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No. 70957-7-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

TOTAL OUTDOOR CORPORATION,

Appellant,

v.

CITY OF SEATTLE DEP'T OF PLANNING AND DEVELOPMENT,

Respondent.

APPELLANT'S REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases

Statutes

Other Authorities

I. INTRODUCTION

This case comes down to three sequential questions: *first*, what rights vested when the Sign became nonconforming on October 25, 1975; *second*, whether the property owner abandoned any of those rights; and *third*, whether the property owner has expanded any of the Sign's structural nonconformities that vested on October 25, 1975. As outlined below, that sequence is important.

As both parties point out, the Court reviews the record de novo. *HJS Dev., Inc. v. Pierce Cnty.*, 148 Wn.2d 451, 468, 61 P.3d 1141 (2003). On the one hand, it is Total Outdoor's burden to establish that substantial evidence does not support DPD's determination that the Sign's structural nonconformities have been expanded. *See Rosema v. City of Seattle*, 166 Wn. App. 293, 297, 269 P.3d 393 (2012).

But on the other hand, DPD's determination that the Sign's nonconforming size has expanded is dependent on first proving that the property owner abandoned the nonconforming size that originally vested with the Sign. As the party asserting abandonment, DPD carries the threshold burden of establishing that any of the nonconforming rights associated with the Sign (*e.g.*, size) have been abandoned. *City of Univ. Place v. McGuire*, 144 Wn.2d 640, 647, 30 P.3d 453 (2001). This is a "heavy burden" for DPD. *Van Sant v. City of Everett*, 69 Wn. App. 641,

648, 849 P.2d 1276 (1993). As explained below, because DPD cannot prevail on its abandonment theory, its expansion argument necessarily fails and the Court should reverse the final decisions that the City issued on December 14, 2012 (the "Land Use Decisions").

II. ARGUMENT

A. The Property Owner Did Not Abandon Any Vested Nonconforming Rights Associated With Size.

1. The Structural Nonconforming Size That Vested on October 25, 1975, Was 55 Feet High by 68.5 Feet Wide.

The threshold inquiry in this case is what rights vested when the Sign became nonconforming on October 25, 1975, the effective date of the ordinance that made rooftop signs nonconforming, Ordinance No. 104971. R 00125-36. The record shows that on October 25, 1975, the Sign featured copy for Burlington Northern Railway, which measured 55 feet high by 68.5 feet wide. R 00558; 00562. This fact is crucial because the dimensions of the Burlington Northern copy constitute the nonconforming size that vested with the Sign. Thus, in determining whether any subsequent copy represents an expansion of the vested nonconformity, the Burlington Northern copy is the *baseline size*.

On this question, DPD gets a basic, but legally significant fact wrong. DPD asserts that on October 25, 1975, the Sign featured much smaller copy for Alaska Airlines. *See* Resp. Br. at 21. Much of DPD's

case depends on this single assertion. But DPD is wrong. The Alaska Airlines copy did not go up until late November 1975. The only evidence in the record that directly speaks to when the Burlington Northern copy was replaced with the Alaska Airlines copy is a letter to the Seattle Department of Community Development dated November 30, 1975, and stamped "RECEIVED Dec 2 1975." R 00562. In that letter, a resident complains that the copy had changed "in the last week or so" from copy that "advertised for Burlington Northern," to a "flashing sign advertising Alaska Airlines." *Id.* The letter shows that the Burlington Northern copy remained on the Sign until late November 1975—after the ordinance changed.

Nevertheless, DPD insists that the Alaska Airlines copy went up earlier, relying on earlier permits to make its case. DPD focuses on a May 14, 1975, permit application for additional electrical circuits to illuminate the *proposed* Alaska Airlines copy. This is an example of DPD's flawed reasoning: simply because an electrical permit for proposed copy was filed in May 1975 does not mean the copy actually went up that month. On the contrary, as DPD points out, the property owner submitted a *second* permit application for the proposed Alaska Airlines copy on October 31, 1975—a week *after* the ordinance took effect—which added another section to the proposed copy (with separate dimensions listed), and asked

for more electrical circuits to illuminate the proposed copy. R 00014. This second permit shows that the May 1975 permit was simply the first of two permits for the proposed Alaska Airlines copy and corroborates that the Alaska Airlines copy did not go up until sometime after October 31, 1975. Thus, the permitting records confirm that the copy still featured Burlington Northern when the new ordinance took effect.[1]

This timeline is critical because DPD does not contest that the scope of the nonconforming size vested when the Sign became nonconforming on October 25, 1975. Because the 55 x 68.5 foot Burlington Northern copy was still on the sign then, those dimensions constitute the baseline for the nonconformity. Any determination of expansion must be made from this baseline. *See Miller v. City of Bainbridge Island*, 111 Wn. App. 152, 162, 43 P.3d 1250 (2002) ("The relevant date for determining the initial nonconforming use was . . . when the zoning code was enacted."); *Meridian Minerals Co. v. King Cnty.*, 61 Wn. App. 195, 207, 810 P.2d 31 (1991). As Total Outdoor points out, because the Apple copy is *smaller* than the Burlington Northern copy, the Sign's nonconformity has not expanded beyond the vested baseline size.

[1] The City's inspection history confirms this timeline. As DPD points out, the City did not inspect and approve the Alaska Airlines copy until January 20, 1976. *See* Resp. Br. at 5. If the Alaska Airlines copy had gone up in May 1975, the City likely would not have waited nine months to approve it; rather, as the resident's letter indicates, the copy went up in late November 1975, and the City gave its final approval after the holidays.

Contrary to this well-established principle, DPD's argument is dependent on an entirely different baseline: the Cameras West copy, which was installed six years after the Sign's nonconforming size had vested. DPD asserts that the Sign's nonconformity has expanded, not because the Apple copy is larger than the Burlington Northern copy, but because it is larger than the Cameras West copy. Therein lies the inherent flaw with DPD's Land Use Decisions: DPD cannot swap, through administrative fiat, the baseline that vested when the Sign became nonconforming (Burlington Northern) for a much smaller baseline (Cameras West), without first establishing that the property owner abandoned the vested baseline. This is the crucial dot that DPD fails to connect in its argument. As outlined in Total Outdoor's opening brief, and summarized again below, DPD cannot prevail under the two-part test that courts apply to determine whether a property owner has abandoned a nonconforming right, nor does DPD receive any deference for its ad hoc determination that the Cameras West copy is the baseline.

2. The Established Two-Part Test for Abandonment Applies to Nonconforming Structures.

Instead of trying to meet its burden under the two-part abandonment test, DPD asks the Court not to apply it in the first place. DPD argues that the test should apply only to nonconforming *uses*, not to

nonconforming *structures*. Resp. Br. at 26-27. At the outset, the Court should reject this argument because there is no authority for it. The Court should decline DPD's invitation to do what no other court has done: arbitrarily limit the abandonment test only to nonconforming uses. It is not surprising that DPD cites no authority for this argument because it is inconsistent with the position DPD took in its Land Use Decisions, at odds with the Seattle Municipal Code, unsupported by case law (which makes no such distinction), and not justified by the "public policy reasons" DPD advances.

First, DPD cannot avoid abandonment principles because its own Land Use Decisions were based explicitly on an abandonment theory. For instance, in its December 14, 2012, Land Use Decisions, the DPD writes that "the size of the structure and sign face that exist[ed] in 1975 was abandoned when the sign structure and face became smaller in 1981." R 00795. Even now, DPD relies on an abandonment theory by suggesting in its response brief that the property owner *abandoned* the size that vested in 1975 through "subsequent changes sought by permit." Resp. Br. at 20. Thus, DPD's argument concerning the Sign's size has been—and continues to be—dependent on an abandonment theory.

But DPD cannot have it both ways. DPD cannot rely on an abandonment theory while simultaneously rejecting the very framework

associated with that theory. If DPD is going to assert that the property owner abandoned the size that vested in 1975—whether through "subsequent changes sought by permit" or through some other means—DPD has to establish both (a) an intent to abandon, and (b) an overt act to abandon. *Rosema*, 166 Wn. App. at 299.

Second, DPD's attempt to create a firewall between nonconforming uses and nonconforming structures is not supported by either the code or the case law. Under the Seattle Municipal Code, a sign is a structure used to attracted attention to its subject matter. *See* SMC 23.84A.036 "S" (definition of "structure"); SMC 23.84A.040 "U" (definition of "use"). The code's definition of "sign" also contains substantial overlap between "use" and "structure." SMC 23.84A.036 "S" (defining "sign" as "any medium, including *structural and component parts*, that is *used or intended to be used* to attract attention to the subject matter for advertising, identification or informative purposes") (emphasis added).

The definitions for nonconforming uses and structures echo this overlap. For instance, the code defines a "nonconforming use" as "a use of land *or a structure* that was lawful when established and that does not now conform to the use regulations." SMC 23.84A.040 (emphasis added). Similarly, a "structure nonconforming to development standards" is

defined as "a structure . . . that met applicable development standards at the time it was built or established, but that does not now conform to one or more of the applicable development standards. Development standards include . . . height . . . lighting, maximum size of *nonresidential uses*, [and] street-level *use requirements*." SMC 23.84A.026 (emphasis added). Neither definition exists in a vacuum, and each incorporates elements of the other. Even the provision DPD is trying to enforce, SMC 23.42.106(D), acknowledges the overlap between nonconforming uses and structures. That provision provides that "[a] *structure* occupied by a *nonconforming nonresidential use* may be maintained, repaired, renovated or structurally altered but shall not be expanded or extended." *Id.* (emphasis added). Given their conceptual similarity, there is no reason to treat the terms differently.[2]

Nor does the case law support this distinction. For instance, in *Rosema v. City of Seattle*, this Court concluded that the nonconforming right to use a house as a duplex had not been abandoned. *Rosema*, 166

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[2] DPD's own analysis is inconsistent with its argument. For instance, in DPD's words, "a nonconforming use is a use that *was lawful when it was established*, but that fails to comply with the restrictions imposed by *later-enacted law*." Resp. Br. at 16 (emphasis added) (citations omitted). Likewise, according to DPD, a nonconforming structure "is a structure that *was lawful when it was constructed*, but is no longer consistent with *later-enacted development standards*." *Id.* at 17 (emphasis added) (citation omitted). Even under DPD's understanding, the concepts underlying each are identical: whether a property's nonconforming feature is categorized as a "use" or a "structure," the key is that the feature was lawful when it was first introduced, but is no longer consistent with "later-enacted" standards.

Wn. App. at 299. In reaching this conclusion, the court's reasoning focused on the *structure* itself, pointing out that the house's basement unit "maintain[ed] the structural capability" to operate as a separate unit. *Id.* Here, the Sign's structure—including its base, which has never changed—is just like the frame of the house in *Rosema*.

Third, the two-part abandonment test should apply to structural and use-based nonconformities because the same interests are at stake. Whether tied to a use or a structure, vested nonconformities are property rights that cannot be abrogated haphazardly. *Rhod-A-Zalea & 35th, Inc. v. Snohomish Cnty.*, 136 Wn.2d 1, 10, 959 P.2d 1024 (1998). Historically, the Sign has had nonconforming features attached to both its *use* (displaying advertising copy) and its *structure* (a steel framework of a certain size located on a roof). As Total Outdoor explained in its opening brief, DPD initially determined that the property owner had abandoned the nonconforming *use* associated with off-premises copy. R 00302. As with its present argument concerning size, DPD had reasoned that the Cameras West copy, which was an on-premises use, signaled an abandonment of the right to off-premises use. *Id.* Because the Cameras West copy did not utilize the nonconforming off-premises *use*, DPD initially concluded that the property owner must have abandoned that nonconforming feature. But later, after applying the two-part abandonment test, DPD acknowledged

that the property owner had not abandoned this nonconforming use (because there was no intent to abandon). R 00656.

Thus, DPD conceded that the right to off-premises advertising use was not abandoned, after applying the two-part abandonment test. But now DPD insists that the size associated with that use has been abandoned, but that the same two-part abandonment test should not apply. There is no reason why DPD could not apply the same two-part test to the Sign's nonconforming size, which is simply another nonconforming feature associated with the Sign. DPD never shows how the interests underlying structural nonconformities are so different from those underlying use-based nonconformities that a different test is required for each.[3]

DPD caricatures the notion of applying the abandonment test to a nonconforming structure by claiming that if "Total Outdoor's argument was carried out to its logical end, any nonconformity that existed at some point in the past could be resurrected and even expanded even if . . . a

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[3] While DPD's failure to cite any authority for its argument is reason enough to reject it, it is notable that in contrast to DPD's argument, other jurisdictions have applied abandonment principles to structural nonconformities on signs like the one here. *See, e.g.*, *69th Street Retail Mall LP v. Upper Darby Zoning Hearing Bd.*, No. 969 C.D.2011, 2012 WL 8681672, at *3 (Pa. Commw. Ct. Mar. 27, 2012) (applying abandonment principles to determine whether a property owner abandoned a nonconforming right associated with a sign face); *3M Nat'l Adver. Co. v. City of Tampa Code Enforcement Bd.*, 587 So.2d 640 (Fla. Dist. Ct. App. 1991) (same); *see also Pallco Enters., Inc. v. Beam*, 34 Cal. Rptr. 3d 490, 500 (Cal. Ct. App. 2005) (applying abandonment principles to nonconforming illumination on a sign).

structure [had become] more conforming [over time]." Resp. Br. at 22. This is a straw man. The point is not that *any* nonconformity that existed in the distant past could be "resurrected" with the flip of a switch. Rather, the point is that the code permits nonconformities to continue to exist so long as they are not abandoned (or expanded). SMC 23.42.100. If a nonconformity is abandoned, there is no way to resurrect it. Thus, the issue is not about resurrecting nonconformities, but rather whether a particular vested nonconformity was ever abandoned in the first place.

Finally, DPD advances two "practical" or "public policy" arguments about why it believes abandonment principles should not apply to nonconforming structures. Neither has merit. First, DPD claims that the "intent" prong of the abandonment test "is not needed in cases where a structure is nonconforming . . . . [because] one could simply look at a structure to determine if it was a nonconforming structure." Resp. Br. at 28. But simply *looking at* a structure with a nonconforming features does not show whether a property owner has *abandoned* any of those nonconforming features. If "looking" were enough, then DPD would have been correct to conclude that the nonconforming right to off-premises use had been abandoned because a street-level glance at the Cameras West copy would have showed that it was on-premises copy. But that observation, without more, would not reveal the property owner's *intent*.

The same goes for the size. By looking *at* the Cameras West copy, an observer can certainly conclude that it was *smaller* than the Burlington Northern copy; but that observation alone would not tell the observer whether the property owner ever *intended* to abandon the right to the larger size, which had vested with the Sign. Thus, DPD's conclusory statement that the intent prong "is not needed" for nonconforming structures is simply wrong.

The second reason DPD advances for why the abandonment test should not apply to nonconforming structures is even less persuasive. DPD asserts that because development standards often change, "the number of nonconforming structures would be significant," meaning DPD would face a "major administrative task" to keep track of them, "with very limited benefit for property owners." Resp. Br. at 29. This claim fails for two reasons. First, changing standards create nonconformities (both use-based and structural) all the time. Other than this conclusory statement, there is no evidence in the record that would suggest applying the two-part abandonment test to nonconforming structures presents an administrative burden that is any more onerous than applying it solely to nonconforming uses. Second, this case directly contradicts DPD's blanket assertion that property owners would see "very limited benefit" in having the abandonment test applied consistently to both uses and structures.

Applying the abandonment test to nonconforming structures ensures that property owners do not lose their nonconforming rights without first having evidence presented about intent and an overt act.

In sum, DPD's arbitrary and ad hoc decision to limit abandonment principles to nonconforming uses, and not to nonconforming structures, finds no support in the law.

3. DPD Has Not Established Intent or an Overt Act to Abandon the Sign's Vested Nonconforming Size.

As explained above, the baseline size for the Sign's nonconformity is the Burlington Northern copy, which measured 55 feet high by 68.5 feet wide. To determine whether the property owner abandoned that baseline the court applies the two-part abandonment test. As the party asserting abandonment, DPD bears the burden of proof to establish two factors: "'(a) an intention to abandon; and (b) an overt act, or failure to act, which carries the implication that the owner does not claim or retain any interest in the right to the nonconforming use.'" *Van Sant*, 69 Wn. App. at 648 (quoting 8A. E. McQuillin, *Municipal Corporations* §§ 25.191, 192 (3d ed. 1986)).

Perhaps realizing that it cannot carry its burden under this test, DPD does not even try. At no point in its brief does DPD ever assert that (a) the property owner *intended* to abandon the size associated with the

Burlington Northern dimensions, (b) there was any *overt act* of abandonment, or (c) respond to the evidence in the record showing that there was no abandonment (*e.g.*, the Schell Declaration or the letter from the Archdiocese of Seattle).

By contrast, Total Outdoor has pointed to specific evidence in the record to demonstrate that the size that vested on October 25, 1975, was never abandoned. Specifically, Total Outdoor pointed to a letter from the Archdiocese—the property owner at the time the Sign vested, and still today—explaining that it never intended or authorized anyone to abandon any of the nonconforming rights associated with the Sign. R 00587. This letter comes from the property owner and speaks directly to intent; it is the best evidence about whether the nonconformity was abandoned. Yet DPD does not mention it in its Land Use Decisions or in its response brief.

But DPD not only fails to establish intent, it also fails to establish an "overt act" to abandon the Sign's vested size. DPD implies that the 1981 permit to install the Cameras West copy was an overt act of abandonment. Specifically, DPD continues to assert that the sketch on the 1981 permit is proof that the Sign is four feet too tall—even though that sketch *omits* the 4 foot tall base that has been on the Sign for 90 years. *Compare* R 00025 (sketch from 1981 permit, omitting base) *with* R 00751 (picture of Sign sitting atop base, prior to any repairs and with Cameras

West copy still attached). Even assuming that the 1981 permit was more than an electrical permit, DPD's reliance on it would still be misplaced because the permit makes clear that the copy would not affect the "existing structure." R 00024; R 00028. Part of the "existing structure" is the base that the sketch omits, but which the copy never affected. Thus, to the extent the 1981 permit represents anything, it represents an express intent and overt act *not* to abandon the Sign's nonconforming size.

DPD does not respond to these arguments. Under the two-part abandonment test, the property owner did not abandon the vested nonconforming size of the sign, which was 55 feet tall by 68.5 feet wide.

B. The Sign's Nonconformity Has Not Expanded.

1. DPD Receives No Deference for Its Ad Hoc Determination That the Cameras West Copy Is the New Baseline.

According to DPD, the abandonment test does not matter because once the Cameras West copy went up, its dimensions became the new baseline for the vested nonconforming rights. DPD insists that the Cameras West sign became the new baseline by virtue of the fact that it was *less nonconforming* than before (because it was smaller). From there, DPD concludes that the "nonconforming structure cannot be different or larger" than the dimensions specified in the Cameras West permit from 1981. Resp. Br. at 20.

In essence, DPD has created a new ad hoc rule, administered for the first time in this case. DPD's ad hoc rule is based on the following syllogism: if a property owner does something to a nonconforming property that makes it appear to be closer to conformity (even if the change is only temporary, like changing copy on a sign), then the property owner *automatically abandons* the right to the full nonconformity. DPD cites no authority for this dramatic departure from the traditional abandonment framework. In effect, DPD's ad hoc rule allows it to point to a single permit (or in the case of a sign, a single change of copy) to diminish a vested right, freeing DPD from the evidentiary burdens it otherwise would bear when trying to establish abandonment. Notably, DPD does not limit this new ad hoc approach to nonconforming structures, and in fact would extend it to nonconforming uses. *See* Resp. Br. at 19-20 (quoting DPD's Land Use Decision at R 00791) ("'[O]nce a *use or structure* is established or constructed in conformity to the regulations of the Land Use Code, it cannot be changed in ways that are not conforming to the applicable regulations.'") (emphasis added)).

Under LUPA, a court may overturn a land use decision that is "an erroneous interpretation of the law, after allowing for such deference as is due the construction of a law by a local jurisdiction with expertise." RCW 36.70C.130(1)(b). That DPD's ad hoc approach is inconsistent with the

abandonment framework outlined above is enough to reverse DPD's Land Use Decisions as an erroneous interpretation of the law. In a recent case, the Washington Supreme Court declined to defer to Kittitas County's interpretation of its own zoning ordinance because the interpretation "was a by-product of the current litigation" and because the county never "attempted to show that there was any preexisting policy supporting the county's interpretation." *Ellensburg Cement Prods., Inc. v. Kittitas Cnty.*, No. 88165-1, -- Wn.2d --, 317 P.3d 1037, 1046 (Feb. 6, 2014). The record in that case showed that the county's interpretation "was entirely ad hoc." *Id.* The court reasoned as follows:

> [LUPA] does not require a court to show complete deference, but rather, "such deference as is due." [RCW 36.70C.130(1)(b).] Thus, deference is not always due—in fact, even a local entity's interpretation of an ambiguous local ordinance may be rejected. *See Sleasman v. City of Lacey*, 159 Wn.2d 639, 646, 151 P.3d 990 (2007). Instead, the interpreting local entity "bears the burden to show its interpretation was a matter of preexisting policy." *Id.* at 647 (citing *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 815, 828 P.2d 549 (1992)). *No deference is due a local entity's interpretation that "was not part of a pattern of past enforcement, but a by-product of current litigation." Id.* at 646.

Id. (emphasis added). Here, as in *Ellensburg Cement*, DPD's decision not to apply the abandonment test to nonconforming structures is precisely the type of ad hoc interpretation that receives no deference. The record shows that DPD's argument has evolved as this litigation progressed: first, DPD asserted that the nonconforming right to off-premises use had been abandoned; then DPD reversed course, after applying the abandonment test; and now DPD claims that the vested nonconforming size has been abandoned, while insisting that the test associated with that theory should not apply. The evolution of DPD's legal argument is not the product of a previously established interpretation of the code—it is a "by-product of the current litigation." In *Ellensburg Cement*, the court rejected Kittitas County's ad hoc approach and opted for an interpretation that was "more plausible." *Id.* Here, the more plausible and predictable interpretation would be to apply the abandonment test consistently, rather than adopt an ad hoc approach to nonconforming structures.[4]

2. The Sign Is No Bigger Than It Was When Its Nonconforming Size Vested In 1975, and Neither the Repairs Nor the Installation of the Apple Copy Expanded the Sign's Nonconformity.

If the Court agrees that the Burlington Northern copy is the correct baseline, and that the abandonment test applies to the Sign's structural

[4] *See also Chelan Cnty. v. Nykreim*, 146 Wn.2d 904, 933, 52 P.3d 1 (2002) (noting that the "Legislature's intent" in enacting LUPA was to "provide expedited appeal procedures in a consistent, predictable and timely manner").

nonconformities, then DPD's expansion argument fails because the Apple copy is *smaller than* the vested Burlington Northern copy.

Nevertheless, even setting aside DPD's failure to carry its burden under the abandonment framework, substantial evidence does not support DPD's determination that Total Outdoor's repairs increased the size of the Sign's structure. Under the "substantial evidence" standard, the Court asks whether a "fair-minded person" would agree with DPD's determination. *Bierman v. City of Spokane*, 90 Wn. App. 816, 821, 960 P.2d 434 (1998). DPD is right that this standard is deferential. But no amount of deference can justify DPD's conclusion.

DPD's response brief confirms that its determination that Total Outdoor's repairs increased the structure's size was not based on any evidence other than its own "eyeball impressions." For instance, DPD asserts that it "observed workers removing the existing sign and constructing a new sign structure on the roof." Resp. Br. at 10. Total Outdoor has never denied that its repairs were intensive—after all, the Sign has been on top of a roof and exposed to Seattle weather for almost 90 years. But those repairs *did not affect the base*—a fact that DPD never contests—which remained the same width (60 feet) and height (4 feet). In fact, DPD's determination that a "new roof sign" was constructed is based entirely on what its sign inspector observed *from the street*, rather than

from the rooftop. R 00270-83. DPD relies on a photo depicting a pile of old rusted metal that had been removed from the Sign to conclude that the Sign is now larger. *See* Resp. Br. at 11. But pointing at a pile of metal does not mean that the Sign is larger. Before concluding that Total Outdoor's repairs increased the Sign's size, DPD did not even compare those old pieces with the replacement parts, or even attempt to measure any of the old pieces.[5]

In contrast to DPD's approach, Total Outdoor provided objective evidence showing that the Sign structure's size has not increased. First, on several occasions Total Outdoor gave DPD schematics and photographs that showed its repairs were "piece for piece" replacements of the old rusted metal with new parts. *See* R 00744-65. These repair schematics—which DPD has never contested, much less analyzed—illustrate exactly what was done to the Sign's structure. And the photos Total Outdoor submitted corroborate these schematics. In particular, the photo labeled Exhibit F shows the Sign as the repairs were in progress. R 00761. The sections that had not been replaced (on the right) are the same height and width as the sections that had been repaired (on the left). *Id.* DPD's

[5] The photo of old metal pieces does not include the 60-foot long I-beam that constitutes the Sign structure's base, which shows that Total Outdoor's repairs did not affect that portion of the structure. *See* R 00276. This is important because the base—the existence of which DPD has effectively denied by relying on the 1981 permit—is 4 feet high, which explains why DPD mistakenly believes the repairs increased the structure's height by that same amount.

response to this photograph is to dismiss its significance. Resp. Br. at 35 n.147. But Exhibit F is objective evidence that the repairs did not expand the Sign's height or width. Simply asking the Court to ignore the evidence is not a persuasive or reasonable argument.

Second, DPD's claim that the Sign is 4-feet higher than the Cameras West sign is based entirely on the sketch attached to the 1981 electrical permit, which omitted the 90-year-old 4-foot base. DPD cannot ask the Court to ignore reality by concluding that a sketch is more accurate than historical photos showing that the base was there *before*, *during*, and *after* the Cameras West copy hung on the Sign, including photos taken mid-repair showing the height was the same. *See* R 00575 (before); R 00751 (during); R 00602 (after).

And third, the record shows that DPD ignored evidence that was not consistent with its "eyeball impressions." Specifically, Total Outdoor invited DPD to inspect the old metal pieces. R 00746. But DPD declined, and continues to claim that inspecting these pieces would be "difficult." *See* Resp. Br. at 34. DPD's refusal to inspect or measure these pieces illustrates the lack of rigor in DPD's fact finding. Simply saying that a comparison would be "difficult" is not enough because DPD could have tried; instead, it opted to ignore probative evidence. Taken together, it is no surprise that DPD conceded in its Land Use Decisions that Total

Outdoor "may or may not" be correct that the Sign has not increased in size.

The substantial evidence standard is deferential. But deference is not a rubber-stamp. *Ellensburg Cement*, 317 P.3d at 1046 (citing RCW 36.70C.130(1)(b) and noting that "deference is not always due"); *see also Kittitas Cnty. v. E. Wash. Growth Mgmt. Hearings Bd.*, 172 Wn.2d 144, 156, 256 P.3d 1193 (2011) (noting in a similar context that deference "'is neither unlimited nor does it approximate a rubber stamp'") (citation omitted). The Court can surely look at this record and, with a deferential eye, conclude that DPD's conclusion was erroneous because the only evidence that speaks to size confirms that Total Outdoor's repairs did not expand the Sign's nonconformity.

C. Even Under DPD's Analysis, the Permissible Wattage Is No Less Than 3,300 Watts.

In addition to its arguments concerning size, DPD raises a separate argument concerning the proper amount of wattage to illuminate the Sign.

DPD's lighting arguments miss the mark. DPD asserts that the vested wattage when the Sign became nonconforming was only 3,300 watts, based on the May 1975 permit for the proposed Alaska Airlines copy. Based on Total Outdoor's repairs, DPD asserts that Total Outdoor

must comply with today's wattage restrictions, which would limit the Sign to 816 watts. DPD is wrong for four reasons.

First, the code provision DPD cites does not apply. DPD cites (Resp. Br. at 37) Section 1132.1 of the Seattle Energy Code, which relates to "fenestration" requirements when there are changes to a building envelope. DPD may have intended to cite Section 1132.3, which requires compliance with current lighting standards when 20 percent or more of the fixtures are replaced "in a space enclosed by walls or ceiling-height partitions."[6] But that provision does not apply because the Sign is not enclosed by walls or ceiling-height partitions. By contrast, Total Outdoor cites the Code provision that *does* apply to the Sign, which mandates that "[w]hen nonconforming exterior lighting is replaced, new lights shall conform to the requirements of the light and glare standards of the respective zone." SMC 23.42.124. Here, because the Sign is in the "downtown zone," the "light and glare" standards require that the lighting be "shielded and directed away from adjacent uses." SMC 23.49.025(c). There are no requirements related to wattage, and DPD cannot manufacture them.

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[6] Attached to Total Outdoor's reply brief is an Appendix containing these provisions of the 2009 Seattle Energy Code, which the City says is relevant. *See* Resp. Br. at 40, n.171.

Second, setting aside DPD's reliance on inapplicable code provisions, DPD's own baseline wattage (3,300) is higher than what it asserts is the permissible amount today (816). As Total Outdoor emphasized in its opening brief, DPD's claim that the wattage must be reduced below that baseline could not be based on an abandonment theory because DPD has not attempted to prove any intent or overt act to abandon. In fact, even under DPD's "most recent permit" rule, the approved wattage would be much higher because the permit for the Alaska Airlines copy added 51,150 watts, *see* R 00021, and the Cameras West copy added another 8,250 watts on top of that, *see* R 00024.

Third, as Total Outdoor points out in its opening brief, the amount of wattage that was permitted in 1975 is secondary to the vested nonconforming right to the then-existing level of *brightness*. The 55 x 68.5 foot Burlington Northern copy was illuminated. *See* R 00016 (describing lights that "flickered"). The vested wattage is therefore *more than* 3,300 watts because the May 1975 permit added circuits to a Sign that was already illuminated. As an outdoor sign in Seattle, the ability to illuminate the Sign is an important component of its vested nonconforming use. The brightness versus wattage distinction is key because Total Outdoor does not need nearly that much wattage to achieve the same level of brightness, given developments in lighting technology.

As Total Outdoor emphasized in its opening brief, it would not need the 50,000 watts that the City had approved in the past; instead, Total Outdoor could achieve the same level of brightness even at DPD's baseline of 3,300 watts.

III. CONCLUSION

Total Outdoor respectfully requests that the Court grant its LUPA petition and reverse the City's Land Use Decisions.

DATED: April 9, 2014

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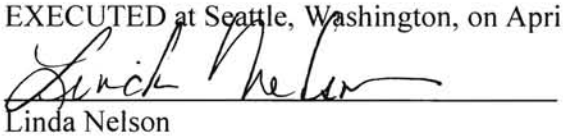
CERTIFICATE OF SERVICE

On April 9, 2014, I caused to be served upon the below named counsel of record, at the addresses stated below, via the method of service indicated, a true and correct copy of the foregoing document.

Elizabeth E. Anderson, WSBA No. 34036 Seattle City Attorney's Office 600 Fourth Avenue, 4th Floor Seattle, WA 98104 Attorney for Respondent/Defendant City of Seattle, Department of Planning and Development	____ Via hand delivery __X__ Via U.S. Mail, 1st Class, Postage Prepaid ____ Via Overnight Delivery ____ Via Facsimile ____ Via Email
William J. Crowley, WSBA No. 18499 Crowley Law Offices 1411 Fourth Avenue, Suite 1520 Seattle, WA 98101 Attorney for Corporation of the Catholic Archbishop of Seattle	____ Via hand delivery __X__ Via U.S. Mail, 1st Class, Postage Prepaid ____ Via Overnight Delivery ____ Via Facsimile ____ Via Email
Andrew J. Gabel, WSBA No. 39310 Lane Powell PC 1420 Fifth Avenue, Suite 4100 Seattle, WA 98101-2375 Attorney for Westlake Park Association	____ Via hand delivery __X__ Via U.S. Mail, 1st Class, Postage Prepaid ____ Via Overnight Delivery ____ Via Facsimile ____ Via Email

I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

EXECUTED at Seattle, Washington, on April 9, 2014.



Linda Nelson

APPENDIX

2009
Seattle Energy Code

(2009 Washington State Energy Code with Seattle Amendments including Reference Standards 29, 35, and 36)

Ordinance 123430

Effective November 23, 2010 for nonresidential spaces; effective January 1, 2011 for residential spaces

An electronic version of the Energy Code is located on the Seattle Department of Planning and Development website. This site contains the entire text of the Energy Code in effect in Seattle. This site also contains links to Client Assistance Memos, forms, and Directors Rules, as well as a search function for the Energy Code, residential energy tips and nonresidential energy tips, and links to other websites with energy efficiency information.

www.seattle.gov/dpd/energy

Seattle Department of Planning and Development

SECTION 1130 — APPLICATION TO EXISTING BUILDINGS

Additions, alterations or repairs, changes of occupancy or use, or historic buildings that do not comply with the requirements for new buildings shall comply with the requirements in Sections 1130 through 1134 as applicable.

EXCEPTION: The building official may approve designs of alterations or repairs which do not fully conform with all of the requirements of Sections 1130 through 1134 where in the opinion of the building official full compliance is physically impossible and/or economically impractical and the alteration or repair improves the energy efficiency of the building.

In no case shall energy code requirements be less than those requirements in effect at the time of the initial construction of the building.

1131 Additions to Existing Buildings: Additions to existing buildings or structures may be constructed without making the entire building or structure comply, provided that the new additions shall conform to the provisions of this Code.

EXCEPTION: New additions which do not fully comply with the requirements of this Code and which have a floor area which is less than 750 ft^2 may be approved provided that improvements are made to the existing building to compensate for any deficiencies in the new addition. Compliance shall be demonstrated by either systems analysis per Section 1141.4 or component performance calculations per Sections 1330 through 1334. The nonconforming addition and upgraded existing building shall have an energy budget or target UA and SHGC that are less than or equal to the unimproved existing building, with the addition designed to comply with this Code. These additions are also exempt from Section 1314.6.

1132 Alterations and Repairs: Alterations and repairs to buildings or portions thereof originally constructed subject to the requirements of this Code shall conform to the provisions of this Code without the use of the exception in Section 1130. Other alterations and repairs may be made to existing buildings and moved buildings without making the entire building comply with all of the requirements of this Code for new buildings, provided the following requirements are met:

1132.1 Building Envelope: Alterations or repairs shall comply with Chapter 13, including the nominal R-values and ((~~glazing~~))fenestration requirements in Table 13-1 or 13-2.

EXCEPTIONS: 1. Storm windows installed over existing glazing.

2. Glass replaced in existing sash and frame provided that glazing is of equal or lower U-factor.

3. For solar heat gain coefficient compliance, glazing with a solar heat gain coefficient equal to or lower than that of the other existing glazing.

4. Existing roof/ceiling, wall or floor cavities exposed during construction provided that these cavities are insulated to full depth with insulation having a minimum nominal value of R-3.0 per inch installed per Sections 1311 and 1313.

5. Existing walls and floors without framing cavities, provided that any new cavities added to existing walls and floors comply with Exception 4.

6. Existing roofs where the roof membrane is being replaced and

a. The roof sheathing or roof insulation is not exposed; or

b. If there is existing roof insulation below the deck.

7. Replacement of existing doors that separate conditioned space from the exterior shall not require the installation of a vestibule or revolving door, provided that the rough opening and the door size does not change, and provided that any existing vestibule or revolving door that separates a conditioned space from the exterior shall not be removed.

In no case shall the energy efficiency of the building be decreased.

1132.2 Mechanical Systems: Those parts of systems which are altered or replaced shall comply with Chapter 14 of this Code. Additions or alterations shall not be made to an existing mechanical system that will cause the existing mechanical system to become out of compliance.

All new systems in existing buildings, including packaged unitary equipment and packaged split systems, shall comply with Chapter 14.

Where mechanical cooling is added to a space that was not previously cooled, the mechanical cooling system shall comply with Sections 1413 and either 1423 or 1433.

EXCEPTIONS: These exceptions only apply to situations where mechanical cooling is added to a space that was not previously cooled.

1. Water-cooled refrigeration equipment provided with a water economizer meeting the requirements of Section 1413 need not comply with 1423 or 1433. This exception shall not be used for RS-29 analysis.

2. Alternate designs that are not in full compliance with this Code may be approved when the building official determines that existing building or occupancy constraints make full compliance impractical or where full compliance would be economically impractical.

Alterations to existing mechanical cooling systems shall not decrease economizer capacity unless the system complies with Section 1413 and either 1423 or 1433. In addition, for existing mechanical cooling systems that do not comply with Sections 1413 and either 1423 or 1433, including both the individual unit size limits and the total building capacity limits on units without economizer, other alterations shall comply with Table 11-1.

When space cooling equipment is replaced, controls shall be installed to provide for integrated operation with economizer in accordance with Section 1413.3.

Existing equipment currently in use may be relocated within the same floor or same tenant space if removed and reinstalled within the same permit.

In no case shall the energy efficiency of the building be decreased.

Seattle amendments do not apply to residential spaces, except that procedural requirements and informative notes in boxed text or brackets, and amendments to administrative and enforcement provisions, apply to all projects.

1132.3 Lighting and Motors: Where the use in a space changes from one use in Table 15-1 to another use in Table 15-1, the installed lighting wattage shall comply with Section 1521 or 1531.

Other tenant improvements, alterations or repairs where ((~~60~~)) 20 percent or more of the fixtures, or of the lamps plus ballasts alone, in a space enclosed by walls or ceiling-height partitions are ((~~new~~)) altered, added, or replaced shall comply with Sections 1531 and 1532. (Where this threshold is triggered, the areas of the affected spaces may be combined for lighting code compliance calculations.) Where less than ((~~60~~)) 20 percent of the fixtures in a space enclosed by walls or ceiling-height partitions are new, the installed lighting wattage shall be maintained or reduced. Where ((~~60~~)) 20 percent or more of the lighting fixtures in a suspended ceiling are new, and the existing insulation is on the suspended ceiling, the roof/ceiling assembly shall be insulated according to the provisions of Chapter 13, Section 1311.2.

Any new lighting control devices shall comply with the requirements of Section 1513. Where new wiring is being installed to serve added fixtures and/or fixtures are being relocated to a new circuit, controls shall comply with Sections 1513.1 through 1513.5 and, as applicable, 1513.8. In addition, office areas less than 300 ft^2 enclosed by walls or ceiling-height partitions, and all meeting and conference rooms, and all school classrooms, shall be equipped with occupancy sensors that comply with Section 1513.6 and 1513.8. Where a new lighting panel (or a moved lighting panel) with all new raceway and conductor wiring from the panel to the fixtures is being installed, controls shall also comply with the other requirements in Sections 1513.6 through 1513.8.

Where new walls or ceiling-height partitions are added to an existing space and create a new enclosed space, but the lighting fixtures are not being changed, other than being relocated, the new enclosed space shall have controls that comply with Sections 1513.1 through 1513.2, 1513.4, and 1513.6 through 1513.8.

Those motors which are altered or replaced shall comply with Section 1511.

In no case shall the energy efficiency of the building be decreased.

1133 Change of Occupancy or Use or Space Conditioning: Changes of occupancy or use or space conditioning shall comply with the following requirements:

a. Any unconditioned space that is altered to become semi-heated, cooled, or fully heated, or any semi-heated space that is altered to become cooled or fully heated space shall be required to be brought into full compliance with this Code.

b. Any nonresidential space which is converted to multi-family residential space shall be brought into full compliance with this Code. Existing warehouses and repair shops are considered unconditioned space unless they are indicated as conditioned space in DPD records or they were built after 1980 and they comply with the building envelope requirements for conditioned space in effect at the time of construction. (See the Seattle Mechanical Code for requirements for combustion appliances.)

c. Any multi-family residential space which is converted to nonresidential space shall be required to comply with all of the provisions of Sections 1130 through 1132 of this Code.

1134 Historic Buildings: The building official may modify the specific requirements of this Code for historic buildings and require in lieu thereof alternate requirements which will result in a reasonable degree of energy efficiency. This modification may be allowed for those buildings which have been specifically designated as historically significant by the state or local governing body, or listed in The National Register of Historic Places or which have been determined to be eligible for listing.

1135 Commissioning: Commissioning in compliance with Sections 1416 and 1513.8 shall be required for new systems or modified portions of systems((~~, with a heating capacity of 600,000 Btu/h or a cooling capacity of 40 tons or more~~)).

SECTION 1140 — ENFORCEMENT

The building official shall have the power to render interpretations of this Code and to adopt and enforce rules and supplemental regulations in order to clarify the application of its provisions. Such interpretations, rules and regulations shall be in conformance with the intent and purpose of this Code. Fees may be assessed for enforcement of this Code and shall be as set forth in the fee schedule adopted by the jurisdiction.

1141 Plans and Specifications

1141.1 General: If required by the building official, plans and specifications shall be submitted in support of an application for a building permit. If required by the building official, plans and specifications shall be stamped and authenticated by a registered design professional currently licensed in the state of Washington. All plans and specifications, together with supporting data, shall be submitted to the building official prior to issuance of a building permit.

1141.2 Details: The plans and specifications shall show in sufficient detail all pertinent data and features of the building and the equipment and systems as herein governed including, but not limited to: design criteria; exterior envelope component materials, U-factors of the envelope systems, R-values of insulating materials; U-factors and solar heat gain coefficients and visible transmittance of fenestration or shading coefficients of glazing; area weighted U-factor calculations; efficiency, economizer, size and type of apparatus and equipment; fan system horsepower; equipment and systems controls; lighting fixture schedule with wattages and controls

Seattle amendments do not apply to residential spaces, except that procedural requirements and informative notes in boxed text or brackets, and amendments to administrative and enforcement provisions, apply to all projects.