December 20, 2024

OFFICE OF THE HEARING EXAMINER
KING COUNTY, WASHINGTON
Telephone (206) 477-0860
hearingexaminer@kingcounty.gov
www.kingcounty.gov/independent/hearing-examiner

ORDER OF REMAND

SUBJECT: Department of Local Services file no. **ENFR230883**

JAMES R HENLEY LIVING TRUST
Code Enforcement Appeal

Location: [redacted] Carnation

Appellant: James R Henley Living Trust
represented by **Ryan Espegard**
Gordon Thomas Honeywell
520 Pike Street Suite 1515
Seattle, WA 98101
Telephone: (206) 676-7548
Email: respegard@gth-law.com

King County: Department of Local Services
represented by **John Fairbanks**
Department of Local Services
919 SW Grady Way Suite 300
Renton, WA 98057
Telephone: (206) 477-2323
Email: jfairbanks@kingcounty.gov

Overview

The Department of Local Services – Permitting Division (Permitting) issued a Notice and Order in June 2024, alleging violations on the Henley property (Property) related to events, structures, and camping. Morgan Henley, trustee of the James R. Henley Living Trust, (Appellant) filed a timely challenge. We went to hearing on December 3. In writing the decision, the Examiner has questions about applying the nonconforming doctrine to the events and camping, particularly considering the Director of Permitting's 2023 Code Interpretation for Remlinger Farm.

For the reasons explained below, the Examiner **remands** this case to Permitting to process a code interpretation application for the James R. Henley Living Trust concerning whether holding events and associated camping at the Henley property should be considered a nonconforming use under the King County Code and not require a Special Use Permit (SUP).

Legal Nonconforming Use Overview

Setting aside structures (alleged violation #2)) for purposes of this Order, Appellant does not dispute that he holds events (alleged violation #1), including camping associated with the events (alleged violation #3).[1] Appellant argues that the events and associated camping constitute a legal nonconforming use. In its staff report, Permitting seemingly concedes that the events and camping are nonconforming uses. However, it argues that such uses have been forfeited. Ex. D1 at 003.

The owner bears the initial burden to show that the use existed prior to the contrary zoning ordinance in question and that the use was lawfully created. *King County, Dept. of Dev. & Envtl. Services v. King County*, 177 Wn.2d 636, 643, 305 P.3d 240, 244 (2013). If a property owner establishes a legal nonconforming use, the burden then shifts to the municipality to show that the owner abandoned or discontinued the use. *McMilian v. King County*, 161 Wn. App. 581, 591-92, 255 P.3d 739 (2011).[2] Although it may seem counterintuitive, the Examiner starts with whether Appellant *forfeited* whatever right existed, before returning to what, if any, legal nonconforming use was *established*—the issue prompting this remand.

Forfeiture

KCC 21A.32.045.C states, in pertinent part (emphasis added) that:

> A nonconforming use that has been discontinued …. may be reestablished … if:
>
> 1. The use has not been *discontinued* for more than twelve months before its reestablishment, or the nonconforming structure or site improvement is reconstructed in accordance with a complete permit application submitted to the department within twelve months of the occurrence of damage or destruction; or
>
> 2. If the use has been discontinued for more than twelve months, the applicant provides documentation that demonstrates to the satisfaction of the department that

[1] Permitting acknowledges that camping associated with the BrodieNation music festival can be legalized and included in an SUP for the events. Permitting made no effort to prove that Appellant is operating a stand-alone campground. Ex. D1 at 003. The evidence indicates that camping occurs only in connection with the community "Valleyball" and music events, and that the BrodieNation multi–day music event grew out of these events. Henley testimony.

[2] *Environmental Services* appears to misstate the third phase of the nonconforming use analysis; our high court stated that even after a landowner proves a lawfully established use, the landowner continues to bear the burden of proving non-abandonment. 177 Wn.2d at 643 (*citing McMilian v. King County*, 161 Wn. App. 581, 591, 255 P.3d 739 (2011)). To the contrary, *McMilian* held that "once the landowner establishes that the legal nonconforming use existed, the burden shifts the to the municipality… to show that the owner abandoned or discontinued the use after the enactment of the relevant zoning ordinance." 161 Wn. App. at 591-92. Our Supreme Court's misstatement in *Environmental Services* was inadvertent, in that the Court determined that the property owner had *not* established a legal nonconforming use; there was no discussion of discontinuation or abandonment.

> there was *no intent to abandon* the use. Documentation may include, but is not limited to, requests for approvals necessary to reestablish the use or structure submitted to appropriate county, state and federal agencies within twelve months after the use was discontinued. A statement from the property owner that merely states that there is no intent to abandon is not sufficient documentation without a showing of additional actions taken by the property owner to reestablish the use or structure[.]

This code provision is consistent with the jurisprudence, which generally holds that, where the nonconforming use ordinance references a time frame (such as discontinuance for one year), once the government proves lack of use for that time period, a rebuttable presumption arises that the user intended to abandon the nonconforming use—i.e., the burden shifts back to the owner to prove lack of intent to abandon. *Miller v. City of Bainbridge Island*, 111 Wn. App. 152, 164, 43 P.3d 1250 (2002) (citing *Skamania County v. Woodall*, 104 Wn. App. 525, 540–41, 16 P.3d 701 (2001) & *Andrew v. King County*, 21 Wn. App. 566, 572, 586 P.2d 509 (1978)).

Permitting's discontinuance argument is based on a July 2022 article in the Snoqualmie Valley Record and the BrodieNation website, which states that the first BrodieNation event occurred in 2006. The newspaper article asserts:

> For years Henley [Morgan's father] would host a community event every Fourth of July at the property featuring live music, a potluck and Valleyball, which Morgan said were a staple in the Valley between the 80s and the 2000s.
>
> But leading up to the holiday in 2006, it'd been a few years since Henley had hosted event. That's when Morgan and his friends decided to throw a party.

Exs. D1 at 003, D10 at 001.

Neither exhibit demonstrates discontinuance for more than 12 months, other than during the Covid pandemic. Mr. Henley persuasively testified that the description in the newspaper is inaccurate; the most accurate information on the history of events on the Property is found in Exhibit A2. Mr. Henley compiled the Exhibit A2 spreadsheet from historical documents, photographs and slides, and interviews with family, community members and musicians that performed at some of the various events. Henley testimony.

Exhibit A2 documents:

- The multi-day Fourth of July party from 1982–1985.
- Weekly or semi-weekly volleyball tournaments from April–June to August–October from 1986–2012.
- BrodieNation from 2006–2012.
- Multiple events including BrodieNation and often including volleyball from 2013–2018.
- BrodieNation events in 2019 and 2021.
- Multiple events, including BrodieNation and some volleyball, from 2022 to 2023.
- BrodieNation in 2024.

Thus, while the number of events fluctuated, Permitting has not shown that events were discontinued for more than 12 months, other than during the Covid pandemic.

To the extent the Examiner has misunderstood the evidence and there *was* a statutory 12- month discontinuation, the Examiner finds that Appellant has successfully rebutted the presumption of an intent to abandon the nonconforming use. This finding is consistent with *Rosema v. City of Seattle*, 166 Wn. App. 293, 300–01, 269 P.3d 393 (2012), and *Tateuchi v. City of Bellevue*, 15 Wn. App. 2d 888, 901–03, 478 P.3d 142, 150–51 (2020), where even though the owners had not employed their respective properties' nonconforming uses for years, evidence that they had maintained their property's full capacity to resume using the properties for those nonconforming uses at any time during those years was sufficient to rebut the presumption of abandonment.

The *initial legality* of a nonconforming use to host events (alleged violation #1) and for camping associated with those events (alleged violation #3) is discussed below. But there was no *forfeiture* of any such uses.

Establishment

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 regulation due to changes in the rules and regulations or their application to the subject property.

While Permitting focused almost exclusively on the BrodieNation multi-day music events, the evidence and testimony are persuasive that the BrodieNation events grew out of multi-day events centered on July 4. These events began in 1982 and expanded in 1986 to weekly community volleyball events known as "ValleyBall." These events were often accompanied by live music, potlucks, and camping. Ex. A2; Henley testimony; testimony of Sally Canfield.

In response to neighbor concerns about parking on Tolt River Road, two neighbors allow event and camping parking on their properties. The Appellant has hired a shuttle company to shuttle people from the parking to the Property. Appellant also sets up and cleans up after the events. Ex. D10 at 004; Henley testimony.

Following the logic and analysis of Director of Permitting's 2023 Code Interpretation relating to holding live events at Remlinger Farm to be a nonconforming use, it seems that Permitting should have determined that the Henley events and associated camping are also a nonconforming use. Yet, even after reviewing Appellant's exhibits and hearing his testimony, Permitting contends that the events require a SUP under today's code. That seems inconsistent with the Director's recent interpretation.

In the Remlinger code interpretation, the Director determined that holding live events at Remlinger Farm was a nonconforming use (open-air theater) permitted under the zoning code in

effect at the time the events began. Ex. A1. The Remlinger facts seem quite similar to today's case.

- The Remlinger property in question consisted of three parcels zoned RA10. The Henley property in question consists of 3 parcels zoned RA10. Exs. A1 (Remlinger); D2 (Henley).
- Events on the Remlinger property, including live music events, corporate events, concerts, and theater, had taken place every year since at least 1991. Events on the Henley property, including community volleyball and live music events, weddings, etc. have taken place every year since at least 1982, until they were paused in 2020 due to the Covid pandemic. Exs. A1 (Remlinger); A2 (Henley).
- Event management provided by Remlinger Farm typically included access to restrooms, setup, and clean up services. Event management by Henley included setup, cleanup, and parking management. Ex. A1 (Remlinger); Henley testimony (Henley).
- iMap indicates that the Remlinger parcels, like the Henley parcels, are located on the Tolt River, are within the conservancy shoreline environment, and are also constrained by floodplain, seismic, and channel migration zone hazard areas.
- The Director determined that the 1963 code was applicable for Remlinger[3] and allowed the Remlinger events as an "open-air theater." That code allowed open air theaters only if the "intended use would [not] create an incompatible or hazardous condition." In discussing this requirement, the Director noted that there was no record of complaints received by the County. In its 41 years of operation (discounting the 2020 Covid closure), the County has received only one complaint regarding Henley; that complaint did not specify any particular impacts or concerns. Exs. A1 (Remlinger); D1 and Fairbanks testimony (Henley).

The zoning code the Director determined to be applicable to Remlinger Farms was adopted by Resolution 25789 in 1963. Article 22, section 2202, of that Resolution enumerated the uses permitted subject to a conditional use permit (CUP), including: "Commercial establishments or enterprises involving large assemblages of people or automobiles as follows… open-air theatres." The Director did not discuss this requirement, leading the Examiner to assume that Remlinger Farm has *not* obtained a CUP and that this failure was not material to the Director's decision; this assumption would fit with the potential land-use-versus-health-and-safety distinction discussed below. The Director did not require that Remlinger Farm obtain an SPU. Fairbanks testimony; his fact also would fit with the potential land-use-versus-health-and-distinction discussed below.

Resolution 25789 is also the code applicable to the Henley events and camping. It allowed music events as open-air theatre and the volleyball events as recreation areas (beach clubs). Both uses would have required a CUP. Res. 25789, art. 22, secs. 2202(3) & (8).

These facts raise two questions.

[3] https://kingcounty.gov/~/media/depts/records-licensing/archives/researchguides/environmental/RES25789-opt.ashx?la=en.

First, and in general, a "local government may impose regulations on nonconforming uses, such as requiring a permit as a condition of those uses' continued legality." *Johnson v. City of Seattle*, 184 Wn. App. 8, 15, 335 P.3d 1027, 1031 (2014) (citations omitted). An agency cannot use permit review to essentially terminate a legal nonconforming use, either outright or by making it economically impossible to operate, but our high court rejected the argument that legal nonconforming uses are exempt from all subsequently enacted regulations, including health and safety regulations. *Rhod-a-Zalea & 35*th, *Inc. v. Snohomish Co.*, 136 Wn. 2d 1, 9-13, 15, 959 P.2d 1024 (1998).

Yet *Rhod-a-Zalea* may not be as broad as it initially appears; a thorough review of the case is warranted. Rhod-a-Zalea had been mining peat since at least 1961. In response to a complaint, Snohomish issued a notice and order charging two code violations: (1) excavation of processing of minerals without obtaining a conditional use permit (CUP); and (2) grading without necessary permits and approvals. The county code required a CUP for uses otherwise prohibited in the zone, unless the use was a valid nonconforming use. On appeal, that examiner found that Rhod-a-Zalea had established a valid nonconforming use and that a CUP was *not* required. Critically, Snohomish did not challenge that portion of the examiner's ruling.

That examiner also found that Rhod-a-Zalea was subject to subsequently enacted police power regulations, including building code provisions regulating grading. Rhod-a-Zalea did challenge this portion of the examiner's ruling, and that was the issue that ultimately made its way to our Supreme Court. Our Court held that nonconforming uses are subject to later enacted health and safety regulations, which it also characterized as reasonable police power regulations. Examples of later enacted regulations the Court discussed included health codes and business license provisions applicable to a nonconforming restaurant; noise and pollution regulations applicable to a nonconforming factory; licensing and health requirements applicable to a nonconforming animal kennel; and licensing and public health regulations applicable to a nonconforming adult entertainment facility.

In upholding the requirement that Rhod-a-Zalea apply for a grading permit, our Court did not even indirectly question the examiner's conclusion that Snohomish could not require a CUP for a nonconforming use. If anything, the Court did the opposite, holding that, "just because Rhod-A-Zalea was not required to obtain a general conditional use permit (because it is a valid nonconforming use) does not mean that it is exempt from all other specific permitting requirements [such as a grading permit], even if they regulate some of the same operations." *Rhod-a-Zalea & 35*th, *Inc. v. Snohomish Co.*, 136 Wn. 2d at 17, 959 P.2d at 1033.

From *Rhod-a-Zalea*, *Johnson*, and other legal nonconforming use jurisprudence—as well as the Director's Remlinger Farm Code Interpretation—there may be a distinction between two types of approvals. On one end are what are commonly referred to as "land use permits" like a temporary/conditional/special use permit, an approval that *authorize* a use in the first place. On the other end are health and safety regulations that require grading permits, building permits, or fire code inspections, or health-related approvals that protect the public health, safety, and welfare. It is beyond dispute that a government may apply such health and safety regulations to a legal nonconforming use. However, it is not so clear that the government may require use permits to authorize a legally nonconforming use itself.

However, what makes a remand—verses simply requesting legal briefing on general legal nonconforming use jurisprudence—is the Director's Remlinger Farm code interpretation and the disparate treatment of Henley.

The Examiner, thus, **REMANDS** this case to Permitting to process a code interpretation application for the James R. Henley Living Trust concerning whether holding events and associated camping at the Henley property should be considered a nonconforming use under the King County Code not requiring an SUP.

The Examiner requests a status update by **March 20, 2025**.

DATED December 20, 2024.

Alison Moss
King County 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.

December 20, 2024

OFFICE OF THE HEARING EXAMINER
KING COUNTY, WASHINGTON
Telephone (206) 477-0860
hearingexaminer@kingcounty.gov
www.kingcounty.gov/independent/hearing-examiner

CERTIFICATE OF SERVICE

SUBJECT: Department of Local Services file no. **ENFR230883**

JAMES R HENLEY LIVING TRUST
Code Enforcement Appeal

I, Lauren Olson, certify under penalty of perjury under the laws of the State of Washington that I transmitted the **ORDER OF REMAND** 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, through Quadient-Impress, with sufficient postage, as FIRST CLASS MAIL in an envelope addressed to the non-County employee parties/interested persons to addresses on record.

DATED December 20, 2024.

Lauren Olson

Lauren Olson
Legislative Secretary

Campbell, Thomas
Department of Local Services

Canfield, Sally
Hardcopy

Espegard, Ryan
Gordon Thomas Honeywell
Hardcopy

Fairbanks, John
Department of Local Services

Henley, Morgan
Hardcopy

Hoober, Leslee
Gordon Thomas Honeywell
Hardcopy

James R Henley Living Trust

Whalen, LaDonna
Department of Local Services