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**WORLD WIDE VIDEO OF WASHINGTON, INC., Appellant, v. THE CITY OF SPOKANE, Respondent, MARCO BARBANTI, Appellant. MARCO T. BARBANTI, Appellant, v. THE CITY OF SPOKANE, Respondent.**

**No. 22092-3-III (consolidated with No. 22093-1-III)**

**COURT OF APPEALS OF WASHINGTON, DIVISION THREE, PANEL THREE**

*125 Wn. App. 289; 103 P.3d 1265; 2005 Wash. App. LEXIS 51*

**January 11, 2005, Filed**

**SUBSEQUENT HISTORY:** Reconsideration denied by *Worldwide Video of Wash., Inc. v. City of Spokane, 2005 Wash. App. LEXIS 303 (Wash. Ct. App., Feb. 15, 2005)* Review denied by *World Wide Video of Wash. v. City of Spokane, 155 Wn.2d 1014, 122 P.3d 186, 2005 Wash. LEXIS 829 (Wash., Oct. 6, 2005)*

**PRIOR-HISTORY:** *World Wide Video of Wash., Inc. v. City of Spokane, 2004 U.S. App. LEXIS 18927 (9th Cir. Wash., July 12, 2004)*

**SUMMARY:**

**Nature of Action:** A company that operates three adult products stores within a city and the landlord of the properties where the stores are located each sought judicial review of a city hearing examiner's decision upholding a six-month extension of the period established by ordinance by which the stores must relocate or change the nature of their business to avoid becoming impermissible nonconforming uses under city regulations.

**Superior Court:** After the two cases were consolidated, the Superior Court for Spokane County, Nos. 02-2-03412-2 and 02-2-03464-5, Salvatore F. Cozza, J., on April 25, 2003, entered a judgment affirming the hearing examiner's decision.

**Court of Appeals:** Holding that the plaintiffs' *First Amendment* claims were resolved in prior litigation, that an independent analysis under the state constitution is not justified, that no other constitutional claims were established, that no error was committed in the administrative proceeding, and that the decision to grant the six-month extension was properly made, the court *affirms* the judgment.

**COUNSEL:** *Marco T. Barbanti, pro se. Dominic M. Bartoletta, for appellants.*

*Michael Connelly, City Attorney, and Milton G. Rowland, Assistant, for respondent.*

**JUDGES:** Author: JOHN A. SCHULTHEIS. Concurring: DENNIS J. SWEENEY & STEPHEN M. BROWN.

**OPINION BY:** JOHN A. SCHULTHEIS

**OPINION**

P1 Schultheis, J. -- By ordinance, the city of Spokane requires all adult retail use establishments (adult stores) to observe specific location requirements. For instance, such establishments may not be located within 750 feet of schools, places of religious worship, public parks, other adult stores, or certain residential zones. Ordinance C-32778, codified as former Spokane Munic-

ipal Code (SMC) 11.19.143(D) (2001). When it became effective in March 2001, the ordinance provided an amortization period of one year for nonconforming adult stores to relocate or change the nature of their businesses, with a procedure for additional extensions of this deadline. Former SMC 11.19.395 (2001).

P2 On appeal, we are asked to decide whether regulating the location of adult stores violates state and federal constitutional rights. We also address whether the administrative hearing on the extension of the deadline for three nonconforming adult stores owned by World Wide Video of Washington, Inc. (WWV), followed proper procedures and reached a decision based on substantial evidence. We conclude that the *First Amendment* issues were settled in a previous case and that review of the free speech issues under the state constitution is not justified. We find no violation of additional constitutional rights. Further, finding no error in the administrative procedures or in the decision to grant an extension of the amortization period, we affirm.

#### FACTS

P3 Spokane ordinance C-32778 was adopted in January 2001 to address civic concerns about the harmful secondary effects associated with adult stores. *World Wide Video of Wash., Inc. v. City of Spokane*, 368 F.3d 1186, 1188 (9th Cir. 2004). By establishing setback requirements, the ordinance sought to limit citizen contact with such secondary effects as prostitution, public lewdness, used condoms, and video package litter featuring graphic depictions of sexual acts. *Id.* at 1190 n.6. The ordinance defined an adult retail use establishment as "an enclosed building, or any portion thereof which, for money or any other form of consideration, devotes a significant or substantial portion of stock in trade, to the sale, exchange, rental, . . . or viewing of 'adult oriented merchandise.'" Ordinance C-32778, codified as SMC 11.19.03023. Adult oriented merchandise was further defined as goods such as videos, DVDs (digital video disc), and printed materials that depict or describe specified anatomical areas or sexual activities. Ordinance C-32778, codified as SMC 11.19.03023. Pursuant to former SMC 11.19.143(D),

1. An adult retail use establishment and an adult entertainment establishment may not be located or maintained within seven hundred fifty feet, measured from the nearest building of the adult retail use establishment or of the adult entertainment establishment to the nearest building of any of the following pre-existing uses:

- a. public library,
- b. public playground or park,

c. public or private school and its grounds, from kindergarten to twelfth grade,

d. nursery school, mini-day care center, or day care center,

e. church, convent, monastery, synagogue, or other place of religious worship,

f. another adult retail use establishment or an adult entertainment establishment, subject to the provisions of this section.

2. An adult retail use establishment or an adult entertainment establishment may not be located within seven hundred fifty feet of any of the following zones:

- a. agricultural,
- b. country residential,
- c. residential suburban,
- d. one-family residence,
- e. two-family residence,
- f. multifamily residence (R3 and R4),
- g. residence-office.

*See also World Wide*, 368 F.3d at 1189 n.2. Former SMC 11.19.395 set out the effect of ordinance C-32778 on nonconforming adult stores:

Any adult retail use establishment located within the City of Spokane on the date this provision becomes effective, which is made a nonconforming use by this provision, shall be terminated within twelve (12) months of the date this provision becomes effective, pursuant to Section 11.19.0336. Provided, however, that such termination date may be extended upon the approval of a written application filed with the Planning Director no later than one (1) month prior to the end of such twelve (12) month amortization period.

The administrative decision on whether or not to approve any extension period and the length of such extension period shall be based upon the applicant clearly demonstrating extreme economic hardship based upon an irreversible financial investment or commitment made prior to the date this provision becomes ef-

fective, which precludes reasonable alternative uses of the subject property.

P4 WWV operates three adult stores in Spokane in buildings leased from Marco Barbanti.<sup>1</sup> Two of the leases are long-term: one for 25 years (the Market lease, signed in September 1998) and the other for 40 years (the Division lease, signed in April 2000). After learning that the Spokane stores did not comply with ordinance C-32778, WWV applied to Spokane planning services for an extension of the amortization period and simultaneously challenged the constitutionality of the ordinance in federal district court. Mr. Barbanti also applied for an extension. He claimed that if WWV defaulted on the leases he would lose \$ 600,000 in revenue from the Division lease and \$ 125,000 in revenue from the Market lease.

1 These stores sell books, movies, and magazines of a sexually explicit nature. WWV's corporate headquarters are in Anaheim, California.

P5 In March 2002, the Spokane city council adopted ordinance C-33001, which provided additional areas in the city that could accommodate adult stores. *World Wide*, 368 F.3d at 1189. Earlier that month, the director of planning services, John Mercer, reviewed the Barbanti and WWV requests for extensions of the amortization period. Mr. Mercer found that the leases for all three businesses allowed for a change in use (with landlord consent) and specified that the premises could not be used in a manner that constituted a nuisance or violated an ordinance. He also noted that neither party requested a specific extension period for relocation to a conforming site. Finding that the leases resulted in "some economic hardship," and that proposed ordinance C-33001 would provide additional areas for relocation, Mr. Mercer approved a six-month extension of the termination date. 1 Appeal Board R. He filed similar decisions for all three leases.

P6 WWV and Mr. Barbanti timely filed appeals of the planning director's decisions to the Spokane hearing examiner, Greg Smith. *World Wide*, 368 F.3d at 1189. In a hearing held in April 2002, Mr. Smith refused to consider additional evidence and declared he would review the planning director's decisions on the record. Mr. Smith upheld the six-month extension, but held that it would run from the date of his May 15, 2002 decision. As a result, WWV was required to relocate or change the nature of its businesses by November 15, 2002. *Id.* at 1189.

P7 Meanwhile, WWV pursued a 42 U.S.C. § 1983 civil rights action against the city in the United States District Court for the Eastern District of Washington,

alleging violations of the *First Amendment*. *Id.* at 1189-90. Although Mr. Barbanti did not join the federal suit as a party, he participated as an expert on the local real estate market and offered deposition testimony regarding the leases and the constitutionality of the ordinances.<sup>2</sup> The district court granted the city's motion for summary judgment in September 2002, and WWV appealed to the Ninth Circuit Court of Appeals. *World Wide Video of Wash., Inc. v. City of Spokane*, 227 F. Supp. 2d 1143 (E.D. Wash. 2002), *aff'd*, 368 F.3d 1186 (9th Cir. 2004); *World Wide*, 368 F.3d at 1191.

2 Mr. Barbanti is a member of the Washington Bar and was in private practice until 1991, when he began working full time as a real estate property manager.

P8 In a decision filed May 27, 2004, the Ninth Circuit affirmed. *World Wide*, 368 F.3d at 1188. *World Wide* held that Spokane's adult store ordinances, because they intended to control the secondary effects of adult businesses, were content neutral and subject to intermediate constitutional scrutiny. *Id.* at 1191-92. The court further held that the ordinances were narrowly tailored to serve a substantial government interest: reduction of the undesirable secondary effects of adult stores. *Id.* at 1195. Finally, the court concluded the ordinances were not overbroad and provided an adequate amortization provision. *Id.* at 1199-1200. Regarding the latter decision, the court stated that "[a]s a general matter, an amortization period is insufficient only if it puts a business in an impossible position due to a shortage of relocation sites." *Id.* at 1200. With sufficient relocation sites provided by ordinance C-33001, WWV had a reasonable extension of the time to comply with code requirements. *Id.* To conclude, *World Wide* held that "municipalities are allowed to 'keep the pig out of the parlor' by devising regulations that target the adverse secondary effects of sexually-oriented adult businesses." *Id.*

P9 During the federal proceedings, WWV and Mr. Barbanti filed petitions challenging the Spokane hearing examiner's decision pursuant to *chapter 36.70C RCW* (the Land Use Petition Act). The two cases were consolidated and on April 25, 2003 the superior court affirmed the decision of the hearing examiner. In its findings and conclusions on the order of dismissal, the superior court found that Mr. Barbanti had an identity of interest and stood in privity with WWV in the federal litigation. Consequently, he was bound by the decision in *World Wide* rejecting *First Amendment* claims. Mr. Barbanti also unsuccessfully challenged the adult store ordinance as a bill of attainder and as unconstitutionally impairing his contract rights. The trial court additionally found that none of the petitioners' rights were violated under the state constitution. Finding no error in the extension pro-

cedures or the hearing examiner's interpretation of law and facts, the trial court denied the petitioners' complaints.

P10 WWV and Barbanti timely appealed the superior court's decision to this court and their cases were consolidated for review. During the pendency of this appeal, the Ninth Circuit's decision in *World Wide* was filed.

#### STATE CONSTITUTIONAL FREE SPEECH PROTECTION

P11 WWV's sole contention on appeal is that ordinances C-32778 and C-33001 violate *article I, section 5 of the Washington State Constitution*. This court addresses the *Gunwall* factors<sup>3</sup> to determine whether, in a particular context, it is appropriate to resort to the state constitution for independent analysis of constitutional issues. *Ino Ino, Inc. v. City of Bellevue*, 132 Wn.2d 103, 114-15, 937 P.2d 154, 943 P.2d 1358 (1997). The same factors are used to determine whether the state constitution provides broader protection than its federal counterpart. *State v. E.J.Y.*, 113 Wn. App. 940, 945, 55 P.3d 673 (2002). The superior court here declined to apply a *Gunwall* analysis and found that no rights were violated under the state or the federal constitutions. We review this issue of law de novo, focusing on the specific context of the state constitutional challenge. *Ino Ino*, 132 Wn.2d at 114; *E.J.Y.*, 113 Wn. App. at 946. Our question is whether adult stores selling sexually explicit books, magazines, and movies should be afforded broader free speech protection under *article I, section 5 of the Washington Constitution* than under the *First Amendment*.

<sup>3</sup> *State v. Gunwall*, 106 Wn.2d 54, 58, 720 P.2d 808 (1986). The nonexclusive *Gunwall* criteria include: (1) the text of the state constitutional provision, (2) differences between the state and federal texts, (3) constitutional history, (4) preexisting state law, (5) structural differences between the state and federal provisions, and (6) state or local concern for the issues in question. *Ino Ino, Inc. v. City of Bellevue*, 132 Wn.2d 103, 114-15, 937 P.2d 154, 943 P.2d 1358 (1997); *State v. E.J.Y.*, 113 Wn. App. 940, 946-48, 55 P.3d 673 (2002).

P12 The first *Gunwall* factor requires examination of the text of the *state constitution*. *Article I, section 5* is expansive: "Every person may freely speak, write and publish on all subjects, being responsible for the abuse of that right." *CONST. art. I, § 5*. Due to its broad language, *article I, section 5* has been held to provide greater protection for pure noncommercial speech in a public forum and to strictly prohibit prior restraints on free speech. *Ino Ino*, 132 Wn.2d at 117-18; *E.J.Y.*, 113 Wn. App. at 946. Time, place, and manner restrictions on noncommercial

speech in a public forum must be supported by a compelling state interest. *Ino Ino*, 132 Wn.2d at 116-17. Speech in a nonpublic forum, however, is not entitled to greater protection under *article I, section 5*. *City of Seattle v. Mighty Movers, Inc.*, 152 Wn.2d 343, 350-51, 96 P.3d 979 (2004). Restrictions on speech in a nonpublic forum may be imposed if the restrictions are viewpoint neutral and are reasonable in light of the purpose served by the forum. *Id.* at 351 (quoting *City of Seattle v. Huff*, 111 Wn.2d 923, 926, 928, 767 P.2d 572 (1989)). Public forums are those places devoted to assembly and debate or those channels of communication used by the public or speakers for assembly and speech. *Huff*, 111 Wn.2d at 927.

P13 The sexually explicit books, magazines, and movies here qualify as pure noncommercial speech. *World Wide*, 227 F. Supp. 2d at 1170; see also *World Wide Video, Inc. v. City of Tukwila*, 117 Wn.2d 382, 388, 816 P.2d 18 (1991) (written or filmed sexually explicit materials are pure speech for the purposes of the *First Amendment*). Adult stores are not, however, public forums. Consequently, the text of *article I, section 5* does not justify extending greater state constitutional protection to the adult stores.

P14 The second *Gunwall* factor requires consideration of the differences in the texts of the state and federal constitutional provisions. *Ino Ino*, 132 Wn.2d at 118. The *First Amendment* provides that "Congress shall make no law . . . abridging the freedom of speech." *U.S. CONST. amend. I*. Federal courts have interpreted this language to mean that speech in a public forum is subject to restrictions on time, place, and manner that are content neutral, are narrowly tailored to a significant government interest, and leave open ample alternative channels of communication. *Mighty Movers*, 152 Wn.2d at 350; *World Wide*, 368 F.3d at 1192. *Article I, section 5 of the Washington Constitution*, on the other hand, requires that restrictions on speech in a public forum must be tailored to a compelling government interest. *Mighty Movers*, 152 Wn.2d at 350. Although the difference in the texts of the federal and state constitutions supports an independent interpretation under the state provision, *Ino Ino*, 132 Wn.2d at 118, this difference does not compel application of the heightened protections of *article I, section 5* to speech in a nonpublic forum. See *Mighty Movers*, 152 Wn.2d at 350-51; *World Wide*, 227 F. Supp. 2d at 1169-70.

P15 The third *Gunwall* factor--constitutional history--does not help us determine whether the drafters intended *article I, section 5* to give enhanced protection in the context of sexually explicit materials. See *Ino Ino*, 132 Wn.2d at 120 (nude dancing) and *E.J.Y.*, 113 Wn. App. at 947 (threatening speech). Although the State Constitutional Convention adopted the most protective of

three proposed drafts of free speech provisions, there is no indication that the convention considered the effect of these provisions in this context. *Ino Ino*, 132 Wn.2d at 120.

P16 The fourth factor in a *Gunwall* analysis is the examination of preexisting state law. *Id.* Our focus is on the cases and statutes from the time of the state constitution's ratification. *Id.*; *E.J.Y.*, 113 Wn. App. at 947. WWV offers no argument that the constitution's drafters intended to impose stricter standards for ordinances restricting the time, place, or manner of selling sexually explicit materials. See *Ino Ino*, 132 Wn.2d at 120-21. Even protected speech in a nonpublic forum is subject to intermediate scrutiny under the *First Amendment* rather than the stricter scrutiny provided by *article I, section 5. Mighty Movers*, 152 Wn.2d at 350-51. Thus, preexisting state law does not justify "the more rigorous time, place, and manner analysis developed in the context of pure speech in a traditional public forum." *Ino Ino*, 132 Wn.2d at 121.

P17 The fifth *Gunwall* factor is simply a comparison of the structural difference between the federal and state constitutions. *Id.* This comparison is the same in every case: "The federal constitution is a grant of enumerated powers, while the state constitution acts as a limitation on the otherwise plenary powers of state government." *Id.* Consideration of this factor will usually support application of independent state analysis and broader protection. *Id.*

P18 Finally, the sixth factor in a *Gunwall* analysis is whether this particular case raises a matter of state or local concern. *Id.* at 122. The record shows that numerous local ordinances have attempted to regulate the sale of sexually explicit material. See, e.g., ordinance C-31261 (regulating adult arcades) and ordinances C-30808 and C-31010 (regulating line-of-sight, illumination, and door requirements for adult movie booths); chapter 10.08 SMC. Although this factor favors independent state analysis, it does not necessarily support greater protection under the state constitution. See *Ino Ino*, 132 Wn.2d at 122.

P19 On balance, the *Gunwall* analysis supports the trial court's conclusion that regulation of the time, place, and manner of the sale of sexually explicit books, magazines, and movies is not subject to the broader protection of *article I, section 5 of the state constitution*. WWV agreed to be bound by the federal court on the *First Amendment* issues. Because application of the state constitutional standard is not appropriate in this case, we affirm the trial court's dismissal of WWV's constitutional claims regarding time, place, and manner restrictions.

P20 WWV additionally argues that the ordinances warrant application of the more protective state standard

because they impose prior restraints. It is true that a governmental attempt to restrict the content of future speech is unconstitutional per se under *article I, section 5. DCR, Inc. v. Pierce County*, 92 Wn. App. 660, 670, 964 P.2d 380 (1998). However, a regulation does not qualify as a prior restraint if it merely restricts the time, place, or manner of expression. *Id.* at 671 (quoting *Ino Ino*, 132 Wn.2d at 126). The ordinances here do not completely ban the sale of sexually explicit materials; they merely create setback and zoning requirements for adult stores. Consequently, they do not rise to the level of prior restraints. *Ino Ino*, 132 Wn.2d at 126; *Collier v. City of Tacoma*, 121 Wn.2d 737, 747, 854 P.2d 1046 (1993).

#### ISSUES BARRED BY COLLATERAL ESTOPPEL

P21 Mr. Barbanti's first issue on appeal relates to his claim that the ordinances violate federal constitutional rights. The trial court found that he was collaterally estopped from raising the issue of the ordinances' constitutionality by the United States district court's decision in *World Wide*, 227 F. Supp. 2d 1143. Mr. Barbanti argues collateral estoppel is not applicable to his claims because he was not a party to the suit in federal court. We review the decision to apply collateral estoppel de novo. *Christensen v. Grant County Hosp. Dist. No. 1*, 152 Wn.2d 299, 305, 96 P.3d 957 (2004).

P22 As a threshold matter, Mr. Barbanti argues that the trial court erred in considering collateral estoppel because the city did not timely present the issue as a defense pursuant to *RCW 36.70C.080*. The statute, which sets out the procedure for the initial hearing on a land use petition, provides that "[t]he parties shall note all motions on jurisdictional and procedural issues for resolution at the initial hearing." *RCW 36.70C.080(2)*. However, the statute specifically provides further that "[t]he defenses of lack of standing, untimely filing or service of the petition, and failure to join persons needed for just adjudication are waived if not raised by timely motion noted to be heard at the initial hearing, unless the court allows discovery on such issues." *RCW 36.70C.080(3)*.

P23 Collateral estoppel is not one of the defenses subject to waiver for untimely notice by motion. Even if it were, the trial court had discretion to allow discovery on such issues after the initial hearing. *RCW 36.70C.080(3)*. Nothing in *RCW 36.70C.080* prevented the city from raising this issue in its response brief to the land use petition. Mr. Barbanti had ample opportunity--which he utilized--to address the issue of collateral estoppel before the trial court.

P24 The doctrine of collateral estoppel bars relitigation of an issue after the party estopped has had a full and fair opportunity to present its case. *Barr v. Day*, 124 Wn.2d 318, 324-25, 879 P.2d 912 (1994). The party seeking to apply the doctrine must show that

(1) the issue decided in the earlier proceeding was identical to the issue presented in the later proceeding; (2) the earlier proceeding ended in a judgment on the merits; (3) the party against whom collateral estoppel is asserted was a party to, or in privity with a party to, the earlier proceeding; and (4) application of collateral estoppel does not work an injustice on the party against whom it is applied.

*Christensen*, 152 Wn.2d at 307. In this case, the issues of the ordinances' constitutionality (including time, place, and manner restrictions, overbreadth, and due process) were resolved in *World Wide*, 368 F.3d 1186. Mr. Barbanti raised identical issues before the superior court. Additionally, the Ninth Circuit's decision was a judgment on the merits. Consequently, our focus is on the remaining tests: whether Mr. Barbanti was a party or in privity with a party to the federal litigation, and whether collateral estoppel works an injustice against him.

P25 Mr. Barbanti was not a party to the federal action. He participated, however, as an expert witness and testified regarding the leases. Generally, privity describes a "mutual or successive relationship to the same right or property." *Hackler v. Hackler*, 37 Wn. App. 791, 794, 683 P.2d 241 (1984). Its binding effect flows from the fact that the successor who acquires an interest in the right is affected by the adjudication in the hands of the former owner. *United States v. Deaconess Med. Ctr.*, 140 Wn.2d 104, 111, 994 P.2d 830 (2000) (quoting *Owens v. Kuro*, 56 Wn.2d 564, 568, 354 P.2d 696 (1960)).

P26 Mr. Barbanti is not a successor to WWV's interests in the adult stores. However, he meets the definition of a recognized exception to the privity requirement. This exception applies to certain interested witnesses in the prior adjudication: "One who was a witness in an action, fully acquainted with its character and object and interested in its results, is estopped by the judgment as fully as if he had been a party." *Hackler*, 37 Wn. App. at 795. If this interested witness could have intervened but chose not to for tactical reasons, he or she suffers no injustice from application of collateral estoppel. *Garcia v. Wilson*, 63 Wn. App. 516, 521-22, 820 P.2d 964 (1991); *Hackler*, 37 Wn. App. at 795.

P27 Mr. Barbanti testified in the federal action, was fully acquainted with its character and object, and was clearly interested in its results. Not only did he testify regarding the local real estate market and the leases with WWV, but he argued that the ordinances were unconstitutional. His decision not to intervene appears purely

tactical. Under these circumstances, he was properly estopped from raising the issues of *First Amendment* violations and due process in the amortization extension process.

P28 The trial court addressed Mr. Barbanti's remaining issues in its findings of fact and conclusions of law. He claims, however, that the trial court orally ruled that he was estopped from arguing all of his issues. It must be noted that a trial judge's oral decision is treated as an informal opinion that may be altered, modified, or completely abandoned in the formal findings, conclusions, and judgment. *Ferree v. Doric Co.*, 62 Wn.2d 561, 566-67, 383 P.2d 900 (1963). The trial court properly distinguished in its written findings and conclusions those issues precluded by application of collateral estoppel, and decided the remaining issues on their merit.

#### ADDITIONAL CONSTITUTIONAL CLAIMS

P29 Mr. Barbanti raises several constitutional issues that survive the doctrine of collateral estoppel. On review of a superior court's decision on an administrative land use appeal, we stand in the shoes of the superior court. *Young v. Pierce County*, 120 Wn. App. 175, 180-81, 84 P.3d 927 (2004). We review issues of law de novo and the hearing examiner's findings for substantial evidence. *Id.* at 181. The evidence is viewed in the light most favorable to the party who prevailed in the highest fact-finding forum. *Id.* The city prevailed in all prior fact-finding proceedings.

P30 Mr. Barbanti first contends the process used to grant extensions of the amortization period pursuant to former SMC 11.19.395 violated due process because the planning director exercised uncontrolled discretion in granting or denying the extension. Statutes or codes that allow public officials to exercise unbridled discretion to grant or deny permits to engage in constitutionally protected expression are invalid as prior restraints. *Lady J. Lingerie, Inc. v. City of Jacksonville*, 176 F.3d 1358, 1361-62 (11th Cir. 1999). Here, of course, the ordinances do not authorize the planning director to deny a permit to sell sexually explicit material. The discretion of the planning director applies solely to the decision to grant a grace period beyond the automatic 12-month grace period for compliance with the location requirements. Former SMC 11.19.395. Further, the code provides precise criteria for the planning director's decision: the applicant must clearly demonstrate "extreme economic hardship based upon an irreversible financial investment or commitment" made prior to the effective date of the ordinance. Former SMC 11.19.395. The process for obtaining an extension of the amortization period is sufficiently prescribed to prevent unbridled discretion by the planning director.<sup>4</sup> Mr. Barbanti is collaterally estopped from

arguing his additional prior restraint argument because it was resolved in the federal decisions.

4 Nothing in former SMC 11.19.395 prohibits the planning director from on site inspections or other attempts to garner information to assist in his or her decision.

P31 In his next assignment of error, Mr. Barbanti contends ordinance C-32778 is an unconstitutional bill of attainder, citing United States Constitution article I, section 10, and *article I, section 23* of the Washington Constitution. A bill of attainder is a legislative act that inflicts punishment on a named individual or on easily ascertained members of a group without the procedural safeguards of a trial. *State v. Manussier*, 129 Wn.2d 652, 665-66, 921 P.2d 473 (1996); *City of Richland v. Michel*, 89 Wn. App. 764, 773, 950 P.2d 10 (1998). Legislative acts are not bills of attainder, however, merely because they compel an individual or defined group to bear unpopular burdens. *Manussier*, 129 Wn.2d at 666.

P32 The ordinance here is a legislative act that applies to an easily ascertained group: adult stores. However, the element of punishment is absent. Municipalities have long had the power to require termination of non-conforming uses within a reasonable period of time. *Northend Cinema, Inc. v. City of Seattle*, 90 Wn.2d 709, 720, 585 P.2d 1153 (1978). Mr. Barbanti's argument that the ordinance deprived him of vested property rights without a trial is without merit. Rights are vested only if they are more than a mere expectation that an existing law will continue. *Harris v. Dep't of Labor & Indus.*, 120 Wn.2d 461, 475, 843 P.2d 1056 (1993) (quoting *Godfrey v. State*, 84 Wn.2d 959, 963, 530 P.2d 630 (1975)). Adult stores historically have been subject to restrictions and regulations. The leases reflect that fact by providing that the tenants may not do anything on the premises forbidden by ordinance. Further, ordinance C-32778 provides for a hearing to extend the termination period. The ordinance does not qualify as a bill of attainder.

P33 Mr. Barbanti also contends the ordinance violates the contract clauses of the federal and state constitutions. U.S. CONST. art. I, § 10; CONST. art. I, § 23. The clauses are given the same effect. *Margola Assocs. v. City of Seattle*, 121 Wn.2d 625, 653, 854 P.2d 23 (1993). Both prohibit legislative action that substantially impairs the obligation of contracts. *Id.* However, the prohibition against impairment of contracts is not absolute and is not read with literal exactness. *Wash. Fed'n of State Employees v. State*, 127 Wn.2d 544, 560, 901 P.2d 1028 (1995) (quoting *Tyrpak v. Daniels*, 124 Wn.2d 146, 151, 874 P.2d 1374 (1994)). We will find substantial impairment if the complaining party relied on the sup- planted part of the contract and on existing state law pertaining to the contract's enforcement. *Margola*, 121

Wn.2d at 653. Even so, if the complaining party entered into the contract with knowledge that the portion subject to impairment is already regulated, then he or she entered into the contract subject to further legislation. *Id.*

P34 In *Margola*, a new ordinance affecting the right of a landlord to evict a tenant was challenged as an unconstitutional impairment of contract. Noting that the right to evict a tenant was already regulated, and that case law has established the right of municipalities to enact additional defenses to eviction, *Margola* held that the parties entered into residential leases subject to further regulations on the right to evict. *Id.* Mr. Barbanti and WWV entered into their leases cognizant of the city's right to adopt ordinances affecting the sale of sexually explicit material--the leases specifically recognize that right. They entered into the leases subject to further regulation by ordinance. Consequently, ordinance C-32778 did not unconstitutionally impair the leases.

#### EXTENSION OF THE AMORTIZATION PERIOD

P35 Mr. Barbanti next challenges the administrative procedure employed in his petition for an extension of the amortization period. He contends he never got an open record hearing before the planning director or the hearing examiner. He also argues the hearing examiner's decision was not supported by the evidence.

P36 We review the interpretation of an ordinance de novo to best advance the city's legislative purpose. *Eugster v. City of Spokane*, 118 Wn. App. 383, 405, 76 P.3d 741 (2003), review denied, 151 Wn.2d 1027 (2004). Applying the same interpretative standards as are applied to statutes, we interpret the ordinance in its entirety, using the plain meaning of its language. *Id.* at 405-06. Ordinance C-32778 added a new section to the municipal code entitled "Adult Retail Use Establishments--Nonconforming Use." See ordinance C-32778, § 7; former SMC 11.19.395. That section provided the following procedure for the appeal of a planning director decision on extension of the amortization period:

The applicant may within the time for notice of appeal request a hearing by the hearing examiner to be held within ten (10) days of the request. The notice of appeal shall be accompanied by a memorandum or other writing setting out fully the grounds for said appeal and all arguments in support thereof. The Planning Director or his designee may submit a memorandum in response to the memorandum filed by the applicant on appeal. After reviewing the relevant information the hearing examiner shall decide to up-

hold or overrule the Planning Director's decision.

Former SMC 11.19.395. Based on this provision, the hearing examiner decided he was limited to conducting a closed record hearing. Mr. Barbanti contends other provisions in the city code required the hearing examiner to take additional evidence.

P37 SMC 11.02.0620(A) states that

[u]nless otherwise provided, the hearings under this chapter are formal public hearings. They are conducted as prescribed in the particular agency's rules so as to afford the affected parties opportunity to present factual evidence relevant to the determination of individual rights and responsibilities under existing law. . . . Hearings under this chapter are administrative proceedings intended to afford interested persons notice and an opportunity to be heard, to the extent appropriate to the subject matter, before a governmental agency makes an order regulating individual property rights or imposing a penalty in the exercise of the police power.

Under the plain terms of former SMC 11.19.395, the appeal afforded the applicant for an extension of the amortization period is based on the "memorandum or other writing setting out fully the grounds for said appeal and all arguments in support thereof" as well as the response memorandum of the planning director. The purpose of the appeal hearing is to decide whether to "uphold or overrule" the planning director's decision. Former SMC 11.19.395. A hearing under this provision does not determine whether or not a nonconforming use can continue; it merely establishes how long beyond the one-year amortization period a nonconforming use may continue. Accordingly, limiting the appeal to the record before the planning director provides the petitioner with an opportunity to be heard "to the extent appropriate to the subject matter." SMC 11.02.0620(A). Read in its entirety, Title 11 of the Spokane Municipal Code supports the hearing examiner's decision to limit the appeal to the record.

P38 Additionally, the hearing examiner's decision is supported by substantial evidence. As the hearing examiner found, Mr. Barbanti and WWV failed to demonstrate extreme economic hardship based on an irreversible financial commitment that precludes reasonable alternative uses of the nonconforming property. Mr. Bar-

banti's claimed adverse economic impact from the loss of the lucrative lease payments is not sufficient to constitute "extreme economic hardship." Former SMC 11.19.395; see also *Deja Vu-Everett-Federal Way, Inc. v. City of Federal Way*, 96 Wn. App. 255, 261, 979 P.2d 464 (1999) (an ordinance's adverse economic effects will not be unconstitutional unless it bars market entry). And the record shows sufficient reasonable alternative uses of the leased properties. The hearing examiner found that the properties were located in commercial and business zones with a number of permitted uses. He also noted that no evidence was submitted that showed the buildings were constructed in such a way that precluded other uses. Viewed in the light most favorable to the city, the record supports the hearing examiner's conclusion that extension of the amortization period was not necessary beyond what was granted by the planning director. *Young*, 120 Wn. App. at 181.

#### SEPA REQUIREMENTS

P39 Finally, Mr. Barbanti contends the city failed to properly assess the environmental impact of ordinance C-32778 by filing an environmental checklist that complies with the State Environmental Policy Act (SEPA), chapter 43.21C RCW. According to Mr. Barbanti, he requested a copy of the environmental checklist, but the city was unable to locate it during the pendency of this appeal. The record shows that the city prepared an environmental checklist and that a determination of nonsignificance was issued in November 2000.

P40 Even if the city has failed to respond to Mr. Barbanti's request for the environmental checklist, his challenge is without merit, because the record also contains no indication that he appealed the SEPA decision in a timely manner. SMC 11.10.170(8) provides that threshold determinations issued prior to a decision on a project action must be appealed within 14 days after the determination was made. Mr. Barbanti clearly did not meet this deadline and accordingly waived this issue. See *Lakeside Indus. v. Thurston County*, 119 Wn. App. 886, 901-02, 83 P.3d 433 (even though a SEPA decision cannot be appealed without appealing the underlying land use decision, the SEPA appeal must be filed within the time limits set by statute), *review denied*, 152 Wn.2d 1015 (2004).

#### MOTION TO STRIKE

P41 In its respondent's brief, the city moves to strike Mr. Barbanti's brief or any issues he did not raise with sufficient clarity to allow a response. The city contends Mr. Barbanti's brief makes general, broadly-worded assignments of error and gives no statement of the issues pertaining to the assignments of error, violating *RAP 10.3(a)(3)*. According to the city, the contradictory and logically inconsistent arguments in Mr. Barbanti's brief

made it impossible to craft a response. Mr. Barbanti responds that his brief contains assignments of error sufficient to put the parties on notice of the matters challenged on appeal. *Brock v. Tarrant*, 57 Wn. App. 562, 789 P.2d 112 (1990).

P42 Although Mr. Barbanti's brief raises numerous arguments that are sometimes difficult to follow, he sets out his issues in labeled sections, and supports his argu-

ments with citation to authority. We find no violation of *RAP 10.3(a)(3)* and deny the motion to strike.

P43 Affirmed.

Sweeney, A.C.J., and Brown, J., concur.

Reconsideration denied February 15, 2005.

Review denied at *155 Wn.2d 1014* (2005).

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**RHOD-A-ZALEA & 35TH, INC., Respondent, v. SNOHOMISH COUNTY, Petitioner.**

**No. 64926-0**

**SUPREME COURT OF WASHINGTON**

*136 Wn.2d 1; 959 P.2d 1024; 1998 Wash. LEXIS 562*

**July 23, 1998, Filed**

**SUMMARY:**

**Nature of Action:** A company that had the right to mine peat as a nonconforming use on property where peat mining was prohibited by the local zoning code sought judicial review of an administrative decision that it could not excavate or fill the property unless it obtained a grading permit as required by a later-enacted local building regulation.

**Superior Court:** The Superior Court for Snohomish County, No. 92-2-05522-6, Thomas J. Wynne, J., on April 18, 1995, entered a judgment in favor of the plaintiff, ruling that the plaintiff's vested right to continue its peat mining operations as a nonconforming use included the right to grade, excavate, and fill the property.

**Court of Appeals:** The court affirmed the judgment by an unpublished opinion noted at *85 Wn. App. 1083 (1997)*.

**Supreme Court:** Holding that the plaintiff's right to mine peat as a nonconforming use did not exempt the plaintiff from complying with the later-enacted regulation requiring a grading permit to excavate or fill the property, the court reverses the decision of the Court of Appeals and the judgment and grants judgment in favor of the defendant.

**COUNSEL:** James H. Krider, Prosecuting Attorney, and Carol Weibel, Deputy, for petitioner.

*Anderson, Hunter, Dewell, Baker & Collins*, by Bradford N. Cattle, for respondent.

*Norm Maleng, Prosecuting Attorney*, and *Cassandra Newell, Deputy*, on behalf of King County, amicus curiae.

*Brent D. Boger, John M. Groen*, and *Robin L. Rivett* on behalf of Pacific Legal Foundation, amicus curiae.

**JUDGES:** Authored by Barbara A. Madsen. Concurring: Barbara Durham, Charles Z. Smith, Richard P. Guy, Charles W. Johnson, Gerry L. Alexander, Philip A. Talmadge. Dissenting: Richard B. Sanders, James M. Dolliver.

**OPINION BY:** Barbara A. Madsen

**OPINION**

En Banc. Madsen, J. -- Snohomish County seeks to reinstate a decision of the Snohomish County Hearing Examiner (Examiner) in which he decided that, although Rhod-A-Zalea and 35th, Inc. (Rhod-A-Zalea) established a nonconforming use under the county's zoning code to peat mine on the subject property, it was separately subject to provisions of the county's building code requiring it to obtain a grading permit for its ongoing excavation and fill activities. The trial court reversed the Examiner, finding that because Rhod-A-Zalea estab-

lished a nonconforming use it was not required to obtain the grading permit. The Court of Appeals agreed. We reverse and reinstate the decision of the Snohomish County Hearing Examiner.

#### STATEMENT OF THE CASE

Rhod-A-Zalea owns property in Snohomish County on which it has conducted peat mining activities since at least 1961. In response to a complaint regarding excessive ponding on a neighboring property, the Snohomish County Department of Community Development (County) initiated an investigation resulting in issuance of a Notice and Order to Rhod-A-Zalea. The notice charged two code violations: (a) the excavation and processing of minerals without first obtaining a conditional use permit required under SNOHOMISH COUNTY CODE (SCC) 18.32.040 (the zoning code use matrix), and (b) grading without necessary permits and approvals required under SCC 17.04.280 of the county building code. The Notice and Order imposed a 30-day compliance period, after which civil penalties would be assessed. Rhod-A-Zalea timely filed an appeal and the compliance schedule was stayed. No penalties were imposed.

A business attempting to establish a use prohibited by the zoning ordinance must obtain a conditional use permit unless it is a valid nonconforming use. A conditional use permit allows otherwise prohibited activities based on certain restrictions. At the hearing before the Examiner, Rhod-A-Zalea presented evidence that the peat mining operation had been conducted on the subject property since a date prior to the enactment of a zoning ordinance which prohibited the use in that area. The Examiner found Rhod-A-Zalea had established that it was a valid nonconforming use and that a conditional use permit was not required. This ruling was not challenged on appeal.

The Examiner further ruled that Rhod-A-Zalea was subject to police power regulations including the building code provisions regulating grading contained in Title 17 SCC. Under SCC 17.04.280, no one may conduct any grading (excavating and filling) without first obtaining a grading permit, with certain exceptions. Among other things, a grading permit application must include grading plans, grading quantities, erosion and sedimentation controls, and a drainage plan. SCC 17.04.295. The code sets forth operating standards for grading activities, including slope, erosion control, ground preparation, fill material, drainage, benches and terraces, and access roads. SCC 17.04.310. Also, the code specifies steps which must be taken upon completion of activities. SCC 17.04.320. Finally, fill placed on land adjacent to or under any stream or water body must be contained so as to prevent damage to other lands. SCC 17.04.330. When determin-

ing that Rhod-A-Zalea was subject to the grading permit requirement the Examiner explained:

Such prohibition of any requirement of a general use permit does not lift the requirement of specific operational activity permits, such as the grading permit in question. Similarly, building construction in the continued operation of a nonconforming use requires a building permit; a change in the use of an existing building (without changing the overall nonconforming use, such as by relocating individual operational aspects within the nonconforming use to different structures, for example changing the location of explosives storage) would require a Certificate of Occupancy under the building code; and business license requirements are not lifted by virtue of the establishment of a nonconforming use under the zoning code.

Appellant's Br. at 190; Snohomish County's Return to Writ of Cert. at 190.

Rhod-A-Zalea appealed the Examiner's decision by writ of certiorari and the superior court ruled in favor of Rhod-A-Zalea. The court determined that Rhod-A-Zalea had a vested right to continue the peat mining operation, and since the operation by its nature involved grading, excavating, and filling, it was not subject to the County's grading regulations, which were enacted after the mining operation began. Snohomish County appealed the superior court's decision.

The Court of Appeals agreed with the superior court stating that requiring Rhod-A-Zalea to obtain a grading permit would allow the county to regulate "virtually every aspect of the peat mining operation . . . ." *Rhod-A-Zalea & 35th, Inc. v. Snohomish County*, No. 36658-1-I, slip op. at 4 (Wash. Ct. App. July 22, 1996) . The court found that a nonconforming use "carries with it the right to the exercise of those accessory uses which are considered customary and incidental to the principal use." *Id.* at 5. The court dismissed other authority, including a Supreme Court decision which held that nonconforming uses are subject to later-enacted police power regulation. The Court of Appeals stated that

[t]hese cases come from states which have adopted a majority position approving retroactive application of new zoning or development legislation. Washington State adopted and maintains a strong mi-

nority position in recognizing vested property rights and the protection of those rights against subsequently adopted development regulations. See *Mercer Enterprises, Inc. v. [City of] Bremerton*, 93 Wash. 2d 624, 627, 611 P.2d 1237 (1980) (retroactive effect of later zoning regulations not recognized in Washington). Here, the building code that the County seeks to apply was adopted in 1985 long after this mining operation.

*Id.*

Snohomish County's motion for reconsideration was denied and it then petitioned this court for review.

#### DISCUSSION

It is undisputed that Rhod-A-Zalea operates a valid nonconforming use. The issue before this court is whether Rhod-A-Zalea's nonconforming peat mining operation is subject to police power regulations subsequently enacted for the health, safety and welfare of the community. Specifically, we are asked to determine whether Rhod-A-Zalea must obtain a grading permit as required by SCC 17.04.280.

A nonconforming use is a use which lawfully existed prior to the enactment of a zoning ordinance, and which is maintained after the effective date of the ordinance, although it does not comply with the zoning restrictions applicable to the district in which it is situated. See 1 ROBERT M. ANDERSON, AMERICAN LAW OF ZONING § 6.01 (Kenneth H. Young ed., 4th ed. 1996). The right to continue a nonconforming use despite a zoning ordinance which prohibits such a use in the area is sometimes referred to as a "protected" or "vested" right. See *Van Sant v. City of Everett*, 69 Wash. App. 641, 649, 849 P.2d 1276 (1993); *Martin v. Beehan*, 689 S.W.2d 29, 31 (Ky. Ct. App. 1985); 4 ARDEN H. RATHKOPF, THE LAW OF ZONING AND PLANNING § 51A.01 (Edward H. Ziegler ed., 1991). This right, however, refers *only* to the right not to have the use *immediately terminated* in the face of a zoning ordinance which prohibits the use. See 1 ANDERSON, AMERICAN LAW OF ZONING § 6.01; RICHARD L. SETTLE, WASHINGTON LAND USE AND ENVIRONMENTAL LAW AND PRACTICE § 2.7(d) (1983).

"The ultimate purpose of zoning ordinances is to confine certain classes of buildings and uses to certain localities. The continued existence of those which are nonconforming is inconsistent with that object, and it is contemplated that

conditions should be reduced to conformity as completely and as speedily as possible with due regard to the special interests of those concerned, and where suppression is not feasible without working substantial injustice, that there shall be accomplished 'the greatest possible amelioration of the offending use which justice to that use permits.'"

*State ex rel. Miller v. Cain*, 40 Wash. 2d 216, 221, 242 P.2d 505 (1952).

The theory of the zoning ordinance is that the nonconforming use is detrimental to some of those public interests (health, safety, morals or welfare) which justify the invoking of the police power. *Id.* at 220. Although found to be detrimental to important public interests, nonconforming uses are allowed to continue based on the belief that it would be unfair and perhaps unconstitutional to require an immediate cessation of a nonconforming use. *Id.* at 218. A protected nonconforming status generally grants the right to continue the existing use but will not grant the right to significantly change, alter, extend, or enlarge the existing use. *Id.* Moreover, zoning ordinances may provide for termination of nonconforming uses by abandonment or reasonable amortization provisions. See SETTLE, WASHINGTON LAND USE § 2.7(d).

While some states' authority to terminate, alter, or extend nonconforming uses is expressly granted or withheld in zoning enabling acts, Washington's enabling acts are silent regarding the regulation of nonconforming uses. See *id.* Instead, the state Legislature has deferred to local governments to seek solutions to the nonconforming use problem according to local circumstances. In Washington, local governments are free to preserve, limit or terminate nonconforming uses subject only to the broad limits of applicable enabling acts and the constitution. See *id.*

Commentators agree that nonconforming uses limit the effectiveness of land-use-controls, imperil the success of community plans and injure property values. See 1 ANDERSON, AMERICAN LAW OF ZONING § 6.02; SETTLE, WASHINGTON LAND USE § 2.7(d); Daniel R. Mandelker, *Prolonging the Nonconforming Use: Judicial Restriction of the Power to Zone in Iowa*, 8 Drake L. Rev. 23 (1958); C. McKim Norton, *Elimination of Incompatible Uses and Structures*, 20 LAW & CONTEMP. PROBS. 305 (1955); James A. Young, *The Regulation and Removal of Nonconforming Uses*, 12 W. RESERVE L. REV. 681 (1961). For these reasons, nonconforming uses are uniformly disfavored and this court has repeatedly acknowledged the desirability of elimi-

nating such uses. See *Ackerley Communications, Inc. v. City of Seattle*, 92 Wash. 2d 905, 920, 602 P.2d 1177 (1979) ("It is a valid exercise of the City's police power to terminate certain land uses which it deems adverse to the public health and welfare within a reasonable amortization period."); *Keller v. City of Bellingham*, 92 Wash. 2d 726, 730-31, 600 P.2d 1276 (1979) ("the severity of limitations in phasing out [nonconforming uses] is within the discretion of the legislative body of the city"); *Bartz v. Board of Adjustment*, 80 Wash. 2d 209, 217, 492 P.2d 1374 (1972) ("phasing out a nonconforming use . . . is the desirable policy of zoning legislation" and is "within the discretion of the legislative body of the city or county."); *State v. Thomasson*, 61 Wash. 2d 425, 427, 378 P.2d 441 (1963) ("there are conditions under which a nonconforming use may be constitutionally terminated"); *Cain*, 40 Wash. 2d at 220 ("It was not and is not contemplated that preexisting nonconforming uses are to be perpetual.").

Thus, it is clear that local governments have the authority to preserve, regulate and even, within constitutional limitations, terminate nonconforming uses. Rhod-A-Zalea, however, argues that it is not subject to any police power regulations, including health and safety regulations, enacted after the existence of their facility. In particular, Rhod-A-Zalea argues that it is not subject to the grading permit requirement because their peat mining facility has been in operation since 1961 and the grading permit regulation was enacted in 1985.

Rhod-A-Zalea's argument is not supported by established land use jurisprudence and is contrary to Washington's desired policy of phasing out nonconforming uses. Moreover, it is counterintuitive to conclude that nonconforming uses which are contrary to public interests, such as health, safety and welfare, would then be exempt from subsequently enacted public health and safety regulations.

As one commentator has explained:

[a] lawful existing nonconforming use or structure may continue to be operated by virtue of the protection afforded by statutory or ordinance provisions or by constitutional vested rights doctrines. However, this protection is limited. Nonconforming uses generally are held to be subject to later police power regulations imposed by statute or local ordinances regulating the manner or operation of use. These regulatory restrictions often take the form of licensing or special permit requirements.

ARDEN H. RATHKOPF, THE LAW OF ZONING AND PLANNING § 51A.02 (citations omitted); see also 1 ANDERSON, AMERICAN LAW OF ZONING § 6.78 ("[a] nonconforming use is amenable to municipal ordinances which regulate similar uses, conforming or nonconforming.").

Courts have consistently recognized that nonconforming uses are subject to subsequently enacted reasonable police power regulations. See *Goldblatt v. Town of Hempstead*, 369 U.S. 590, 82 S. Ct. 987, 8 L. Ed. 2d 130 (1962); *Miller & Son Paving, Inc. v. Wrightstown Township*, 42 Pa. Commw. 458, 401 A.2d 392 (1979); *Watanabe v. City of Phoenix*, 140 Ariz. 575, 683 P.2d 1177 (Ct. App. 1984), *Dock Watch Hollow Quarry Pit, Inc. v. Township of Warren*, 142 N.J. Super. 103, 361 A.2d 12 (1976). Only where the regulation would immediately terminate the nonconforming use have courts found the regulation to be invalid as applied to the nonconforming use. See *Township of Orion v. Weber*, 83 Mich. App. 712, 269 N.W.2d 275 (1978); *Incorporated Village of Brookville v. Paulgene Realty Corp.*, 24 Misc. 2d 790, 200 N.Y.S.2d 126 (1960). These rulings are consistent with the principle that a nonconforming use has a "vested" or "protected" right to continue without being subject to immediate termination. Local governments, of course, can terminate nonconforming uses but they are constitutionally required to provide a reasonable amortization period. See SETTLE, WASHINGTON LAND USE § 2.7(d).

The leading case from the Supreme Court recognizing that a nonconforming use is subject to later enacted regulations is *Goldblatt*. *Goldblatt*, 369 U.S. 590, 82 S. Ct. 987, 8 L. Ed. 2d 130. In *Goldblatt*, a local jurisdiction adopted an ordinance regulating dredging and pit excavations. *Id.* at 592. The owners of a nonconforming sand and gravel mining operation challenged the ordinance which allegedly would have involved an outlay of one million dollars. *Town of Hempstead v. Goldblatt*, 9 N.Y.2d 101, 172 N.E.2d 562, 565, 211 N.Y.S.2d 185 (1961). The owners argued that the regulation was not a bona fide safety measure and was instead designed to force the discontinuation of the use. *Id.* In a unanimous opinion, the Supreme Court found the regulation was reasonably related to the health, safety and welfare of the community and upheld the application of the ordinance to the nonconforming use even though it conceded the "ordinance completely prohibits a beneficial use to which the property has previously been devoted." *Goldblatt*, 369 U.S. at 592. The Court explained that "every regulation necessarily speaks as a prohibition. If this ordinance is otherwise a valid exercise of the town's police powers, the fact that it deprives the property of its most beneficial use does not render it unconstitutional." *Id.*

Other courts have also recognized the authority of local government to regulate the operations of a valid nonconforming use. In *Watanabe v. City of Phoenix*, landowners challenged an ordinance requiring that any lot used for parking of three or more motor vehicles be paved for dust control. *Watanabe*, 140 Ariz. 575, 683 P.2d 1177. The landowners, who had graveled the lots for dust control, argued that the city could not enforce the ordinance because it affected their existing nonconforming use. *Id.* at 1179. The Arizona Court of Appeals found the ordinance was applicable to the nonconforming use and required the landowners to pave their lots. *Id.* at 1180.

The court reasoned that the principle underlying the protection of nonconforming uses was merely to avoid the injustice of requiring their immediate termination, and, thus, while nonconforming uses could not be prohibited under new zoning ordinances, they were still subject to reasonable regulations under the city's police power to protect the public health, safety and welfare. *Id.* The court also emphasized that the regulation would not affect their ability to continue the nonconforming use and that the appellants did not argue that the regulation would make their business economically unfeasible. *Id.*; see also *Miller & Son Paving, Inc.*, 42 Pa. Commw. 458, 401 A.2d 392 (the court found that a nonconforming quarry was subject to an ordinance requiring the construction of a fence around the property, noting that the ordinance was passed to safeguard the public and that it would not interfere with the owner's right to quarry the land).

Another similar case is *Dock Watch Hollow Quarry Pit, Inc. v. Township of Warren*, where the issue as framed by the court was "the extent to which a municipality may regulate by ordinance adopted pursuant to the police power a previously declared nonconforming use of land." *Dock Watch*, 361 A.2d at 15. The court found that although the quarry's status as a nonconforming use "may protect it from later zoning restrictions, its status as such does not render it immune from reasonable regulations pursuant to the police power in the interest of the public health, welfare and safety," including "those designed for the preservation of the environment and the protection of ecological values." *Id.* at 20 (citations omitted).

In particular, two regulations were upheld even though evidence was presented that the restrictions would reduce the quarry's potential excavating material by half, costing the quarry approximately \$ 26 million. *Id.* at 17. While the court recognized the impact to the quarry, it emphasized that "the welfare of the community should not be sacrificed for the purpose of permitting Dock Watch the most profitable use of that land." *Id.* at 25.

Thus, courts agree that nonconforming uses, although protected from zoning ordinances which immediately terminate their use, are subject to later-enacted regulations enacted for the health, safety and welfare of the community. See, e.g., *Mt. Bethel Humus Co. v. Department of Envil. Protection & Energy*, 273 N.J. Super. 421, 642 A.2d 415 (1994) (nonconforming use subject to reasonable zoning restrictions which do not require the immediate cessation of such use); *Renne v. Township of Waterford*, 73 Mich. App. 685, 252 N.W.2d 842 (1977) (nonconforming use required to abandon septic tanks in favor of a public sewer system); *State ex rel. Keener v. Serr*, 53 Ohio App. 2d 143, 372 N.E.2d 360 (1976) (nonconforming junkyard must comply with ordinance requiring list of material held in the yard); *Zoning Comm'n of Town of Groton v. Tarasevich*, 165 Conn. 86, 328 A.2d 682 (1973) (nonconforming use required to obtain a license); *Clouatre v. Town of St. Johnsbury Bd. of Zoning Adjustment*, 130 Vt. 189, 289 A.2d 673 (1972) (nonconforming use subject to later-enacted regulation to protect the public welfare); *City of Rutland v. Keiffer*, 124 Vt. 357, 205 A.2d 400 (1964) (nonconforming use subject to licensing requirements); *City of Chicago v. Miller*, 27 Ill. 2d 211, 188 N.E.2d 694 (1963) (nonconforming use subject to later-enacted ordinance requiring improvements to the defendant's property); *City of Akron v. Klein*, 171 Ohio St. 207, 168 N.E.2d 564 (1960) (nonconforming use subject to time restrictions); *Hantman v. Township of Randolph*, 58 N.J. Super. 127, 155 A.2d 554 (1959) (nonconforming use subject to regulations restricting the number of months during which a business can operate); *Lyman G. Realty Corp. v. Gillroy*, 5 A.D.2d 520, 172 N.Y.S.2d 907 (1958) (nonconforming use subject to ordinance requiring a permit for roof sign).

Courts, however, have been alert to the possibility that a municipal corporation may seek to terminate a nonconforming use by the imposition of regulations so onerous as to render further use impractical. A village, for example, amended its zoning ordinance in order to require a nonconforming private school to meet parking, heating, and construction standards which would have rendered continuance of the school economically impossible. *Paulgene Realty*, 200 N.Y.S.2d at 133. Because the imposition of the ordinance would have the effect of terminating the use, the court held the ordinance invalid. *Id.* at 133-35; see also *Weber*, 269 N.W.2d 275 (court declined to apply portion of zoning permit requirement to nonconforming use because it was found to be confiscatory in nature).

Rhod-A-Zalea does not argue, nor does the record indicate, that obtaining a grading permit would terminate Rhod-A-Zalea's nonconforming right to peat extraction. Although Rhod-A-Zalea and amicus Pacific Legal

Foundation offer arguments regarding potential economic impacts, these concern only the cost of applying for a permit. They note that the ordinance imposes a plan review and inspection fee of \$ 0.33 per cubic yard of earth movement and limits the overall fee to no more than \$ 23,000. SCC 17.02.110(1)(d), (f), (2), (3). Also, they state that these costs do not include the expense of conducting soil engineering and geology reports required by chapter 70 in the appendix of the UNIFORM BUILDING CODE.

Rhod-A-Zalea, however, makes no particularized argument concerning economic impact. For instance, Rhod-A-Zalea does not indicate how much earth on average it moves and, therefore, how much the fee would be, nor does it provide any estimates concerning how much the additional studies would cost. Moreover, there is no evidence concerning the relative value of the business and, therefore, no way to know how, for example, a maximum fee of \$ 23,000 would impact its ability to continue the peat mining operation. Although Rhod-A-Zalea indicates the permitting requirements would be costly, it never argues that the regulation would have the effect of terminating the existing peat mining operation. While the grading permit requirements may result in some economic impact to Rhod-A-Zalea's mining operations, this is true for all mining operations, conforming or nonconforming.

It is also clear that Snohomish County's grading permit is a reasonable exercise of its police powers. In 1985, Snohomish County amended its building code and required mining operations to obtain a grading permit. SCC 17.04.280. There is no dispute that Rhod-A-Zalea's excavation and fill activity constitutes "grading" as defined in SCC 17.04.290. The stated purpose of the grading and excavating regulations is "to safeguard life, limb, property and the public welfare by regulating grading on private property." UNIFORM BUILDING CODE, ch. 70, § 7001 (1976). Title 24 SCC, the county drainage code, which is made applicable to grading permits by operation of SCC 24.16.120(1)(e) also indicates its intent to:

promote sound practical and economical development policies and construction procedures which respect and preserve the county's watercourses; to minimize water quality degradation and control the sedimentation of creeks, streams, rivers, ponds, lakes and other water bodies; to protect the public from storm-water runoff originating on developing land; . . . to maintain and protect valuable groundwater resources; to minimize adverse effects of alterations in groundwater quantities,

locations and flow patterns; . . . and to decrease drainage-related damage to public and private property.

SCC 24.04.080.

With regard to Rhod-A-Zalea's property, the County's enforcement officer testified that the County's main concern was that Rhod-A-Zalea was not using acceptable fill material. The County's investigation of the site indicated that Rhod-A-Zalea was using a mixture of rock, wood, plastic, and other miscellaneous unidentifiable materials. The enforcement officer noted that the area is quite large, perhaps half the size of a football field. Another neighboring property owner testified that water is running onto his property because the backfill used by Rhod-A-Zalea does not absorb as much water as the peat does.

Although a particularized finding of harm is not required for the grading permit to be applicable, it does appear that there are problems concerning current operations on Rhod-A-Zalea's property which would be cured through the application of the grading permit requirements. The County's grading code controls what kinds of materials may be used as fill and excludes plastic, rock and "similar irreducible material." SCC 17.04.310(D). The ordinance also regulates drainage. SCC 24.16.120(1).

Thus, it is clear the ordinance is reasonable and serves to safeguard the health, safety and welfare of the community. Furthermore, it appears that Rhod-A-Zalea's property is being operated in derogation to these interests and that requiring a grading permit would solve these problems.

To accept Rhod-A-Zalea's arguments and find that this later enacted regulation does not apply to their peat operation because it is a nonconforming use would have serious repercussions for all local governments attempting to regulate property. Rhod-A-Zalea does not adequately speak to this concern. From their position it follows that a nonconforming restaurant would not be subject to later-enacted health codes or business license provisions; a nonconforming factory would be exempt from later-enacted noise or pollution regulations; a nonconforming animal kennel would be exempt from later-enacted licensing or health requirements; and a nonconforming adult entertainment facility would be exempt from later-enacted licensing or public health regulations. Such a result would not be in the public interest and is contrary to law. Also, to allow nonconforming uses to continue exempt from all subsequently enacted health and safety regulations would be devastating to the community's land use planning. Finally, such an exemption

would give those nonconforming uses an undeserved and substantial competitive advantage against their "conforming" competitors who are required to comply.

We find that the Court of Appeals and the superior court erred in their decisions that Rhod-A-Zalea is not subject to the later-enacted grading permit requirement. In reaching its decision, the Court of Appeals dismissed authority to the contrary, including the Supreme Court's decision in *Goldblatt*, stating that those cases involved jurisdictions that have not recognized "vested property rights." *Rhod-A-Zalea*, No. 36658-1-I, slip op. at 5. It is true that Washington is one of only a few states that has adopted the "vested rights doctrine." However, this doctrine has no bearing on the issue of whether a nonconforming use is subject to later-enacted health and safety regulations, as the doctrine applies only to permit applications.

Under Washington's "vested rights doctrine" developers who file a timely and complete building permit application obtain a vested right to have their application processed according to the zoning and building ordinances in effect at the time of the application. See *West Main Assocs. v. City of Bellevue*, 106 Wash. 2d 47, 51, 720 P.2d 782 (1986). The purpose of the "vested rights doctrine" is to determine or "fix" the rules that will govern land development with reasonable certainty. *Id.* This immunity from regulations adopted subsequent to the time of vesting pertains *only* to the right to establish the development. See SETTLE, WASHINGTON LAND USE § 2.7.

Thus, pursuant to the "vested rights doctrine" a permit is considered under the rules in effect at the time of the permit application. This situation is not before the court. Here, the court is concerned with whether a nonconforming use is exempt from later-enacted police power regulations.<sup>1</sup>

<sup>1</sup> Even if the "vested rights doctrine" were at issue in this case, it would not allow a business to operate exempt from later-enacted police power regulations. The "vested rights doctrine" protects *only* a permit applicant from regulations enacted after a permit application has been completed and filed and serves only to fix the rules that will govern a particular land use permit application. See *West Main Assocs. v. City of Bellevue*, 106 Wash. 2d 47, 51, 720 P.2d 782 (1986). Once the development is established, it must then comply with later-enacted police power regulations which are limited only by constitutional safeguards. See RICHARD L. SETTLE, WASHINGTON LAND USE AND ENVIRONMENTAL LAW AND PRACTICE § 2.7(c)(vi) (1983).

The Court of Appeals and the superior court also indicate that because grading is intrinsic to the nonconforming use it is not subject to the permitting requirements. *Rhod-A-Zalea*, No. 36658-1-I, slip op. at 2. This reasoning, however, leads to illogical results. For example, a nonconforming restaurant would not be subject to subsequently-enacted regulations governing the handling and cooking of meat to prevent E. coli contamination because handling and cooking food is "intrinsic" to the restaurant business.

Additionally, case law does not support such a distinction. In *Goldblatt*, the Court required a nonconforming sand and gravel operation to obtain a later enacted permit which regulated dredging and pit excavation. *Goldblatt*, 369 U.S. 590. Under our Court of Appeals' analysis these activities would be intrinsic to their operations.

The Court of Appeals and the superior court further imply that because Rhod-A-Zalea was not required to obtain a conditional use permit that it should not then be subject to the grading permit requirement. The Court of Appeals states that "Snohomish County cannot regulate indirectly what it has conceded is not regulable directly," *Rhod-A-Zalea*, No. 36658-1-I, slip op. at 2, and that the County was seeking to regulate "through the back door, by applying the building code, that which it cannot regulate through the front door by applying the zoning code . . . ." *Id.* at 4-5. However, 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, even if they regulate some of the same operations.

This same argument was made and rejected by the Supreme Court in *Goldblatt*. "A successful defense to the imposition of one regulation does not erect a constitutional barrier to all other regulation. The first suit was brought to enforce a zoning ordinance, while the present one is to enforce a safety ordinance." *Goldblatt*, 369 U.S. at 597. Similarly, the fact that Rhod-A-Zalea does not have to obtain a conditional use permit does not operate as a shield to the grading permit requirement.

Rhod-A-Zalea also argues that Snohomish County's zoning provision, which allows the continuance of nonconforming uses, precludes the application of the grading permit provision. It contends that because Snohomish County "has *not chosen* to disfavor nonconforming uses" that their use is not subject to later-enacted police power regulations. Answer to Pet. for Review at 9.

SCC 18.71.010 of the Snohomish County zoning code provides that any nonconforming use may continue "subject to the provisions of this chapter." Focusing on the words "subject to the provisions of this chapter,"

Rhod-A-Zalea argues that SCC 18.71.010 does not authorize the application of the grading permit requirement contained in SCC 17 to valid nonconforming uses.

Rhod-A-Zalea is incorrect. The zoning code specifically contains a provision which requires compliance with other applicable laws and regulations. SCC 18.13.020 provides:

Any development or activity regulated herein must also comply with all other requirements of county code and of all applicable laws and regulations administered and enforced by other jurisdictions.

Additionally SCC 18.13.010 states that "[t]he provisions of this title shall be held to be the minimum requirements necessary for the promotion of public health, safety, morals, and general welfare." Only where the provisions of the zoning code impose greater restrictions upon the use of buildings or land than is imposed by other ordinances will the provisions of that Chapter govern. SCC 18.13.010.

Thus, Title 18 of the zoning code directs nonconforming uses to comply with all other applicable regulations and laws.<sup>2</sup>

2 Rhod-A-Zalea also cites UNIFORM BUILDING CODE section 104 as prohibiting later-enacted police power regulations from applying to nonconforming uses. Section 104(c) provides:

Buildings in existence at the time of the adoption of this code may have their existing use or occupancy continued, if such use or occupancy was legal at the time of the adoption of this code, provided such continued use is not dangerous to life.

UNIFORM BUILDING CODE ch. 1, § 104(c), at 2 (1991). Section 104 of the Building Code, however, relates only to buildings. Since no buildings are at issue in this case, this provision is not relevant.

Finally, we must address the superior court's determination that the grading permit requirement violates Rhod-A-Zalea's substantive due process rights. The Court of Appeals specifically declined to address this issue.

We find the superior court's decision in this regard was premature as the issue is not ripe for review. A constitutional challenge to a land use regulation is ripe when the developer has received a final decision regarding how the regulation at issue will be applied to the particular land in question. See *Herrington v. County of Sonoma*, 857 F.2d 567 (9th Cir. 1988). Rhod-A-Zalea has not applied for the grading permit and, therefore, this court cannot determine if the ordinance as applied to Rhod-A-Zalea violates its substantive due process rights. See *Guimont v. City of Seattle*, 77 Wash. App. 74, 89, 896 P.2d 70 (1995) (the court could not hear the appellant's substantive due process claim regarding a relocation report requirement because the appellant had not submitted the required report).

Additionally, there has been no argument by Rhod-A-Zalea<sup>3</sup> nor any indication from the record that an attempt to apply for a grading permit would be futile. See *Herrington*, 857 F.2d at 569 ("[a] landowner may avoid the final decision requirement if attempts to comply with that requirement would be futile.").

3 Rhod-A-Zalea has not argued in its briefs to this court that the grading permit requirement violates its substantive due process rights.

#### CONCLUSION

In conclusion, we find that Rhod-A-Zalea's nonconforming use is subject to the grading permit requirement contained in SCC 17.04.280. Nonconforming uses have *only* a vested right not to have the use immediately terminated in the face of a zoning ordinance which prohibits the use. The case law overwhelmingly holds that nonconforming uses are subject to later-enacted reasonable police power regulations. Finding to the contrary would lead to an illogical result whereby disfavored uses would be allowed to continue unabated without having to comply with state and local health and safety regulations. In this case, the grading permit provision is a reasonable regulation enacted to protect the health and safety of the community and there is no indication that complying with the regulation would jeopardize Rhod-A-Zalea's existing peat mining operation. Rhod-A-Zalea, like its conforming counterparts, is subject to the grading permit requirement.

We reverse the superior court's and the Court of Appeals' decisions and reinstate the decision of the Hearing Examiner that Rhod-A-Zalea is subject to the grading permit requirement contained in SCC 17.04.280. Additionally, we reverse the superior court's determination that the grading permit violates Rhod-A-Zalea's substantive due process rights because the issue is not ripe for adjudication.

Durham, C.J., and Smith, Guy, Johnson, Alexander, and Talmadge, JJ., concur.

#### DISSENT BY: SANDERS

#### DISSENT

Sanders, J. (dissenting) -- The majority concedes Rhod-A-Zalea has a valid vested right to continue its peat mining operation as a nonconforming use. Majority at 6. But Snohomish County argues, and the majority concludes, the County seeks not to deny Rhod-A-Zalea its right to mine, but only to properly utilize its local police power prerogative to regulate the manner in which the mining is conducted to protect the public health and safety. Supplemental Br. of Snohomish County at 6; Majority at 19-20.

The Court of Appeals, however, disagreed, writing:

We cannot improve on the trial court's answer to this argument.

In this instance, application of the grading permit provisions of the county building code constitutes such pervasive regulation of the peat mining operation that it effectively abrogates Rhod-A-Zalea's vested property rights in maintaining the nonconforming use.

*Rhod-A-Zalea & 35th, Inc. v. Snohomish County*, No. 36658-1-I, slip op. at 6 (Wash. Ct. App. July 22, 1996) (quoting Trial Court's Amended Mem. Decision at 4), review granted, 131 Wash. 2d 1020, 937 P.2d 1102 (1997). Nor can I better the observation of the trial court and would, therefore, affirm the Court of Appeals.

Rhod-A-Zalea seeks neither to expand its nonconforming use nor restart its operation after a hiatus. Rather it seeks to mine peat, an activity that, by the definition adopted by the county, is "grading." See Clerk's Papers (CP) at 322 (Snohomish County Decision of the Deputy Hearing Examiner (*hereinafter* "Hearing Examiner") (Sept. 18, 1992)). In the words of the learned trial judge: "The *grading* taking place on the property is not merely an activity component of the mining process. It is the mining process." CP at 41 (Trial Court's Amended Mem. Decision at 5).

The County, as the lower courts discerned, seeks to "regulate through the back door, by applying the building code, that which it cannot regulate through the front door by applying the zoning code, due to the existence of a valid nonconforming use." *Rhod-A-Zalea & 35th, Inc. v. Snohomish County*, No. 36658-1-I, slip op. at 4-5 (quoting Trial Court's Amended Mem. Decision at 4-5).

The majority opines it would be "counterintuitive to conclude that nonconforming uses which are contrary to public interests, such as health, safety and welfare, would then be exempt from subsequently enacted public health and safety regulations," Majority at 9; noting "the theory of the zoning ordinance is that the nonconforming use is detrimental to some of those public interests (health, safety, morals or welfare) which justify the invoking of the police power," but not immediately. Majority at 7.

The majority seems to say that while the County has no right to immediately prohibit through the zoning (pursuant to the County's police power),<sup>4</sup> it may nevertheless presently invoke its police power to burden Rhod-A-Zalea's protected activity by simply denominating the regulation "grading" rather than zoning.

<sup>4</sup> See 1 ROBERT M. ANDERSON, AMERICAN LAW OF ZONING 3D § 7.03, at 690 (1986).

Such approach ignores the fundamental proposition that "[a] valid nonconforming use carries with it the right to the exercise of those accessory uses which are considered customary and incidental to the principal use." *Ferry v. City of Bellingham*, 41 Wash. App. 839, 844, 706 P.2d 1103, review denied, 104 Wash. 2d 1027 (1985). In *Ferry* the court found the addition of a crematory to a funeral home (which had a nonconforming use right in a residentially zoned area) *did not* constitute any enlargement of the nonconforming use and, thus, could not be precluded because of a zoning regulation. *Id.* Here, Rhod-A-Zalea seeks nothing more than to continue the very use of the land it has rightly enjoyed for over 30 years.

In an analogous case a rock mining and crushing business was protected in its continuation of its vested nonconforming use without submitting to a permitting requirement that encompassed potential termination of the nonconforming use. *Missouri Rock, Inc. v. Winholtz*, 614 S.W.2d 734, 739-40 (Mo. App. 1981). The authority to permit implies the power to prohibit.

As the Hearing Examiner noted, "the subject excavation and fill constitutes 'grading' as such term is defined" in the SNOHOMISH COUNTY CODE. CP at 332 (Hearing Examiner at 11, conclusion 20). The subject excavation and fill is, of course, the peat mining. See CP at 324 (Hearing Examiner at 3).

The majority drags the red herring of undercooked food across the table where it uses this analogy: "[Rhod-A-Zalea's] reasoning . . . leads to illogical results. For example, a nonconforming restaurant would not be subject to subsequently-enacted regulations governing the handling and cooking of meat to prevent E. coli contamination because handling and cooking food is 'intrinsic' to the restaurant business." Majority at 17.

By the majority's reasoning a valid nonconforming restaurant use could, under the guise of a police power regulation, be regulated out of existence, or at least burdened, through the prohibition of stoves, ovens, or normal restaurant fare. Cooking facilities to prepare food are intrinsic to a restaurant; however, service of contaminated food is not. This distinction is the heart of the case.

The distinction is of kind, not degree. Although a regulation banning black pepper might cost that restaurant only one customer a month, such regulation would be most problematic as it strikes at the heart of restaurantering, which is the preparation of wholesome, tasty food. One need not put the restaurant out of business to compromise its vested nonconforming use.

To support the County's asserted right to impose its will upon Rhod-A-Zalea, the majority relies upon the "purpose" of the Uniform Building Code's grading regulations: "'to safeguard life, limb, property and the public welfare by regulating grading on private property.'" Majority at 14 (quoting UNIFORM BUILDING CODE, ch. 70, § 7001 (1976)). However the UNIFORM BUILDING CODE specifically exempts mining from the grading permit requirements it sets out and, therefore, by its original terms does not purport to justify any regulation whatsoever of peat mining. UNIFORM BUILDING CODE 1-508, app. ch. 33, § 3306.2(6) (1994).<sup>5</sup> However Snohomish County, which adopted much of the UNIFORM BUILDING CODE verbatim (SNOHOMISH COUNTY CODE (SCC) 17.04.010-.330), deleted this exemption (SCC 17.04.280) while retaining the grading permit requirement. Thus the County retains the justification of the original code but imposes a contrary result.

5 The 1994 UNIFORM BUILDING CODE is substantially different from earlier versions in terms of organization, but the relevant content remains effectively the same. The exemption for mining, for example, was present in earlier versions as section 7003(6).

It is illogical on the one hand to rely upon the policy arguments of the UNIFORM BUILDING CODE to support the necessity of the County's regulation while, on the other hand, ignoring the objectives of its drafters. The very first sentence of the UNIFORM BUILDING CODE sets out exactly why its provisions should not apply here:

"The *Uniform Building Code* is dedicated to the development of better building construction and greater safety to the public by uniformity in building laws." UNIFORM BUILDING CODE, *Preface* at 1-iii (1994). The grading regulations of the UNIFORM BUILDING CODE are justified as reasonable requirements pertaining to *building*, not *mining*; hence, the exemption for mining makes perfect sense while the application of the code's grading permit requirements to mining makes no sense.

The majority, with near religious fervor, also invokes the spirit of *Goldblatt v. Town of Hempstead*, 369 U.S. 590, 82 S. Ct. 987, 8 L. Ed. 2d 130 (1962), to justify its conclusion that the County may apply its grading permit requirements to Rhod-A-Zalea. See Majority at 5, 8, 9, 10, 15, 16, 17. Yet, as one commentator has rightly noted, what *Goldblatt* really does is "underline the difficulty of determining whether a particular regulation, onerous to a user, is an unlawful attempt to destroy the use, or a legitimate means of regulating it." 1 ROBERT M. ANDERSON, AMERICAN LAW OF ZONING 3D § 6.78, at 680 (1986).<sup>6</sup> The majority's flaw is its failure to make the distinction between continuation of a nonconforming use which is exempt from police power regulation on the one hand, and imposition of the police power without exemption, subject only to the usual requirements of due process, on the other. If the latter be the rule, the nonconforming use doctrine is robbed of its reason for existence, and is no more than the usual due process test.

6 The Supreme Court has recently criticized *Goldblatt*, noting that the case assumed that when examining property regulations, the standards for takings challenges, due process challenges, and equal protection challenges are identical. "That assumption is inconsistent with the formulations of our later cases." *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 835 n.3, 107 S. Ct. 3141, 97 L. Ed. 2d 677 (1987).

The majority notes courts "have been alert to the possibility that a municipal corporation may seek to terminate a nonconforming use by the imposition of regulations so onerous as to render further use impractical." Majority at 12-13.<sup>7</sup> And the majority then complains of Rhod-A-Zalea's alleged failure to make any "particularized argument concerning economic impact." *Id.* at 13.<sup>8</sup> Apparently the majority invites the conclusion that it is the degree, not fact, of imposition which is determinative. I disagree.

7 See also 1 ANDERSON, *supra*, section 6.06 at 462 (Noting general disapproval of retroactive zoning regulations: "Thus, one court . . . remarked: 'Retroactive legislation is so offensive to

the Anglo-Saxon sense of justice that it is never favored." (quoting *Appeal of Sawdey*, 369 Pa. 19, 85 A.2d 28, 43 Mun. L. Rep. 193 (1951)).

8 Rhod-A-Zalea did, in fact, argue both the general impact and the specific impact that imposition of the grading permit would have on its operations. See generally Resp't's [Rhod-A-Zalea] Br. to the Court of Appeals Division One at 34-38 (discussing due process implications of County's action) and 38-40 (discussing specific damages to Rhod-A-Zalea from imposition of grading permit).

Placing this requirement of a "particularized argument" upon Rhod-A-Zalea is *exactly* what we should not do. If the regulation is consistent with the vested nonconforming use, it is valid no matter how prohibitory (assuming it satisfies due process); whereas, if it is *inconsistent* with the vested use, it is invalid no matter how slight its burden.

In any case the burden of proof properly rests on the County to establish that its regulation does not burden a vested nonconforming use but rather is a legitimate effort to protect from a recurring harm not incident to the very nature of the nonconforming use. See *State v. Thomasson*, 61 Wash. 2d 425, 428, 378 P.2d 441 (1963) (requiring facts that establish a nuisance or "circumstances showing a condition substantially detrimental to the public health, safety, morals or welfare" before a municipality may attempt to abolish existing nonconforming use without violating due process of law). See also *Orion Township v. Weber*, 83 Mich. App. 712, 269

*N.W.2d* 275, 278-79 (1978) (nonconforming vested sand and gravel business not subject to retroactive burdensome regulation).

While the majority requires a "particularized argument" from Rhod-A-Zalea, the majority adopts the opposite view when dealing with the County: "[A] particularized finding of harm is not required for the grading permit to be applicable . . . ." Majority at 15. Nonetheless, the majority, relying on the testimony of the County's enforcement officer and a neighboring property owner (testimony this court did not hear), concludes "it does appear that there are problems concerning current operations on Rhod-A-Zalea's property which would be cured through the application of the grading permit requirements." Majority at 15. The "problem" noted by the majority is the fact that Rhod-A-Zalea replaces peat with other materials. *Id.* This is the nub of the County's complaint. Rhod-A-Zalea is indeed replacing peat with fill, which is to say Rhod-A-Zalea is peat mining. Were it the County's prerogative to "permit" the mining, it would equally be its prerogative to withhold the permit. However the permit could be withheld only at the expense of the protected use.

The trial court and the Court of Appeals correctly discerned the distinction between that which is intrinsic to the privileged use and that which is not. However the majority overlooks it. I therefore dissent.

Dolliver, J., concurs with Sanders, J.

Reconsideration denied November 16, 1998.

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