 9, 1988; King County Agreement for Grading Permit, undated; King County DNS, dated August 18, 1988; King County Grading Permit (#3014-716) Renewal Notice, dated August 14, 1992; King County denial of Grading Permit #3014-716 renewal, dated November 10, 1992; King County Grading Permit form, signed March 9, 1992; and Certificate of Insurance, issued September 29, 1992
19. King County Notice of Violation, dated November 30, 1992; Notice of Satisfaction, dated April 29, 1994; and Notification of Financial Guarantee Release, dated May 9, 1994
20. Historical King County Assessor Records, 14 pgs
21. Four Historical Aerial Photos submitted by Applicant, dated September 13, 1977; July 17, 1990; July 2, 1991; and June 23, 2014
22. King County Staff Notes (Grading File #3014-57) from Unknown Individual, December 1990 through December 1992
23. Aerial site photos (five), dated 2005, March 2006, September 2007, March 2009, and May 2013
24. Two site photos, dated May 13, 2014
25. Three outdoor storage photos, dated September 12, 2013; Five photos, dated May 13, 2014
26. Roth Grade & Fill Mitigated Determination of Nonsignificance, dated June 18, 2008; City Environmental Report, dated June 18, 2008; Environmental Checklist, dated December 28, 2006
27. Hearing Examiner Notice of Violation Agreed Order, dated November 15, 2006
28. Notice of Violation, Case No 05-0005721, dated September 28, 2006
29. Ordinance No. 3442 – Rezone from MHP to CC, beginning July 1, 1998
30. King County Assessor Parcel Data, undated
31. City Inspection History Report (File #656-007), dated February 18, 2014; Department of Ecology-Env Report Tracking System, ERTS #633393, entry dates April 19, 2012, April 23, 2012, and May 10, 2012; and #646812, entry date February 13, 2014
32. Kent Municipal Court Documents, No. K97908, Order on Judgment, Sentence and Probation; *City v. Roth*, No. K97908, Complaints 1, 2, and 3, Filed September 27, 2013; Kent Policy Department #13-11988 case records
33. Robert W. Thorpe, AICP, CV
34. Landscape Plan (Sheet L 1.0), dated January 7, 2014; Conditions (Sheet 1.0), dated January 15, 2014; Site Photos, dated September 16, 2014
35. Google Earth photo and four photos provided by City, undated

36. Application for Comprehensive Plan Amendment, received September 1, 1998

The Hearing Examiner enters the following Findings and Conclusions based upon the testimony and exhibits admitted at the open record hearing:

FINDINGS

1. Patrick Roth, on behalf of Ro-Con Equipment Specialist, Inc.[1] (Ro-Con) (Applicant), requests a Conditional Use Permit (CUP) on property located at 15326 SE 272nd Street (SE Kent-Kangley Road).[2] The CUP application lists the proposed use as "Heavy Equipment (Storage/Maintenance)."[3] On March 10, 2014, City Senior Planner Erin George wrote to Robert Thorpe, Applicant Representative, requesting clarification of the proposed use. Mr. Thorpe submitted historical documents about the CUP application and "a review of a legal non-conforming use application."[4] The City put the CUP application on hold and, on June 16, 2014, requested additional information about a legally established non-conforming use, expansion of that use, and compliance with the CUP criteria and performance standards. *Exhibit 7; Exhibit 9; Exhibit 10; Exhibit 11; Exhibit 12; Exhibit 15; Exhibit 34.*

   The Applicant provided a project description, received June 24, 2014. This project description states that the current use is "heavy equipment storage and repair . . . within the existing Quonset Hut, although a certain amount of storage is needed outdoor to store equipment waiting to be worked on in the hut." The Applicant notes in the project description that the CC zoning district permits automotive repair as a conditional use,[5] "similar to the proposed use of [a] heavy equipment storage and repair, excavation/utility/construction contractor. . . . The Owner is therefore seeking a conditional use permit for an existing non-conforming use/business." *Exhibit 9.* Mr. Thorpe testified that the Applicant is not proposing to expand the existing use.[6] *Testimony of Mr. Thorpe.*

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[1] The Application refers to "ROCON EQUIPMENT" (Exhibit 7), while the staff report refers to "Ro-Con Equipment" (Exhibit 1, Staff Report, page 1). Kent Police Department records identify the business as "Ro-Con Equipment Specialist Inc. (Exhibit 32), which is the name used in this decision.

[2] The subject property is identified by the King County Assessor as Parcel No. 2622059091. The legal description of the subject property is included with the CUP application. *Exhibit 7.*

[3] The CUP application did not cite to any sections of the Kent City Code (KCC).

[4] No legal non-conforming use application was submitted.

[5] KCC 15.04.090 lists "Auto repair and washing services (including body work)" as a conditional use.

[6] KCC 15.08.100.C.2 allows for expansion of nonconforming uses with a CUP.

2. The City of Kent (City) determined the application was complete on January 21, 2014. The City posted notice of the application on the property, published notice in the *Kent Reporter*, mailed notice to the parties of record, and emailed notice to interested agencies on July 18, 2014. The City posted notice of the open record hearing on the property, published notice in the *Kent Reporter*, mailed notice to owners of property within 300 feet of the property and to the parties of record, and emailed notice to the parties of record and interested agencies on September 5, 2014. *Exhibit 1, Staff Report, page 6; Exhibit 3; Exhibit 4; Exhibit 5; Exhibit 6.*

3. Ms. George testified that the proposed uses are exempt from review under the State Environmental Policy Act (SEPA), Chapter 43.21C Revised Code of Washington (RCW) because the Applicant was not proposing a development. *Testimony of Ms. George.*

4. The property is designated Commercial (C) under the City Comprehensive Plan (Comprehensive Plan). The C designation allows a variety of retail, office, and service uses that are located along major thoroughfares, that serve local residential neighborhoods or serve regional clients and customers, and that consist of a contiguous strip of commercial activities. Many areas on the Land Use Map, which were previously designated for commercial uses, now are designated as Mixed-Use areas. *Comprehensive Plan, Land Use Element, page 4-56.* City staff identified goals and policies for commercial areas as providing good aesthetic design and walkability; ensuring concentrated commercial development in the urban core and activity centers that provide neighborhood services; and minimizing impacts to residential areas. *Exhibit 1, Staff Report, page 7.*

5. The property was previously under King County jurisdiction. The City annexed the property in 1996 from King County as part of the Meridian annexation (Ordinance No. 3421). The City zoned the property Mobile Home Park (MHP), and rezoned it to its current zoning of Community Commercial (CC) in 1998 at the request of Byron Gusa, the property owner at that time. The purpose of the CC zoning district is to provide areas for limited commercial activities that serve several residential neighborhoods and to provide opportunities for mixed use development within the designated mixed use overlay boundary, as designated by the comprehensive plan. *KCC 15.03.010.* The purpose of a CUP is to properly integrate into the community uses that may be suitable only under certain conditions in specific locations in a zoning district, or if the site is regulated in a particular manner. *KCC 15.09.030.A.1.* Adjacent property to the north and east is zoned Residential Agriculture (SR-1), and most of the property to the west is zoned Mobile Home Park (MHP). One adjacent parcel to the west and adjacent property to the south are zoned CC. *Exhibit 1, Staff Report, pages 3 and 4; Exhibit 29, Exhibit 36.*

6. KCC 15.09.065.A provides that, if a use is not listed in the Land Use Tables, "it shall be considered to be a prohibited use."[7] "Outdoor storage (including truck, heavy equipment, and contractor storage yards as allowed by development standards, KCC 15.04.190 and 15.04.195)" and "Heavy equipment and truck repair," are not principally permitted uses or conditional uses within the CC zoning district. *KCC 15.04.040 and -.090.* Auto repair and washing services (including body work) are allowed with a CUP. *KCC 15.04.090.*

7. City code provides performance standards that apply to all land uses within the City. No land or building in any district shall be used or occupied in any manner so as to create any dangerous, injurious, noxious or otherwise objectionable condition from noise, vibration, or glare; smoke, dust, odor or other form of air pollution, heat cold or dampness, and Hazardous substances and wastes. Measurement of performance standards for noise, vibration, odors, glare or hazardous substances or wastes shall be taken at the property or lot lines in all districts. *KCC 15.08.050.A and C.*

8. The 3.82-acre property is a long rectangle, running north/south. The property is generally flat at an elevation approximately eight feet higher than the Soos Creek Estates mobile home park to the east and is separated by two, four-foot retaining walls. Most of the remaining site is covered by gravel, with some grass and weeds along the property edge. A single-family structure converted for office use, a manufactured home used as a caretaker's unit, and a Quonset hut, along with several evergreen trees, are located in the southern portion of the property, with a City-approved detention pond north of the manufactured home. City code requires off-street vehicle parking areas to be paved with asphalt or equivalent material. *KCC 15.05.090.E.1.* Although parking on-site is adequate, the site contains a gravel surface.

   The property is served by the Soos Creek Sewer District, Water District #111, and the City of Kent stormwater system. Access to the site is from SE 272nd Street (SE Kent-Kangley Road), a high capacity corridor for regional trips, via a 20-foot wide access easement along the east side of the neighboring property to the south. The Applicant did not provide a traffic study. The City determined that traffic generated by the Applicant is unlikely to unduly burden the traffic circulation system. A 2006 Environmental Checklist, prepared for a grade and fill permit on the property, identified songbirds as having been observed or known to be on or near the site. *Exhibit 1, Staff Report, pages 2, 4, 5, 13, 14, and 17; Exhibit 3; Exhibit 9; Exhibit 10; Exhibit 26.*

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[7] KCC 15.09.065.A provides that an applicant may request an interpretation from the planning director as to whether or not a use is a permitted use. The Applicant did not make such a request.

9. The Applicant provided a 2013 Declaration of Byron Gusa, the previous property owner. The City objected to the admission of Mr. Gusa's declaration. The objection was overruled, and the declaration was admitted. *Exhibit 17.*

10. Mr. Gusa declared that the property was zoned "Heavy Industrial" by King County when he purchased it in 1975 from Paul Smith. No documentation of that zoning designation of the property or provisions relating to the "Heavy Industrial" zone were provided. By 1998, the property was zoned Multi-family (RM2400) according to a 1998 letter from King County. A 1992 King County Notice of Violation to Mr. Gusa indicates the property was zoned Residential Mobile Home Park (RMHP-P) in 1992. No evidence was presented indicating when those zoning designations were enacted or when they were first applied to the site. *Exhibit 17; Exhibit 18; Exhibit 19.*

11. Mr. Gusa declared that Mr. Smith had used the site from the 1950's for a saw mill called "Kent Lumber Company," and had stored heavy equipment, trucks, and implements on the property. He declared that, from 1975 to 2005, his business, "Byron's Bulldozing," stored bull dozers, trucks, and heavy equipment on the property. He also declared that he continued to use the property for heavy equipment and truck storage after the 1996 City annexation of the property and zoning change to Mobile Home Park and after the 1998 property rezone to Community Commercial. The Applicant also provided a Title Report from Chicago Title (# 0014143-06), printed April 23, 2014, and King County Assessor's records. King County staff notes from December to March 1990 state, "Apparently the site has a legal non-conforming use for a sawmill." *Exhibit 15, Exhibit 16; Exhibit 17; Exhibit 20; Exhibit 22.*

12. A landowner bears the burden of establishing that a valid nonconforming use[8] exists.[9] Under Title 15 KCC, "Nonconforming uses, structures, lots, or signs are not favored by law and this title, and it is to avoid injustice that this title accepts such elements. To benefit from the protection given to nonconforming development, such use, structure, or sign <u>must have been lawfully established pursuant to a county resolution in effect at the time of annexation which rendered it nonconforming</u>, or it must have been lawfully

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[8] KCC 15.02.285 provides:

> Nonconforming use means the use of land, a building, or a structure lawfully existing prior to the effective date of this title or subsequent amendments thereto, which does not conform with the use regulations of the district in which it is located on the effective date of such use regulations.

[9] "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 applicant did not abandon or discontinue the use for over a year prior to the relevant change." *King County Dep't of Dev. & Envtl. Servs. v. King County,* 177 Wn.2d 636, 643 (2013).

established prior to the effective date of the ordinance codified in this chapter or subsequent amendments thereto. . ." *KCC 15.08.100.B (emphasis added).*

13. The intent of the City regarding nonconforming development is as follows:

> 2. Ensure reasonable opportunity for use, maintenance, and improvement of legally constructed buildings, structures, and site development features which do not comply with current minimum requirements for the district in which they are located.
>
> 3. Ensure reasonable opportunity for continuation of legally established uses which do not conform to use regulations for the district in which they are located.
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> 4. Encourage the eventual replacement of nonconforming uses having potentially undesirable impacts on conforming uses.
>
> 5. Encourage the eventual upgrading of nonconforming buildings, structures, and site development features which do not comply with current minimum requirements for the district in which they are located.

KCC 15.08.100.A (emphasis added).

14. The Applicant's claim to a lawfully established nonconforming use is based on uses existing prior to the property's annexation by the City. Therefore, the Applicant must prove that the claimed use was "lawfully established pursuant to a county resolution in effect at the time of annexation which rendered it nonconforming." *KCC 15.08.100.B.* Applicant did not present, and the record does not contain, evidence of a county ordinance permitting the uses claimed by Mr. Gusa and the Applicant sufficient to show that they were at one time lawfully established pursuant to a county resolution. No reference to any county resolution was submitted in support of the claim. Mr. Gusa's declaration generally describes uses of the property over time, but no evidence was presented to show under which of King County's code sections the use may have been lawful or may have become nonconforming. Applicant has failed to carry its burden of proof to show the establishment of a legally nonconforming use. To the extent that the Applicant may contend that the current uses are a continuation of a legally established nonconforming uses under the King County Code, no evidence or authority was provided to show compliance with County provisions regarding preexisting uses, if any. City staff reviewed the exhibits submitted by the Applicant and determined that they were not sufficient to demonstrate past usage by Mr. Gusa for the storage of heavy equipment and trucks on the site and that a Certification of Insurance issued to Byron's Bulldozing Company was listed with a different address. City staff determined that Ro-Con's use,

Mr. Gusa's use, and the sawmill before that were never "lawfully existing" and not a legal nonconforming use. *Exhibit 1, Staff Report, pages 9 and 10.*

15. The City code provides:

> A change of use shall be determined to have occurred when it is found that the general character of the operation has been modified. This determination shall include review of but not be limited to: (1) hours of operation, (2) materials processed or Sold, (3) required parking, (4) traffic generation, (5) impact on public utilities, (6) clientele, and (7) general appearance and location.

KCC 15.02.533.

The Applicant must also prove that its current use of the property is the same as the claimed legally established preexisting use. The uses described by Mr. Gusa in his declaration refer to his storage of bull dozers, heavy equipment, and trucks on the property until he sold the land. Mr. Gusa declares that, "In 2005 I sold the property to Patrick Roth who carried on the use of the property for heavy equipment and trucks." *Exhibit 17, §10.* He does not provide a foundation for that knowledge in so far as he seeks to imply that he is familiar with the Applicant's use from 2005 to the present. Other evidence of the Applicant's use of the property consists of photographs submitted by the Applicant, witness testimony, and information contained in the application for the conditional use permit. *Exhibit 7; Exhibit 8; Exhibit 9; Exhibit 14; Exhibit 21; Exhibit 23; Exhibit 24; Exhibit 25; Exhibit 35.*

16. Mr. Gusa's declaration describes the property being used for storage of bull dozers, heavy equipment, and trucks. Ro-Con's Conditional Use Permit Application lists the proposed use as "HEAVY EQUIPMENT (STORAGE/MAINTENANCE)". *Exhibit 7, page 1.* The Applicant's project description Submittal Requirement "A" (Exhibit 9) lists "the proposed use of heavy equipment storage and repair, excavation/utility/construction contractor." It further states,

> "The existing use, subject to this Conditional Use Permit, is storing and repair of heavy equipment. This use takes place within the existing Quonset Hut, although a certain amount of storage is needed outdoor to store equipment waiting to be worked on in the hut." *Exhibit 9.*

17. The Applicant's proposed conditions for a CUP describe the use as "Equipment repair limit to current two story repair shop. Limit 4 vehicles stored for repair on site. No storage – Heavy equipment, parts, supplies except in enclosed building. Any parts storage in enclosed metal containers, i.e. Box Car/Containers." The Applicant claims that the use designated for

the CC zone would be most similar to "automotive repair." *Exhibit 9; Exhibit 34; Testimony of Mr. Thorpe.*

18. The use of the property by the Applicant for the repair of trucks and heavy equipment is consistent with the photographs submitted into evidence and the testimony of witnesses. *Exhibit 8; Exhibit 14; Exhibit 14; Exhibit 21; Exhibit 23; Exhibit 24; Exhibit 25; Exhibit 35; Testimony of Mr. Baker and Mr. Arth.*

19. The uses described by Mr. Gusa only refer to the storage of equipment. There is no mention of repair operations of the type existing and proposed by Ro-Con. The general character of the operation has been modified from the uses made of the property prior to the Applicant's purchase, as have the general appearance and location, as evidenced by photo exhibits. Applicant's use has changed from that of any lawful preexisting use that may have been established under the King County Code. *Exhibit 8; Exhibit 14; Exhibit 21; Exhibit 23; Exhibit 24, Exhibit 25; Exhibit 35.*

20. The Quonset hut is shown in Exhibit 8. Photographs of a previously existing building described as a sawmill shelter are included in Exhibit 20. The most recent photograph of the sawmill shelter is on a report dated "4-10-80." King County tax records continue to describe the shelter on reports through 1993. As previously noted, the property had been zoned Multi-family at some point several years earlier. No evidence was presented about when the Quonset hut was built and if it was permitted under the then existing zone. Ms. George testified that the city could find no record of a building permit for the hut. The Quonset hut was not listed on any tax records submitted into evidence. A use created in violation of law or without a proper permit cannot be the basis for a lawful nonconforming use. *King County Dep't of Dev. & Envtl. Servs. v. King County*, 177 Wn.2d 636, 647-8, (2013). The Applicant has not presented sufficient evidence to show that the building that is central to its described operations qualifies as a lawful preexisting structure or use. *Exhibit 20; Exhibit 30; Testimony of Ms. George.*

21. The City submitted a "Waiver of Appeal, Stipulation to Facts and Violations, and Agreed Order," dated November 16, 2006, in which the Applicant stipulates to parking various trucks and heavy equipment on the property in violations of the zoning designation. The City also submitted a Kent Municipal Court Order on Judgment, Sentence and Probation for Patrick Roth for violating several sections of the City zoning code, including KCC 15.04.040 and 15.04.090. *Exhibit 27; Exhibit 32.*

22. Daryl Dahlquist testified that the current use creates noise, including banging and pounding. He compared Applicant's operation with an auto repair business across the street where the noise was contained on-site and

testified they were different. *Testimony of Mr. Dahlquist.* Elaine Collins testified that she has been the manager of the Soos Creek Estates Mobile Home Park for the last year and a half. She objected to dust from the Applicant's property coming on her property and objected to proposed landscaping with cyclone fencing and slats. She submitted additional written comments (Exhibit 13). *Testimony of Ms. Collins.* William Baker testified that he lives in the mobile home area to the west and is adjacent to the Re-Con property. He is a retired mechanic and testified that the use is nothing like an auto-repair use, but rather a heavy equipment operation. He testified that some of the Ro-Con's heavy equipment could not fit within the Quonset hut, and the noise could not be contained. Over 320 family homes are located within 500 feet of either side of Ro-Con's property lines. He logged 178 incidents of work starting before 7:00 AM or working past 10:00 PM at night and testified that trucks were started at 3:30 in the morning and left to idle. He submitted five photos of the site (Exhibit 35). *Testimony of Mr. Baker.*

23. Ronald Frederick Arth testified that he lives in Soos Creek Estates on the east side, and he is a master certified auto technician. He explained that there is a difference between auto repair and large-truck repair and that large-truck repair uses different equipment and causes more noise. He requested that the CUP be denied. *Testimony of Mr. Arth.* Stacy Van Tassel testified that her mother lives in the neighboring mobile home park. Her mother complained about noise. Ms. Van Tassel moved into her mother's mobile home in October of 2012 and has experienced noise from the Ro-Con property, as well. She also reported natural gas odors from the site on Sunday morning, resulting in a response from the Fire Department. *Testimony of Ms. Van Tassel.* Jennifer England testified that she lives in Soos Creek Estates and that Ro-Con does deconstruction work, and has brought and stored debris on the property. She played a tape of equipment noise from the site. She testified that a fence or trees as a barrier would not work. *Testimony of Ms. England.* John Millard testified that he is the property manager for the Cascades Mobile Home Park on the west side. He testified that he also runs a construction company and abides by the rules of the City. He expressed concerns about asbestos from manufactured home demolition on the site. *Testimony of Mr. Millard.* In addition to other written letters documenting noise, vibration, dust, and odors from the site, six form letters referencing disturbing noise before 7:00 AM and after 11:00 PM, exhaust odors, and unpleasant decaying type odors and opposing the CUP were also received. *Exhibit 13.*

24. The Applicant proposes a 10-foot wide landscape buffer including six-foot cyclone fences with wood slats on the east and west sides of the property. A two-tier block wall on the east side would be planted with cedars and alders. City staff reviewed the application and proposed buffer and landscaping and

determined that, because of the close proximity of residences, no amount of landscaping or fencing could protect adjacent property from visual, odorous, vibratory and auditory impacts from the proposed use. *Exhibit 1, Staff Report, page 15; Exhibit 9; Exhibit 10; Exhibit 34.*

25. Assistant City Attorney David A. Galazin, argued that the Hearing Examiner should consider whether the use is within the use tables in KCC 15.04.090, and stated that it is not, and also that the Hearing Examiner should determine whether the use is an expansion of a legal non-conforming use. Mr. Galazin argued that the evidence shows that there has been illegal use of the property. He cited to *McMilian v. King County,* 161 Wn. App. 581 (2011), as holding that illegality in one unrelated to zoning will take a non-conforming use and change it from one that is a lawful legal non-conforming use to an illegal non-conforming use. He argued that even if a legal non-conforming use had been established, the illegal use of the site has made it an illegal non-conforming use. *Argument of Mr. Galazin.*

26. City staff reviewed the application and recommends denial of the CUP. *Exhibit 1, Staff Report, page 18.*

CONCLUSIONS

Jurisdiction

The Hearing Examiner has jurisdiction to hear and decide this application pursuant to the authority granted by the legislature to the City in Chapter 35A.63 of the Revised Code of Washington (RCW) and pursuant to the authority granted by the City of Kent in Chapter 2.32 of the Kent City Code (KCC). *KCC 2.32.090.A.* The parties agreed that the question of the existence of a lawfully established preexisting use came before the Hearing Examiner as part of Ro-Con's request for a CUP based on that claim.

Criteria for Review

KCC 15.09.030.D sets forth seven specific criteria and one optional criterion that must be satisfied for approval of a Conditional Use Permit (CUP). Each of the seven criteria must be satisfied in order to grant approval of a CUP, under KCC 15.04.090 and 15.08.100.C.2, as requested by the Applicant. In order to approve a request for a CUP, the Hearing Examiner must conclude that:

1. The proposed use in the proposed location will not be detrimental to other uses legally existing or permitted outright in the zoning district;
2. The size of the site is adequate for the proposed use;
3. The traffic generated by the proposed use will not unduly burden the traffic circulation system in the vicinity;
4. The other performance characteristics of the proposed use are compatible with those of other uses in the neighborhood or vicinity;

5. Adequate buffering devices such as fencing, landscaping, or topographic characteristics protect adjacent properties from adverse effects of the proposed use, including adverse visual or auditory effects;
6. The other uses in the vicinity of the proposed site are such as to permit the proposed use to function effectively;
7. The proposed use complies with the performance standards, parking requirements, and other applicable provisions of this title; and
8. Any other similar considerations may be applied that may be appropriate to a particular case.

KCC 15.09.030.D.

The criteria for review adopted by the Kent City Council are designed to implement the requirement of Chapter 36.70B RCW to enact the Growth Management Act. In particular, RCW 36.70B.040 mandates that local jurisdictions review proposed development to ensure consistency with City development regulations, considering the type of land use, the level of development, infrastructure, and the characteristics of development. *RCW 36.70B.040.*

Conclusions Based on Findings

1. **Under KCC 15.08.100.B., the proposed uses for heavy equipment storage and repair is not a use lawfully established pursuant to a county resolution in effect at the time of annexation which rendered it nonconforming, or lawfully established prior to the effective date of the ordinance codified in Chapter 15.08 KCC or subsequent amendments.** The Applicant/landowner bears the burden of establishing that a valid nonconforming use exists. *King County Dep't of Dev. & Envtl. Servs. v. King County,* 177 Wn.2d 636 (2013*).* The Applicant did not provide a King County resolution showing the use was lawful at the time of the City's annexation of the property in 1996. The Applicant purchased the property in 2005 from Mr. Gusa. Mr. Gusa's 2013 declaration (Exhibit 17) that he stored heavy equipment, trucks, and implements on the property from 1975 to 2005, does not cite to any King County Code or ordinance allowing such use. The Applicant provided documentation of the establishment of a sawmill on the site, as well as a sawmill shelter constructed in 1951. King County staff notes from December to March 1990, following an inspection of the property, state, "Apparently the site has a legal non-conforming use for a sawmill." The Applicant is not claiming a legal non-conforming use for a sawmill and has not requested a CUP for a sawmill. The Applicant has failed to carry his burden of proof to show a legally established preexisting use prior to annexation, either as a permitted use or as a valid preexisting use under the King County Code. The Applicant has failed to carry its burden to show that its current and requested use is the same as any use which may have been lawfully preexisting at the time of annexation. Because the Applicant has not shown that the proposed use was lawfully existing prior to the effective date

of Title 15 KCC, its use is not a legally nonconforming use. *Findings 1 – 20, 26.*

2. **The uses for which the Applicant seeks a Conditional Use Permit are not permitted in the CC zone, either as a principal or conditional use.** KCC 15.04.090 (Service Land Uses) lists "Principally Permitted Uses" and "Conditional Uses" for service land uses. Outdoor storage (including truck, heavy equipment, and contractor storage yards) and heavy equipment and truck repair are not Principally Permitted Uses in the CC zoning district. Outdoor storage is also not a permitted manufacturing land use under KCC 15.04.040 (Manufacturing Land Uses). Neither use is permitted in the CC zone as a conditional use, and therefore is prohibited. The Applicant argues that the proposed use is similar to auto repair and washing services, which is a conditional use allowed in this zone. The City Council, in establishing permitted and conditional uses in KCC 15.04.090, however, distinguished between auto repair, an allowed conditional use, and heavy equipment and truck repair, and outdoor storage, which are not allowed. KCC 15.09.030 authorizes the Hearing Examiner to issue CUPs "for any of the uses or purposes for which such permits are required or permitted by the terms of this title." The evidence and Ro-Con's application for a CUP indicate that the operations of the Applicant fall within the categories of "heavy equipment and truck repair" and "outdoor storage (including truck, heavy equipment, contractor storage yards),"[10] which are prohibited by the code. KCC 15.04.090. Therefore, Ro-Con's conditional use permit application should be denied because it requests uses for which no conditional use is allowed. Because the proposed use is not listed in the City's land use matrix for a CUP in this zone, it is a prohibited use. *Findings 1-11, 21 - 26.*

3. **If the requested uses were permitted as a conditional use, they would not be authorized under KCC 15.09.030.D.**

   a. **Under 15.09.030.D the proposed heavy equipment storage and repair, excavation/utility/construction contractor uses would be detrimental to other uses legally existing or permitted outright in the zoning district.** Two adjacent mobile home parks are located to the west and east. Mr. Baker testified that over 320 family homes are located within 500 feet of either side of Ro-Con's property lines. Ronald Frederick Arth testified that as a master certified auto technician, large truck repair causes more noise and uses different equipment than auto repair. The Ro-Con site is elevated approximately eight feet higher than the mobile home park to the east. Letters were submitted by neighbors documenting noise, vibration, dust, and odors from the site. The Applicant's project

[10] The Applicant' project description notes that a certain amount of storage is needed outdoors. *Exhibit 9.*

description states that a certain amount of storage is needed outdoor to store equipment waiting to be worked on in the Quonset hut. The proposed use is also detrimental because to protect other legal uses, the City Council prohibited outdoor storage and truck repair in the CC District. *Findings 1 - 26.*

b. **The size of the site would be adequate for the proposed use.** The 3.82 acre site would accommodate the proposed use. However, the Applicant failed to demonstrate that the proposed heavy equipment repair could be accommodated within the on-site Quonset hut, or that any sound-proofing would be installed. *Findings 1, 5, 8, 22.*

c. **The traffic generated by the proposed use would not unduly burden the traffic circulation system in the vicinity.** The Applicant did not provide a traffic study or evidence concerning the current daily number of ingress/egress trips. SE 272nd Street (Kent-Kangley Road) is a high capacity corridor for regional trips. The City determined that traffic generated by the application is unlikely to unduly burden the surrounding traffic system. *Findings 1, 5, 8.*

d. **The other performance characteristics of the proposed use would not be compatible with those of other uses in the neighborhood or vicinity.** Testimony from both the City and the public demonstrate that Ro-Con's existing use has created objectionable conditions from noise, vibration, dust, odor on adjacent property that is incompatible with adjacent residential properties. Testimony at the hearing pointed out that heavy equipment repair generates more noise and vibration than an auto repair business. The Applicant failed to demonstrate that his heavy equipment repair could be accommodated within the Quonset hut or that noise and vibration would not continue to be objectionable at the property lines. *Findings 1, 5, 8, 22, 23, 24, 26.*

e. **Buffering devices such as fencing, landscaping, or topographic characteristics would not protect adjacent properties from adverse effects of the proposed use.** Heavy equipment repair would produce vibration, noise and exhaust odor in close proximity to a large number of adjacent residents. The site is located at a higher elevation than the mobile home park to the east. The fencing proposed by the Applicant would not shield adjacent residents from these adverse impacts. *Findings 1, 5, 8, 22, 23, 24, 26.*

f. **The other uses in the vicinity of the proposed site are such as to permit the proposed use to function effectively.** Surrounding uses would not interfere with the proposed use. *Findings 1, 5.*

g. **The proposed use would comply with the parking requirements, but not the performance standards, and other applicable provisions of this code.** Adequate parking for the proposed use is located on the property. As noted above, the proposed use would not comply with the performance standards related to noise, vibration, odors, or dust. The site is graveled and does not comply with KCC 15.05.090.E.1, requiring vehicle storage on asphalt or equivalent material. *Findings 1, 8, 22, 24, 26.*

h. **There are no other considerations appropriate in this particular case**. *Findings 1 – 26.*

DECISION

Based on the preceding Findings and Conclusions, the requests for a Conditional Use Permit to continue operation of existing construction/excavation/utility contracting and associated truck and heavy equipment repair and storage at 15326 SE 272nd Street is **DENIED**.

DATED this 29th day of September 2014.

LEE RAAEN
Hearing Examiner
Sound Law Center