No. 91863-5

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

(Court of Appeals No. 70957-7-I)

TOTAL OUTDOOR CORPORATION,

Petitioner,

v.

CITY OF SEATTLE DEPARTMENT OF PLANNING AND DEVELOPMENT,

Respondent.

PETITION FOR REVIEW

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I. IDENTITY OF THE PETITIONER

Petitioner Total Outdoor Corporation ("Total Outdoor"), an outdoor advertising company, brings this Petition for Review.

II. THE DECISION BELOW

Total Outdoor petitions for review of the decision of the Court of Appeals, which was ordered published on May 7, 2015. A copy of the decision and the order granting motions to publish are attached to the Appendix.

III. ISSUES PRESENTED FOR REVIEW

1. Title 23 of the Seattle Municipal Code vests the Municipal Court with "exclusive[]" jurisdiction to review code enforcement actions. SMC 23.90.018(C).

   The first issue presented is whether the Court of Appeals exceeded its jurisdiction when it decided Total Outdoor's repair work on the Sign violated the Seattle Municipal Code, even though the Municipal Court, which has exclusive jurisdiction over this question, had yet to render a decision because the code enforcement action was (and still is) stayed.

2. The Seattle Municipal Code defines "use, nonconforming" to include both "a use of land ***or a structure*** that was lawful when established and that does not now conform to the use regulations of the zone in which it is located." SMC 23.84A.040 "U" (emphasis added). It is well-established in Washington that the common law doctrine of abandonment applies to a property owner's vested right in a nonconforming use.

   The second issue presented is whether the common law doctrine of abandonment applies to a property owner's vested rights in all types of nonconforming uses, including nonconforming structures.

IV. STATEMENT OF THE CASE

A. Factual Background

Since 1926, an illuminated rooftop sign (the "Sign") has sat atop the Centennial Building, on the corner of 4th Avenue and Stewart, in downtown Seattle. R 00003.[1] On October 24, 1975, a new City ordinance took effect, prohibiting advertising signs on rooftops in the downtown zone in which the Sign is located. R 00125. Thereafter, the Sign became a legal nonconforming use. The old copy was later changed to an illuminated advertisement for Alaska Airlines, R 00562, and the Sign structure's height was reduced "to make it conform[] to exist[ing] code." R 00012; *see also* R 00097 (ordinance SMC 102929(15)(b), limiting sign height to 30 feet above the nearest parapet). The advertising copy on the Sign changed again in 1981, this time to display a neon illuminated advertisement for Cameras West. The City issued a permit for additional electrical circuits necessary for the new copy, R 00024-25 ("1981 lighting permit"), which stated that the new copy would be "[m]ounted on [the] *existing structure* above [the] existing message center," R 00024 (emphasis added). Installing the Cameras West copy did not alter the Sign's structure, which remained the same size. R 000751.

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[1] Citations to the record are indicated by "R" followed by the page number, using the page numbers of the documentary record as transmitted to the Superior Court and Court of Appeals.

Cameras West ceased using the Sign in November 2011, and Total Outdoor installed new copy.[2] After replacing the copy, Total Outdoor noticed that the Sign needed significant repairs. After nearly 90 years of exposure, the structure above the base had corroded badly, and needed to be replaced to ensure the Sign's safety and stability. R 00602. The Sign's base did not need to be repaired. *Id.* The repairs consisted of "piece for piece" repairs of the upper lattice frame, and thus the size and height of the structure did not change. *See* R 00602-05 (schematics for the repair work). After the repairs were completed, Total Outdoor placed new copy on the Sign advertising an Apple product. R 00607; 00765.

More than a month after Total Outdoor's request for a sign registration number, the City issued a stop-work order asserting that Total Outdoor was required to obtain a permit for the repair work on the Sign. R 00284. The stop-work order was based on the City's belief that "[t]he new sign structure appeared to be larger, wider, and taller than the original sign structure and sign face." R 00313. Based on observations from street-level, and without taking any measurements, the City determined that the "existing roof sign structure has been completely demolished and a new

[2] On December 6, 2011 Total Outdoor formally requested that the City's Department of Planning and Development ("DPD") issue a sign registration number for the Sign, in a letter with back-up for Total Outdoor's position, R 00211-69, as required by SMC 23.55.014. The City did not respond until February 2012, when it denied the request. Z R 00300-03.

sign structure erected," *id.*, even though the repairs did not affect the base. Total Outdoor appealed this decision to Municipal Court, which has yet to rule because that appeal has been stayed.[3]

On October 26, 2012, the City issued its "Proposed Decisions" regarding the Sign. First, it conceded that the Sign was a valid nonconforming, off-premises advertising sign, and that the right to off-premises use had not been abandoned. R 00656. But even though it conceded that there was no intent to abandon the right to off-premises use, the City continued to insist that the 1981 lighting permit *did* establish an intent to abandon certain vested rights associated with size. The City reasoned that a hand-drawn sketch on the 1981 lighting permit depicting the proposed Cameras West copy "establish[ed] the current approved dimensions of both the sign support structure and the sign face size," R 00658. In other words, the City concluded that the Apple copy represented an invalid expansion of a nonconforming structure because it was larger than the Cameras West copy (even though the Apple copy was much smaller than the copy on the Sign when the nonconformity vested in 1975). R 00657-59. In its final decision on the Sign, issued in December

[3] The City also denied Total Outdoor's December 2011 request for a registration number, claiming that the 1981 lighting permit, which allowed the installation of additional electrical circuits to illuminate the Cameras West copy, had functioned to permanently change the Sign's use from an off-premises sign to an on-premises sign. R 00300-03. The City later reversed course and conceded that the right to continue off-premises advertising had not been abandoned. R 00656.

2012, the City asserted that "the size of the structure and sign face that exist[ed] in 1975 was abandoned when the sign structure and sign face became smaller in 1981." R 00795.[4]

B. Procedural History

Total Outdoor appealed the City's land use decisions to the Superior Court, under LUPA. CP 1. The appeals were consolidated under Cause No. 12-2-06852-6. CP 44. The Superior Court affirmed, CP 1012, and Total Outdoor timely appealed to the Court of Appeals, CP 1015.

Rather than address whether the City met its burden to show that the property owner had abandoned the vested rights associated with the Sign—*i.e.*, intent and an overt act in furtherance of that intent, *see Rosema v. Seattle*, 166 Wn. App. 293, 299, 269 P.3d 395 (2012)—the Court of Appeals reached the surprising conclusion that the doctrine of abandonment *did not even apply*.[5] Instead of applying the abandonment test, the Court of Appeals repeatedly asserted that Total Outdoor had violated Seattle's Municipal Code when it conducted the Sign repairs, and that Total Outdoor violated the City's stop-work order—even though

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[4] The City conceded that it "may or may not be true" that the Sign structure was the same size as it was prior to the repairs, but then went on to state that "the sign frame and sign face area . . . are *clearly different and larger* than the sign frame and sign face allowed by [the 1981 lighting permit]." R 00790-91 (emphasis added).

[5] The Court of Appeals also concluded that DPD's finding that Total Outdoor had increased the size of the nonconformity was supported by sufficient evidence (the hand-drawn sketch on the 1981 permit), but reversed DPD's determination regarding the maximum wattage permitted for the Sign. *See* Slip Op. at 1, 8-9, 19.

neither party to the appeal had relied on the stop work order because the litigation addressing that issue was pending (but stayed) before the Municipal Court. *See, e.g.*, Slip Op. at 13-14. Nevertheless, the Court of Appeals *adjudicated* the stayed Municipal Court action on its own. *Id.* ("[I]t is undisputed that Total Outdoor demolished the existing structures and erected new sign structures without obtaining required permits and continued its work in violation of a posted no-work order."). The Court of Appeals reasoned that "these building code violations are [not] excused by any common law doctrine." *Id.* After adjudicating an action not before it, the Court of Appeals concluded, almost in passing, that "nonconforming structures and nonconforming uses are analytically separate," and thus the abandonment test does not apply to a nonconforming structure. The Court of Appeals provided no analysis for this conclusion—even though it was the central issue presented. *Id.* at 14-15.

V. REASONS FOR GRANTING REVIEW

A. The Court of Appeals Lacked Jurisdiction to Enforce the Seattle Municipal Code

The Court of Appeals based its opinion on Total Outdoor's alleged failure to get required permits for the sign repairs and an alleged violation of a stop-work order. In its view, "the core issue" was "whether the owner of legal nonconforming structures who, *without required permits*, demolishes those structures and then erects new structures in *violation of a*

stop-work order may rebuild or 'repair' to dimensions larger than allowed in the most recent permit issued by the City." Slip Op. at 1 (emphasis added). But far from being the "core issue," whether Total Outdoor's repair work on the sign complied with Seattle's Municipal Code was not even a *peripheral* issue. Neither party presented the issue of whether Total Outdoor had the required permits or whether Total Outdoor's repairs violated a stop-work-order because the Court of Appeals lacked jurisdiction to weigh in on those disputes, which were currently stayed before the Municipal Court (pending the appeal). By repeatedly focusing on the alleged violation, the Court exceeded its jurisdiction. Correcting this significant jurisdictional error is a matter of "substantial public interest" warranting review by this Court. RAP 13.4(b)(4).[6]

LUPA "establish[ed] uniform, expedited appeal procedures" "for judicial review of land use decisions made by local jurisdictions." RCW 36.70C.010; *see also* RCW 36.70C.030 (LUPA provides "exclusive means of judicial review of land use decisions"). LUPA allows property owners and those aggrieved by a land use decision to petition for review of that decision in the superior court. RCW 36.70C.040; RCW 36.70C.060. But it *withholds* from superior court jurisdiction one important class of cases: actions to enforce local ordinances that are "required by law" to be

[6] Neither the Court of Appeals in its opinion, nor the City in its briefing, ever identified what "required" permits Total Outdoor supposedly failed to acquire.

brought "in a court of limited jurisdiction" may not be appealed to superior court under LUPA. RCW 36.70C.020(2)(c).

Enforcement actions under Seattle's Land Use Code fall into this class of cases over which the superior court lacks jurisdiction. The Land Use Code is in Title 23 of the Seattle Municipal Code ("SMC"), chapter 23.90 of which governs enforcement actions. *See generally* SMC 23.02.010, *et seq.*; SMC 23.90.002, *et seq.* Under chapter 23.90, the Director of DPD has the authority to issue stop-work orders on construction projects that appear to run afoul of the Land Use Code. SMC 23.90.004 (granting the Director "the duty . . . to enforce" the Land Use Code); 23.90.010 (granting the Director authority to issue stop-work orders). "Civil actions to enforce Title 23"—such as stop-work orders—"shall be brought *exclusively in Seattle Municipal Court* except as otherwise required by law or court rule." SMC 23.90.018(C) (emphasis added). The Municipal Court is a "[c]ourt[] of limited jurisdiction," as that term is used in LUPA. *See Post v. City of Tacoma*, 167 Wn.2d 300, 311, 217 P.3d 1179, 1185 (2009) ("Infraction jurisdiction resides exclusively in the district and municipal courts, *i.e.* courts of limited jurisdiction."); *see also* RCW 3.02.010; RCW 35.20.010. Thus, any enforcement action brought under Title 23 can be heard *only* in Municipal Court. *Post*, 167 Wn.2d at 310 ("LUPA does not authorize petitions on

the subject of ordinances that must be enforced 'in a court of limited jurisdiction.'").

It is true that DPD issued a stop-work order asserting that Total Outdoor was required to obtain a permit for its repair work on the Sign.[7] It is also true that Total Outdoor appealed this decision to Municipal Court, and that the appeal has been stayed.[8] In any enforcement action brought under Title 23, "the City has the burden of proving by a preponderance of the evidence that a violation exists or existed." SMC 23.90.010(C). But contrary to the Court of Appeals' reasoning, the mere "issuance of the notice of violation or of an order following a review by the Director *is not itself evidence that a violation exists*." *Id.* (emphasis added). Thus, whether Total Outdoor violated the Land Use Code remains a disputed issue in ongoing litigation before the only court with jurisdiction to hear it: the Seattle Municipal Court.

And yet, the Court of Appeals' opinion is based on its determination that Total Outdoor violated the Land Use Code by repairing the Sign in violation of the stop-work order. Slip Op. at 1. This violation was the "core issue" for the Court of Appeals. *Id.* Repeatedly, the Court

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[7] *See Total Outdoor Corp. v. City of Seattle, Dep't of Planning and Dev't*, No. 12-028 (King Cnty. Mun. Ct. filed Feb. 24, 2012) (complaint) (attached in the Appendix to this Petition).

[8] *See Total Outdoor Corp. v. City of Seattle, Dep't of Planning and Dev't*, No. 12-028 (King Cnty. Mun. Ct. Aug. 14, 2012) (order staying proceedings) (attached in the Appendix to this Petition).

of Appeals treated Total Outdoor's alleged violation as a settled issue rather than the subject of ongoing litigation. *See, e.g.*, *id.* at 1 ("the owner demolished and erected new structures *without seeking the required permits*") (emphasis added). The Court of Appeals' incorrect understanding even permeated its factual discussion of the case.[9]

Worse, this factual error affected the Court of Appeals' legal analysis, causing it to stray outside its jurisdiction. The Court of Appeals even asserted that the "appeal turn[ed] on [Total Outdoor's] changes to the nonconforming rooftop sign frame and sign structures *made without required permits*." *Id.* at 10 (emphasis added). It then applied its decision to pre-adjudicate the Municipal Court action to the actual issue presented in the appeal and concluded that because Total Outdoor "demolished the structures *without a permit*, the owner here had no right to rebuild the sign frame or sign face to pre-1981 dimensions." *Id.* at 12 (emphasis added). The Court of Appeals even used its pre-adjudication of the Municipal Court action to find that the doctrine of abandonment does not apply to nonconforming structures. *Id.* at 13-14 ("[I]t is undisputed that Total

[9] *See, e.g.*, Slip Op. at 5 ("*Without obtaining a permit*, Total Outdoor then violated the stop-work order . . . .") (emphasis added); *id.* at 6 ("[B]ecause the sign frame and sign face were removed and reconstructed *without first obtaining the necessary DPD permits*, the actual dimensions of the rooftop sign structure are not known with certainty.") (emphasis added); *id.* at 8 ("But the Department expressly noted the actual dimensions of the sign frame that was dismantled are not known with certainty because Total Outdoor dismantled the existing sign frame *without obtaining a permit*.") (emphasis added).

Outdoor demolished the existing structures and erected new sign structures *without obtaining required permits and continued its work in violation of a posted stop-work order.* Total Outdoor cites no authority that these building code violations are excused by any common law doctrine [of abandonment and/or vested rights].") (emphasis added).

But whether Total Outdoor had the right permits or violated a stop-work-order is a disputed issue pending before the Municipal Court.[10] The Court of Appeals lacked jurisdiction to resolve this dispute *sua sponte*. This significant jurisdictional defect laid the foundation for later legal errors that, as discussed below, drew the Court of Appeals into a conflict with one of its own prior decisions, as well as a decision of this Court, on a matter of substantial public interest. This Court should grant the Petition for Review in order to correct this fundamental, jurisdictional defect.

B. The Common Law Doctrine of Abandonment Applies to All Nonconforming Uses, Including Nonconforming Structures

Besides the significant jurisdictional error that the Court of Appeals committed, its decision on the merits also warrants review because it abrogated a deeply rooted common law principle in the absence of a legislative directive to do so and diverged from both its own and this Court's precedents. *See* RAP 13.4(b)(1), (2). The Petition presents an

[10] Total Outdoor's position is that no permit was required because the Seattle Building Code ("SBC") allows maintenance and repair to take place without a permit. *See* SBC § 3107.4.2.4.

important question of land use law in Washington that will impact how local jurisdictions evaluate property owners' vested rights in the continued existence of lawful nonconformities. *Id.* 13.4(b)(4); *see* City of Seattle's Motion to Publish, at 2 (filed April 6, 2015) ("Local jurisdictions process many permits involving nonconforming structures and it is important for municipalities and the public to understand what test applies.").

1. The Court of Appeals' conclusion finds no support in the text of the Seattle Municipal Code.

This Court's "[i]nterpretation of local ordinances is governed by the same rules of construction as state statutes." *HJS Dev't, Inc. v. Pierce Cnty. ex rel. Dep't of Planning and Land Servs.*, 148 Wn.2d 451, 471, 61 P.3d 1141, 1151 (2003) (citation omitted). "It is a well-established principle of statutory construction that [t]he common law . . . ought not to be deemed repealed, unless the language of a statute be clear and explicit for this purpose." *Potter v. Wash. State Patrol*, 165 Wn.2d 67, 77, 196 P.3d 691, 695-96 (2008) (internal quotation marks and citation omitted; second alteration in original). In the absence of language expressly stating such intent, this Court will interpret a law to "abrogate[] the common law [only] when the provisions of a . . . statute are so inconsistent with . . . the prior common law that both cannot simultaneously be in force." *Id.* at 77 (internal quotation marks and citation omitted; alteration in original).

A legal nonconforming use is a use of property that was lawful before the enactment of a zoning ordinance and is permitted to continue although it is no longer compliant. *Rhod-a-Zalea & 35th, Inc. v. Snohomish Cnty.*, 136 Wn.2d 1, 6, 959 P.2d 1024 (1988). It is thus a product of zoning regulations, which may refer to different types of nonconformities—*e.g.*, nonconforming uses, lots, or structures. McQuillin, *supra*, § 25:182. Even the Seattle Municipal Code references several types of nonconformities. *See* SMC 23.42.128 ("Parking nonconformity"); *id.* 23.42.130 ("Nonconforming solar collectors"). Once a legal nonconformity is established, the right to continue it is "a vested property right protected by the federal and state constitutions." 2 Patricia E. Salkin, AM. LAW OF ZONING § 12:11 (5th ed.). That right may be lost under the common law doctrine of abandonment, "but a party so claiming has a heavy burden of proof." *Rosema v. City of Seattle*, 166 Wn. App. 293, 299, 269 P.3d 393 (2012). All parties and the Court of Appeals agree that the vested nonconforming use of off-premises advertising relating to the Sign has not been abandoned.

The abandonment doctrine is well-established in Washington's common law. *See, e.g.*, *Van Sant v. City of Everett*, 69 Wn. App. 641, 648, 849 P.2d 1276, 1280 (1993). Nothing in the text of the SMC indicates an intent to treat use- and structure-based nonconformities

differently for purposes of this well-recognized common law rule. Indeed, far from exhibiting a clear intent to abrogate the common law abandonment doctrine as to nonconforming structures but not nonconforming uses (the conclusion that the Court of Appeals implicitly reached), the SMC repeatedly commingles the two. The SMC expressly defines "use, nonconforming" to include *both* "a use of land *or a structure* that was lawful when established and that does not now conform to the use regulations of the zone in which it is located." SMC 23.84A.040 "U" (emphasis added). Likewise, the code defines "Nonconforming to development standards" 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 "N" (emphasis added). This overlap between structure and use continues in how the SMC defines "sign." *See* SMC 23.84A.036 "S" ("'Sign' means 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). Even the provision the City is trying to enforce, SMC 23.42.106(D), acknowledges the overlap between nonconforming uses and structures.

Id. ("A *structure* occupied by a *nonconforming nonresidential use* may be maintained, repaired, renovated or structurally altered but shall not be expanded or extended.") (emphasis added).

None of these provisions express a "clear and explicit" statement of intent to abrogate a deeply rooted common law principle. *See Potter*, 165 Wn.2d at 77. Nor do they imply that abandonment should apply differently to nonconforming structures because many discuss the two in the same breath. The Court of Appeals thus erred when it held that the abandonment doctrine does not apply to nonconforming structures. Correcting this error, which the City acknowledged in its Motion to Publish will now affect scores of land use decisions across the state, is reason enough to grant this Petition for Review.

2. This Court should grant the Petition for Review to resolve the conflicts created by the Court of Appeals' decision.

The Court of Appeals' conclusion that the doctrine of abandonment does not apply to nonconforming structures is inconsistent both with a decision of this Court and with a prior decision of the Court of Appeals. *See* RAP 13.4(b)(1), (2). The Court should grant the Petition to resolve this conflict. *See id.* 13.4(b)(4).

In *Rhod-a-Zalea*, this Court made clear that "local governments are free to preserve, limit or terminate nonconforming uses subject only to the

broad limits of applicable enabling acts and the constitution." 136 Wn.2d at 7. The right to continue a lawful nonconformity in the face of a prohibitory zoning ordinance is a vested right, and "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 6. Whether tied to a use or a structure, vested nonconformities are property rights that cannot be taken away without implicating constitutional interests in property. *See id.* at 7; *State ex rel Miller v. Cain*, 40 Wn.2d 216, 218, 242 P.2d 505, 506 (1952). But the Court of Appeals brushed aside these vested rights.

The Petition for Review should also be granted because the Court of Appeals' decision "is in conflict with another decision of the Court of Appeals," RAP 13.4(b)(2), insofar as its holding cannot be reconciled with *Rosema v. Seattle*, 166 Wn. App. 293, 269 P.3d 393 (2012). Unlike the Court of Appeals here, *Rosema* correctly applied the two-part abandonment test to a structural nonconformity. The property in *Rosema* had once been permitted and used as a "duplex," but had been used as a single-family residence for almost 20 years. *Id.* at 296. The LUPA petitioner argued that the prior property owner had intended to abandon the nonconforming right to a duplex. *Id.* at 297-999. But the court rejected this argument because "intent alone is not enough." *Id.*

Rosema expressly applied the abandonment test to a structural nonconformity. The Court began its analysis by recognizing that "[a]bandonment or discontinuance is a question of fact, and ordinarily depends upon a concurrence of 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." *Id.* (internal quotation marks and footnote omitted). The *Rosema* court observed that despite having stated his intent to use the property *only* as a single-family home, the owner "*declined to make the structural changes required* by the City for recognition as a single-family home" or to seek an additional dwelling permit. *Id.* (emphasis added) Thus, there was no overt act to abandon, and so the court allowed the nonconforming structure to continue. *Id.* at 302.

The Court of Appeals here failed to reconcile its holding with *Rosema*.[11] It attempted to distinguish it on the basis that "[u]nlike the nonconforming duplex in *Rosema*, the owner here demolished the rooftop sign frame and sign face." Slip Op. at 16. But this statement tacitly

[11] The City itself cannot even reconcile the position it took in this case with the position it took in *Rosema*. In *Rosema*, the City supported allowing the house to continue as a lawful nonconforming duplex, arguing that the LUPA petitioner had failed to show that the nonconformity had been abandoned. *See Rosema v. Seattle*, No. 09-2-43984-4 SEA, City of Seattle's Response to Petitioner's Opening Br., at 12 (filed: Apr. 9, 2010) (attached in the Appendix to this Petition). But in this case, the City reversed course, asserting that the doctrine of abandonment *does not even apply* to nonconforming structures.

conceded that the two-part abandonment test should apply, because that is a distinguishing fact *only* if Total Outdoor's purported demolition of the sign was an overt act furthering an intent to abandon the vested rights in the sign's nonconformity—that is, whether Total Outdoor's conduct meets the test for abandonment. Total Outdoor maintains, as it did below, that the DPD cannot satisfy the abandonment test. But that involves a fact question, *Rosema*, 166 Wn. App. at 299, and it is one that the Court of Appeals refused to consider.

Not only did the Court of Appeals' conclusion effectively abrogate the common law doctrine of abandonment in the absence of legislative intent to do so, it also conflicts with *Rhod-a-Zalea* and *Rosema*. This Court should grant the Petition in order to resolve this split in authority.

3. The Court of Appeals' reasons for not applying the abandonment doctrine do not withstand scrutiny

The Court of Appeals wrote that "'[t]he distinction between a nonconforming use of land and a nonconforming building/structure is genuine and can be critical under ordinances or statutes that provide separate regulations for 'nonconforming structures.'" Slip Op. at 14 (quoting Salkin, *supra*, § 12:11). This statement betrays two errors in the Court's reasoning. First, as discussed above, nothing in the SMC suggests that use- and structure-based nonconformities should be treated differently

for abandonment purposes. Second, even if it were true that nonconforming uses and structures are analytically distinct for some purposes, neither logic nor authority suggest that these distinctions require that the doctrine of abandonment apply differently between them.

The analytical distinction between nonconforming uses and structures arises when courts need to evaluate what changes owners can make without forfeiting their vested right to continue the nonconformity. For example, a nonconforming use generally cannot be changed to a different nonconforming use if the change is "substantial." *See Salkin, supra*, § 12:18. Thus, the Alabama Supreme Court denied a request to change a bakery, operating as a lawful nonconforming use in a residential zone, to a wholesale and retail automobile parts business. *State ex rel. Dauphin Stor-All, Inc. v. City of Mobile*, 503 So.2d 1224, 1226 (Ala. 1987); *see also Hinves v. Comm'r of Pub. Works of Fall River*, 172 N.E.2d 232, 234 (Mass. 1961) (establishment of a catering business was not a permitted continuation of a lawful nonconforming grocery store). When the nonconformity is structural, on the other hand, courts generally allow owners to change from one permissible use to another, provided that "there is no change in the degree that the structure is noncomplying." *In re Appeal of Wesco, Inc.*, 904 A.2d 1145, 1154-55 (Vt. 2006). This is so because "a nonconforming lot and building have a vested right in

continued existence," and thus the owner's "right to use the lot and building for a permitted use is protected by law." *Petruzzi v. Zoning Bd. of Appeals of Town of Oxford*, 408 A.2d 243, 246 (Conn. 1979). Zoning laws "often provide for the continuance of nonconforming buildings and uses . . . until such time as the nonconforming building or use is legally abandoned." McQuillin, *supra*, § 25:181.[12]

Moreover, even if there were a clear distinction between uses and structures for purposes of abandonment principles under Washington law (which there is not), the legal nonconforming use at issue in this case (an advertising sign with changing copy) is so integrated into the structure, that the use and structure cannot be said to exist independently. Accordingly, the Court of Appeals' strained characterization of the Sign as a structure is factually flawed and the Sign should properly be treated as a nonconforming use subject to abandonment principles akin to the dwelling in *Rosema*. The Court of Appeals' conclusion was inconsistent with the Seattle Municipal Code and precedent from this Court and the Washington Court of Appeals, and its reasoning cannot withstand scrutiny. The Petition for Review should be granted.

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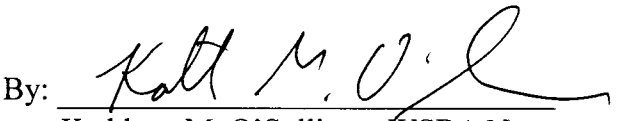
[12] For example, nonconforming structures can be legally abandoned by their voluntary demolition or destruction. McQuillin, *supra*, § 25:204; *see also Bornscheuer v. Corbett*, 175 N.Y.S.2d 913, 914 (N.Y. App. Div. 1958) (holding that tearing down a non-conforming fence and hedge "was an abandonment of all right to the maintenance thereof as against the ordinance provision"), *aff'd*, 157 N.E.2d 718 (N.Y. 1959).

DATED: June 5, 2015

PERKINS COIE LLP

By: 

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CONTENTS

MUNICIPAL CODE PROVISIONS

Seattle Municipal Code ("SMC") 23.02.010 - Title

This title shall be known as the Land Use Code of The City of Seattle.

SMC 23.42.106 - Expansion of nonconforming uses

. . .

D. A nonconforming nonresidential use shall not be expanded or extended, except as follows:

1. A structure occupied by a nonconforming nonresidential use may be maintained, repaired, renovated or structurally altered but shall not be expanded or extended except as otherwise required by law, as necessary to improve access for the elderly or disabled or as specifically permitted elsewhere in this Code.

2. In the Seattle Mixed zone, general manufacturing uses exceeding twenty-five thousand (25,000) square feet of gross floor area and heavy manufacturing uses may be expanded or extended by an amount of gross floor area not to exceed twenty (20) percent of the existing gross floor area of the use, provided that this exception may be applied only once to any individual business establishment.

SMC 23.42.128 - Parking nonconformity

A. Existing parking deficits of legally established uses shall be allowed to continue even if a change of use occurs. This provision shall not apply to a change of use to one defined as a heavy traffic generator.

B. Nonconforming parking areas or nonconforming parking within structures may be restriped according to the standards of Section 23.54.030, Parking space standards.

C. Parking areas that are nonconforming uses may be restriped according to the standards of Section 23.54.030, Parking space standards.

D. In commercial zones, surface parking areas that are nonconforming due to lack of required landscaping and are proposed to be expanded by ten (10) percent or more in number of parking spaces or in area are required to be screened and landscaped according to the standards of Section 23.47A.016, or in the Seattle Mixed (SM) zone, according to Section 23.48.024, to the extent feasible as determined by the Director.

E. See subsection C6 of Section 23.71.008 for requirements in the Northgate Overlay District regarding elimination of nonconformities with respect to

location, screening and landscaping of existing parking areas along major pedestrian streets.

SMC 23.42.130 - Nonconforming solar collectors

The installation of solar collectors that do not conform to development standards or that increase an existing nonconformity may be permitted as follows:

A. In single-family zones, pursuant to subsection B of Section 23.44.046;

B. In multifamily zones, pursuant to Section 23.45.582;

C. In NC zones or C zones, pursuant to subsection Section 23.47A.012 E.

SMC 23.55.014 - Off-premises signs

. . .

F. Registration of Advertising Signs. Each owner of an off-premises advertising sign shall file a written report with the Director on or before July 1st of each year. The report shall be submitted on a form supplied by the Director. The owner shall identify the number and location of advertising signs maintained by the owner in the City at any time during the previous year, and provide such other information as the Director deems necessary for the inspection of signs and for the administration and enforcement of this section. The owner shall pay a fee to the Director at the time the written report is filed. The amount of the fee is Forty Dollars ($40) for each sign face identified in the report. DPD shall assign a registration number to each sign face, and the sign number shall be displayed on the face of the billboard frame in figures which are a minimum of eight (8) inches tall. It is unlawful to maintain a sign face which has not been registered as required by this section. Notwithstanding any other provision of this code, any person who maintains an unregistered sign face is subject to an annual civil penalty of Five Thousand Dollars ($5,000) for each unregistered sign face.

SMC 23.84A.026 - "N"

. . .

"Nonconforming to development standards" means a structure, site or development 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, but are not limited to height, setbacks, lot coverage, lot area, number and location of parking spaces, open space, density, screening and landscaping, lighting, maximum size of nonresidential uses, maximum size of non-industrial use, view corridors, sidewalk width, amenity features, street-level use requirements, street facade requirements, and floor area ratios.

SMC 23.84A.036 - "S"

. . .

"Sign" means 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.

SMC 23.84A.040 - "U"

. . .

"Use, nonconforming" means a use of land or a structure that was lawful when established and that does not now conform to the use regulations of the zone in which it is located, or that has otherwise been established as nonconforming according to section 23.42.102.

SMC 23.90.002 - Violations

A. It is a violation of Title 23 for any person to initiate or maintain or cause to be initiated or maintained the use of any structure, land or property within The City of Seattle without first obtaining the permits or authorizations required for the use by Title 23.

B. It is a violation of Title 23 for any person to use, construct, locate, demolish or cause to be used, constructed, located, or demolished any structure, land or property within The City of Seattle in any manner that is not permitted by the terms of any permit or authorization issued pursuant to Title 23 or previous codes, provided that the terms or conditions are explicitly stated on the permit or the approved plans.

C. It is a violation of Title 23 to remove or deface any sign, notice, complaint or order required by or posted in accordance with Title 23.

D. It is a violation of Title 23 to misrepresent any material fact in any application, plans or other information submitted to obtain any land use authorization.

E. It is a violation of Title 23 for anyone to fail to comply with the requirements of Title 23.

SMC 23.90.010 - Stop Work Order

Whenever a continuing violation of this Code will materially impair the Director's ability to secure compliance with this Code, or when the continuing violation threatens the health or safety of the public, the Director may issue a Stop Work Order specifying the violation and prohibiting any work or other activity at the site. A failure to comply with a Stop Work Order shall constitute a violation of this Land Use Code.

SMC 23.90.018 - Civil enforcement proceedings and penalties

. . .

C. Civil actions to enforce Title 23 shall be brought exclusively in Seattle Municipal Court except as otherwise required by law or court rule. The Director shall request in writing that the City Attorney take enforcement action. The City Attorney shall, with the assistance of the Director, take appropriate action to enforce Title 23. In any civil action filed pursuant to this chapter, the City has the burden of proving by a preponderance of the evidence that a violation exists or existed. The issuance of the notice of violation or of an order following a review by the Director is not itself evidence that a violation exists.

Seattle Building Code ("SBC") § 3107.4.2

. . .

3. Permits are not required for the normal maintenance such as painting, repainting, cleaning and repairing, unless a structural or electrical change is made or a different business entity uses the sign;

RICHARD D. JOHNSON,
Court Administrator/Clerk

The Court of Appeals
of the
State of Washington
Seattle

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March 16, 2015

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CASE #: 70957-7-I
Total Outdoor, Corp., Appellant v.
City of Seattle Dept. of Planning and Development, Respondent

King County, Cause No. 12-2-06852-6.SEA

Counsel:

Enclosed is a copy of the opinion filed in the above-referenced appeal which states in part:

"Affirmed in part and reversed in part."

Counsel may file a motion for reconsideration within 20 days of filing this opinion pursuant to RAP 12.4(b). If counsel does not wish to file a motion for reconsideration but does wish to seek review by the Supreme Court, RAP 13.4(a) provides that if no motion for reconsideration is made, a petition for review must be filed in this court within 30 days. The Supreme Court has determined that a filing fee of $200 is required.

In accordance with RAP 14.4(a), a claim for costs by the prevailing party must be supported by a cost bill filed and served within ten days after the filing of this opinion, or claim for costs will be deemed waived.

Should counsel desire the opinion to be published by the Reporter of Decisions, a motion to publish should be served and filed within 20 days of the date of filing the opinion, as provided by RAP 12.3 (e).

Sincerely,

Richard D. Johnson
Court Administrator/Clerk

emp

Enclosure

c: The Honorable Theresa Doyle

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

TOTAL OUTDOOR CORPORATION, a Washington corporation, Appellant, v. CITY OF SEATTLE DEPARTMENT OF PLANNING AND DEVELOPMENT, a municipal corporation, Respondent.	)	No. 70957-7-I UNPUBLISHED OPINION FILED: March 16, 2015

VERELLEN, A.C.J. — Seattle ordinances recognize genuine distinctions between nonconforming uses and the nonconforming structures associated with such uses. The core issue presented in this Land Use Petition Act[1] (LUPA) appeal is whether the owner of legal nonconforming structures who, without required permits, demolishes those structures and then erects new structures in violation of a stop-work order may rebuild or "repair" to dimensions larger than allowed in the most recent permit issued by the City.

Sufficient evidence supports the Seattle Department of Planning and Development (Department) determination that dimensions of the demolished structures were not known with certainty because the owner demolished and erected new structures without seeking the required permits. The Department's resulting conclusion

[1] Ch. 36.70C RCW.

that a rooftop sign frame and sign face,[2] may not be rebuilt or repaired to dimensions larger than those approved in the most recent permit is not clearly erroneous. We are not persuaded that the common law doctrine of abandonment has any application in this setting.

Accordingly, we affirm the Department's determination that the height and width of the rooftop sign frame (including the sign base) and the square footage of the sign face are limited to the dimensions documented in the 1981 building permit and sketch. But we reverse the Department's determination that the sign's lighting is limited to 816 watts.

FACTS

In 1926, the city of Seattle (City) issued a permit to build an illuminated rooftop sign atop the Centennial Building in downtown Seattle. There have been several major developments since 1941.

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[2] For purposes of this opinion, "sign frame" refers to the steel lattice framework for mounting and supporting structural sign components. Unless otherwise indicated, the sign frame does not include the 4.5 foot tall metal base that connects the sign frame to the rooftop. "Sign face" refers to the structural sign components that are mounted on or attached to the sign frame. We also distinguish between the structural components constituting the sign face and the words or images of advertising copy that are displayed from time to time on the sign face.

This terminology is consistent with the ordinances defining "structure" as "anything constructed or erected on the ground or any improvement built up or composed of parts joined together in some definite manner and affixed to the ground, including fences, walls and signs," and "sign" as "any medium, including structural and component parts used . . . for advertising," Seattle Municipal Code 23.84A.036 (SMC); "sign structure" as "[a]ny structure which supports or is designed to support any sign," and "display surface" as "[t]he area of a sign structure used to display the advertising message," former Seattle Building Code (SBC) 3107.3 (2009); and "advertising copy" as synonymous with "[a] message on [a] sign[.]" Former SBC 3107.4.2(2).

Until 1975, a large 55 foot by 68.5 foot sign[3] advertised railroads.

In 1974, the City adopted an ordinance prohibiting all rooftop signs in the downtown zone from exceeding 30 feet above the roofline or nearest parapet.

In 1975, the sign face was changed to a 26 foot by 60 foot display surface,[4] used to advertise Alaska Airlines. The 1975 permit reflects the sign frame was lowered to 30 feet "to make it conforming to exist[ing] sign code."[5]

Effective October 24, 1975, the City prohibited any rooftop signs in the downtown zone.

In 1978, a 4 foot by 48 foot electronic message center was also attached to the sign frame. The 1978 permit refers to the "message center sign on existing structure."[6]

In 1981, the Department issued a permit authorizing the installation of new sign components in place of the 26 foot by 60 foot Alaska Airlines sign face. The 1981

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[3] The 1941 permit does not indicate whether the 55 foot by 68.5 foot dimensions refer to the size of the sign frame or the sign face, or whether the sign's height was measured above the roof parapet, the 4.5 foot tall metal base, or the roofline. See Clerk's Papers (CP) at 731 ("Records of the sign face size and shape are less clear, but [the Department] acknowledges that there is a 1941 permit . . . that gives dimensions of 55 feet by 68.5 feet. Height and width are not specified, and there is no specific information about the frame size or sign face size, but presumably the sign face height was 55 feet and width was 68.5 feet, based on photographs of the sign before and after 1941.").

[4] Like the 1941 permit, the May 1975 permit does not indicate whether the 26 feet by 60 feet refers to dimensions of the sign frame or the sign face. But the City acknowledged in its October 26, 2012 proposed decision that "these dimensions presumably refer to the sign face size." CP at 731.

[5] CP at 85. It is unclear from the permit and associated documents whether the sign frame was lowered to 30 feet as measured from the roof parapet, the top of the 4 to 5 foot tall metal base, or the roofline.

[6] CP at 94. The parties dispute whether the 1975 changes had been completed prior to October 24, 1975. But the outcome of this appeal would be the same regardless of whether the 55 foot by 68.5 foot sign face and larger sign frame remained in place as of October 24, 1975.

permit is the most recent permit for the rooftop sign. That permit allowed a 5 foot by 54.5 foot Cameras West name and logo to be mounted at the top of the sign frame, together with a 3.5 foot by 48 foot electronic message center[7] mounted several feet below the name and logo. Both were mounted "on [the] existing [sign frame] structure."[8] A sketch attached to the 1981 permit depicts the top of the sign frame and the top of the Cameras West name and logo portion of the sign face both at 30 feet above the "roofline."[9]

In November 2011, Total Outdoor, the current agent of the owner,[10] removed the Cameras West components and installed a new solid rectangular display surface containing a holiday greeting.[11] In December 2011, Total Outdoor requested a sign registration number for the legal nonconforming rooftop advertising sign.[12] While waiting for the Department to respond to the request, Total Outdoor removed and replaced the sign frame on the existing 4.5 foot tall metal base without obtaining a permit. A department inspector observed workers removing the existing sign frame and sign face and constructing a new sign frame. On January 31, 2012, the Department

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[7] Although the 1978 permit authorized the erection of a 4 foot by 48 foot message center sign, the 1981 permit depicts the dimensions of the existing message center sign as 3.5 feet by 48 feet. Compare CP at 94, with CP at 101.

[8] CP at 311.

[9] CP at 100-01. The sign face's total area as measured by the 1981 permit was 440.5 square feet, which included both the 54.5 foot by 5 foot Cameras West name and logo and the 3.5 foot by 48 foot electronic message center.

[10] Our references to "owner" include the owner's agents.

[11] Although no dimensions are available, a photo reveals that the new display surface covered most of the width and more than half the height of the sign frame. CP at 34, 282.

[12] See SMC 23.55.014(F).

issued a stop-work order because the existing "sign [frame] structure . . . ha[d] been completely demolished and a new sign [frame] structure erected" without a permit.[13] Without obtaining a permit, Total Outdoor then violated the stop-work order by installing a new solid, rectangular display surface 20 feet high by 60 feet wide on the new sign frame displaying an ad for a computer tablet. An inspector ultimately measured the top of the sign frame, including the 4.5 foot base, as 34 feet above the roofline. The new sign frame was 56.5 feet wide, and the top of the new 20 foot by 60 foot display surface was even with the top of the sign frame at 34 feet above the roofline, including the 4.5 foot base. In February 2012, the Department denied Total Outdoor's request to withdraw the stop-work order, noting that Total Outdoor violated the building code by failing to obtain required permits and by ignoring the posted stop-work order.

In response to Total Outdoor's request for a sign registration number, the Department confirmed that the owner had a valid nonconforming use to engage in off-premises rooftop advertising.

In response to correction notices issued by the Department, Total Outdoor asserted that it had merely made a piece-for-piece replacement of rusted steel members making up the sign frame lattice and that the new frame was exactly the same size as before demolition. The Department acknowledged that it "may or may not be true" that the current sign frame and sign face are the same size as immediately before Total Outdoor's recent work, but because the sign frame and sign face were "removed and reconstructed without first obtaining the necessary DPD permits, the actual

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[13] CP at 386; see also former SBC 3107.4.1 ("A permit issued by the building official is required before any sign is erected, re-erected, constructed, painted, posted, applied, altered, structurally revised, or repaired, except as provided in this chapter.").

dimensions of the rooftop sign structure are not known with certainty."[14] The Department concluded "it is most reasonable to expect that the dimensions matched the most recent permit issued [in 1981]."[15]

Although "a nonconforming structure may be maintained, and a continuous nonconforming use may be recognized," the Department determined that the code does not "provide a means to simply tear down and replace a roof[top] sign with a new and larger structure."[16] To determine whether the sign frame's height and width had been expanded, the Department principally relied on the 1981 sketch. Because the work performed under the 1981 permit was approved in a final inspection, the Department reasoned that the work must have complied with the dimensions set out in the 1981 sketch. Therefore, the rooftop sign "is limited to the sign frame size, overall height, and sign face size" as depicted by the sketch attached to the 1981 permit—a sign frame 30 feet high above the roofline including the 4.5 foot tall sign base, by 54.5 feet wide, and a sign face of 440.5 square feet.[17] The Department also concluded that the rooftop sign is limited to 816 watts for illumination.

Total Outdoor appealed the Department's final decisions to the superior court. The superior court denied Total Outdoor's LUPA petitions, and affirmed the Department's decisions.

Total Outdoor appeals.

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[14] CP at 864.

[15] CP at 864.

[16] CP at 734.

[17] CP at 863.

ANALYSIS

Standard of Review

Under LUPA, we review the "final determination by a local jurisdiction's body or officer with the highest level of authority to make the determination" directly on the administrative record.[18] To prevail, Total Outdoor must establish that the Department made a mistake of law, that there was insufficient evidence to support the decision, or that the decision was clearly erroneous.[19]

The "mistake of law" standard applies if the "land use decision 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."[20] This standard presents a question of law, which we review de novo.[21]

Under the "substantial evidence" standard, relief is warranted if the "land use decision is not supported by evidence that is substantial when viewed in light of the whole record before the court."[22] We consider "all of the evidence and reasonable inferences in the light most favorable to the party who prevailed in the highest forum that exercised fact-finding authority."[23] This process "'entails acceptance of the factfinder's views regarding . . . the weight to be given reasonable but competing

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[18] RCW 36.70C.020(2); Lakeside Indus. v. Thurston County, 119 Wn. App. 886, 894, 83 P.3d 433 (2004).

[19] RCW 36.70C.130(1); Rosema v. City of Seattle, 166 Wn. App. 293, 297-98, 269 P.3d 393 (2012).

[20] RCW 36.70C.130(1)(b).

[21] Abbey Rd. Grp., LLC v. City of Bonney Lake, 167 Wn.2d 242, 250, 218 P.3d 180 (2009).

[22] RCW 36.70C.130(1)(c).

[23] Abbey Rd., 167 Wn.2d at 250.

inferences.'"[24] We must determine whether the record contains "'a sufficient quantity of evidence to persuade a fair-minded person of the truth or correctness of the order.'"[25]

The "clearly erroneous" standard supports relief if the "land use decision is a clearly erroneous application of the law to the facts."[26] "A finding is clearly erroneous when, although there is evidence to support it, the reviewing court on the record is left with the definite and firm conviction that a mistake has been committed."[27]

Sufficiency of the Evidence

First, we focus on the factual disputes. There is no dispute that the Department agreed that the owner has a legal nonconforming use for off-premises rooftop advertising. Total Outdoor argues that insufficient evidence supports the Department's finding that its most recent work increased the size of the sign. Total Outdoor contends that it made a piece-for-piece repair of the sign frame and that the 1981 sketch is not reliable in light of the 2012 construction photos revealing that the new sign frame is exactly the same size as the sign frame it replaced, both sitting atop the 4.5 foot base. But the Department expressly noted the actual dimensions of the sign frame that was dismantled are not known with certainty because Total Outdoor dismantled the existing sign frame without obtaining a permit. Additionally, the sufficiency of the evidence

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[24] City of University Place v. McGuire, 144 Wn.2d 640, 652, 30 P.3d 453 (2001) (quoting State ex rel. Lige & Wm. B. Dickson Co. v. County of Pierce, 65 Wn. App. 614, 618, 829 P.2d 217 (1992)).

[25] City of Redmond v. Cent. Puget Sound Growth Mgmt. Hr'gs Bd., 136 Wn.2d 38, 46, 959 P.2d 1091 (1998) (quoting Callecod v. Wash. State Patrol, 84 Wn. App. 663, 673, 929 P.2d 510 (1997)).

[26] RCW 36.70C.130(1)(d).

[27] Wenatchee Sportsmen Ass'n v. Chelan County, 141 Wn.2d 169, 176, 4 P.3d 123 (2000).

standard is extremely deferential to the fact finder. The Department may rely on the evidence and all reasonable inferences viewed in a light most favorable to the Department and may determine the weight to be given to reasonable but competing inferences.[28] Because the work completed under the 1981 permit received a final inspection and approval, the Department is allowed the reasonable inference that the work would not have been approved unless it complied with the dimensions depicted in the 1981 permit and sketch—a total height of 30 feet above the roofline including the 4.5 foot tall sign base. Photos taken during the recent construction may suggest that a completed section of the new frame on one edge of the sign frame matches up with the height of a section of the old frame on the other edge of the sign frame. But no precise "before" measurements are available and the photos do not include a precise frame of reference. Even accepting that the photos may support a competing inference that the new sign frame is the same size as the sign frame it replaced, the Department was entitled to give greater weight to the competing reasonable inference arising from the final inspection and approval of the work completed under the 1981 permit.

As to the sign face attached to the sign frame, it is undisputed that the current sign components exceed the 440.5 square foot sign face approved in the 1981 permit. Total Outdoor argues that the 1981 configuration is not the proper base to measure against and that changes in advertising copy from time to time cannot alter the permissible dimensions of the sign. But Total Outdoor itself cites the building code reference to "advertising copy" or "copy" as synonymous with a "message on . . . [a]

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[28] McGuire, 144 Wn.2d at 652.

sign[.]"[29] Changes reducing the size of the sign components physically mounted on or attached to the sign frame are not mere changes in the words and images constituting the message on a sign. For example, if the owner of a 20 foot by 60 foot billboard changes the words and images on that display surface, that is a mere change in advertising copy. But if the owner removes the billboard and replaces it with a new structure that is half the size, 10 feet by 30 feet, that constitutes a change in the sign's structural component, whether or not the new smaller surface is used to display a message that is identical to or different from the message that had been displayed on the larger surface. Here, the owner's changes to the sign face were not mere changes to the message on the sign; changes to the structural components attached to the sign frame altered the nonconforming structures.

Changes to Nonconforming Structures

Although it is undisputed that Total Outdoor may engage in the legal nonconforming use of rooftop advertising, this appeal turns on the owner's changes to the nonconforming rooftop sign frame and sign face structures made without required permits and in violation of a stop-work order.

A zoning change can render a structure nonconforming, for example, as to setbacks, lot size, and other dimension standards.[30] An owner's right to maintain, alter, rebuild, or repair a nonconforming structure is subject to the restrictions imposed by

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[29] Appellant's Opening Br. at 3 (alterations in original) (citing former SBC 3107.4.2(2)).

[30] 8A EUGENE MCQUILLIN, THE LAW OF MUNICIPAL CORPORATIONS § 25:182, at 21 (3d ed. rev. 2012); 2 PATRICIA E. SALKIN, AMERICAN LAW OF ZONING § 12.11 (5th ed. 2014).

zoning laws.[31] For example, most courts have upheld ordinances imposing reasonable phase-out deadlines (amortization periods) for eliminating nonconforming structures.[32] Specifically, an owner's right to rebuild a nonconforming structure is governed by ordinance.[33]

With minor exceptions, the SMC does not use the term "nonconforming structures" but defines the equivalent phrase "nonconforming to development standards" 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."[34] The SMC includes specific provisions that govern such

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[31] See 8A MCQUILLIN, supra, § 25:216 at 192 ("The general rule is that structural or substantial alterations of nonconforming structures are prohibited under zoning laws."); Eunice A. Eichelberger, Annotation, *Alteration, Extension, Reconstruction, or Repair of Nonconforming Structure or Structure Devoted to Nonconforming Use as Violation of Zoning Ordinance*, 63 A.L.R.4TH 275, § 2(a) (1988) ("A determination as to whether an alteration, extension, reconstruction, or repair of a nonconforming structure . . . is permissible is dependent on, or is affected by, the particular provisions of the applicable zoning ordinance.").

[32] 17 WILLIAM B. STOEBUCK & JOHN W. WEAVER, WASHINGTON PRACTICE: REAL ESTATE: PROPERTY LAW § 4.21, at 252 (2d ed. 2004) ("Most decisions uphold the phase-out technique, which has become a standard feature of zoning."); see also Ackerley Commc'ns, Inc. v. City of Seattle, 92 Wn.2d 905, 913-19, 602 P.2d 1177 (1979) (upholding an ordinance requiring removal of outdoor advertising signs without compensation after three- to seven-year amortization period); Village of Skokie v. Walton on Dempster, Inc., 119 Ill. App. 3d 299, 456 N.E.2d 293, 296-97, 74 Ill. Dec. 791 (1983) (approving a sign ordinance requiring removal after two- to seven-year grace period depending on original cost).

[33] See State ex rel. Edmond Meany Hotel, Inc. v. City of Seattle, 66 Wn.2d 329, 337, 402 P.2d 486 (1965) (applying an ordinance precluding reconstruction of a building nonconforming as to height, even if use as hotel or adult living facility is conforming).

[34] SMC 23.84A.026. The code does refer to "nonconforming structures" in SMC 23.42.112(A)(5), which allows renovations, repairs, or structural alterations that increase nonconformity "as specifically permitted for nonconforming uses and *nonconforming structures* elsewhere in this Land Use Code."

nonconforming structures.

Two provisions permit an owner to rebuild a nonconforming structure. The first is limited to structures "occupied by or accessory to a residential use" and has no application here.[35] The other provides that "[a]ny structure nonconforming to development standards that is destroyed by fire, act of nature, or other causes beyond the control of the owner, may be rebuilt to the same or smaller configuration existing immediately prior to the time the structure was destroyed."[36] Because there has not been any destruction by fire, act of nature, or other cause beyond the owner's control, and the owner demolished the structures without a permit, the owner here had no right to rebuild the sign frame or sign face to pre-1981 dimensions.

A separate provision allows repair of a nonconforming structure but not any expansion or increase in nonconformity. "A structure nonconforming to development standards may be maintained, renovated, repaired or structurally altered but may not be expanded or extended in any manner that increases the extent of nonconformity or creates additional nonconformity [with exceptions that do not apply here]."[37] Further, the plain meaning of "repair" is "to restore by replacing a part or putting together what is torn or broken."[38] A repair does not extend to rebuilding to the original or pre-1981 dimensions.

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[35] SMC 23.42.112(B).

[36] SMC 23.42.112(C).

[37] SMC 23.42.112(A); see also SMC 23.42.106(D)(1) ("A structure occupied by a nonconforming nonresidential use may be maintained, repaired, renovated or structurally altered but shall not be expanded or extended except as otherwise required by law.").

[38] WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1923 (2002).

Here, the owner reduced the size of the rooftop sign frame and sign face over the years. In 1975, the owner reduced the dimensions of the sign face to a 26 foot by 60 foot display surface and reduced the height of the sign frame.[39] Based on the 1978 permit, a 4 foot by 48 foot message center was added to the then-existing sign frame structure. Most importantly, the 1981 permit resulted in an illuminated Cameras West name and logo measuring 5 feet tall by 54.5 feet wide installed "on existing structure."[40] The sketch attached to the 1981 permit depicts the top of the sign frame and top of the sign face as 30 feet above the "roofline." The permit and attached sketch also included an electronic message center of 3.5 feet by 48 feet located a short distance below the name and logo.

A repair of the corroded steel lattice frame could include a piece-for-piece replacement of corroded steel components but does not encompass rebuilding to dimensions larger than those permitted and approved by the Department in 1981. The sign face's size is also limited to the 1981 dimensions. Total Outdoor may not rebuild the sign frame or the sign face to the pre-1981 dimensions.

Total Outdoor contends that the common law abandonment doctrine extends to nonconforming structures used in conjunction with such nonconforming uses. We disagree.

First, it is undisputed that Total Outdoor demolished the existing structures and erected new sign structures without obtaining required permits and continued its work in

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[39] It is unclear from the record whether the sign's 1975 reduction in height to 30 feet was measured from the roof parapet, the 4.5 foot high metal based attached to the sign frame structure, or the roofline.

[40] CP at 238.

violation of a posted stop-work order. Total Outdoor cites no authority that these building code violations are excused by any common law doctrine.

Second, Washington's common law abandonment doctrine applies to nonconforming uses. Specifically, the right to engage in a legal nonconforming use "may be lost by abandonment or discontinuance, but a party so claiming has a heavy burden of proof."[41] Abandonment or discontinuance depends on two factors: "'(a) [a]n 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.'"[42] Total Outdoor contends that the Department may not distinguish between nonconforming uses and the nonconforming structures affiliated with such uses.

But "[t]he distinction between a nonconforming use of land and a nonconforming building/structure is genuine and can be critical under ordinances or statutes that provide separate regulations for 'nonconforming structures.'"[43] Further, nonconforming structures and nonconforming uses are analytically separate.[44] The Seattle ordinances

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[41] Rosema, 166 Wn. App. at 299.

[42] Id. (alteration in original) (internal quotation marks omitted) (quoting Van Sant v. City of Everett, 69 Wn. App. 641, 648, 849 P.2d 1276 (1993)).

[43] 2 SALKIN, supra, § 12:11.

[44] See 8A MCQUILLIN, § 25:182, at 21 ("[C]ourts try to keep these issues analytically separate."); Vial v. Provo City, 2009 UT App 122, 210 P.3d 947, 951-52 ("The city ordinances provide for nonconforming uses, nonconforming structures, nonconforming lots, and other nonconformities. These are all different." (citations omitted)); Jones v. Planning Bd. of Marlborough, 203 A.D.2d 626, 628, 609 N.Y.S.2d 972 (1994) (holding that the city ordinances specifically distinguished between nonconforming uses and nonconforming structures); County of Lake v. Courtney, 451 N.W.2d 338, 341 (Minn. App. 1990) (holding that to equate a use exception with a structure exception "tortures" an ordinance's "plain and ordinary meaning").

on nonconformity include references to both "use" and "development,"[45] but the code separately defines and regulates nonconforming structures and nonconforming uses.[46]

Here, the nonconforming use is advertising.[47] The use is distinct from a structure that may be used to accomplish that use. The code includes separate provisions governing rebuilding or repairing a structure that does not conform to development standards.[48] The overlaps cited by Total Outdoor do not alter this fundamental and genuine distinction.[49]

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[45] SMC 23.42.102.

[46] "'Use, nonconforming' means a *use* of land or a structure that was lawful when established and that does not now conform to the *use* regulations of the zone in which it is located, or that has otherwise been established as nonconforming according to section 23.42.102 [delineating various means to establish nonconforming status]." SMC 23.84A.040 (emphasis added); see also Rhod-A-Zalea & 35th, Inc. v. Snohomish County, 136 Wn.2d 1, 6, 959 P.2d 1024 (1998) ("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 [current] zoning restrictions applicable to the district in which it is situated."). SMC 23.42.112 provides an entirely separate definition governing "structures" that do not conform to development standards, such as sign dimensions and rooftop signs.

[47] It is undisputed that the nonconforming use is subject to the doctrine of abandonment. For example, the Department applied the doctrine of abandonment to conclude that the owner is not restricted to on-premises advertising because the owner never intended to abandon its right to the nonconforming use of off-premises advertising.

[48] SMC 23.42.112.

[49] See also State ex rel. Miller v. Cain, 40 Wn.2d 216, 242 P.2d 505 (1952) where the court held that the owner of a gasoline service station was not entitled to a building permit to reconstruct the existing service station by replacing a structure and a canopy, which together covered 450 square feet, with a steel reinforced structure covering 631 square feet. The court pointed out that the case law is practically unanimous that a nonconforming building devoted to a nonconforming use cannot be replaced with a new and larger nonconforming building even though it would be devoted to the same use. The court declared that the property owner had no vested right in the perpetuation of the use of her property as a gasoline service station as would compel the issuance of a building permit for a new and larger nonconforming building to make that use effective.

Finally, Total Outdoor's other arguments related to abandonment are not persuasive:

- Total Outdoor focuses on the SMC 23.42.100 reference to a "framework for dealing with nonconformity that allows most nonconformities to continue." But SMC 23.42.100 also recognizes that "[t]he redevelopment of nonconformities to be more conforming to current code standards is a long term goal."
- Total Outdoor cites Rosema v. City of Seattle to argue common law abandonment principles apply here.[50] Rosema held that the nonconforming right to use a house as a duplex had not been abandoned because the house's basement unit "maintain[ed] the structural capability" to operate as a separate unit.[51] Unlike the nonconforming duplex in Rosema, the owner here demolished the rooftop sign frame and sign face.
- Total Outdoor cites three out-of-state cases to support its contention that abandonment principles can apply to nonconforming structures. But these cases are not persuasive because they do not directly address the question before us.[52]

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[50] 166 Wn. App. 293, 269 P.3d 393 (2012).

[51] Id. at 300.

[52] 69th Str. Retail Mall LP v. Upper Darby Zoning Hr'g Bd., 2012 WL 8681672 (Pa. Commw. Mar. 27, 2012) (unpublished) (nonuse of a billboard sign for statutory period of discontinuance did not, by itself, establish an abandonment of that sign; the sole issue analyzed on appeal was the interplay between discontinuance and abandonment); Pallco Enters., Inc. v. Beam, 132 Cal. App. 4th 1482, 34 Cal. Rptr. 3d 490 (2005) (illegal addition of illumination to a nonconforming *use* of an advertising sign; rejecting the argument that the addition of illumination was a voluntary abandonment of the advertising displays and holding that nonuse of the sign was not an abandonment of the landowner's legal, nonconforming *use*, emphasizing the *use* of advertising); 3M Nat'l Adver. Co. v. City of Tampa Code Enforcement Bd., 587 So. 2d 640 (Fla. Dist. Ct. App.

- Total Outdoor argues the rights that vested when the structures and use became nonconforming determine the outcome of this dispute. But the use of advertising is not foreclosed here and the only rights at issue are those of an owner of a nonconforming structure. Those rights are limited to the code provisions governing the scope and extent of a nonconforming structure. We find no support in the land use or building codes for allowing an owner to rebuild or "repair" a nonconforming sign frame or sign face to prior dimensions more than 30 years after reducing the size of those structures.[53]
- Finally, Total Outdoor highlights the portion of the Department's decision that "the size of the structure and sign face that [existed] in 1975 was *abandoned* when the sign structure and face became smaller in 1981 and thus, more

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1991) (holding that, in the context of landowner's attachment of a full-size model airplane to the top of a nonconforming sign, "a prohibited increase in a nonconforming *use* does not result in loss of the entire use, at least if the landowner can return to the status quo ante.") (emphasis added) (italics omitted).

[53] Total Outdoor cites to case law discussing an owner's "vested rights" in a nonconforming use, such as McMilian v. King County, 161 Wn. App. 581, 591, 255 P.3d 739 (2011) ("'Legal, nonconforming uses are vested legal rights'" (quoting First Pioneer Trading Co. v. Pierce County, 146 Wn. App. 606, 614, 191 P.3d 928 (2008))); Rhod-A-Zalea, 136 Wn.2d at 6 ("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."). We note the concept of vested rights in a nonconforming use is not precisely the same as an application of the Washington "vested rights doctrine." See McGuire, 144 Wn.2d at 652 ("Nonconforming uses *are treated like vested property rights,* and may not be voided easily." (emphasis added)). The vested rights doctrine applies only to a narrow set of circumstances prescribed by statute for building permit applications, RCW 19.27.095(1), and subdivision applications, RCW 58.17.033(1). "[T]he vested rights doctrine is now statutory." Town of Woodway v. Snohomish County, 180 Wn.2d 165, 173, 322 P.3d 1219 (2014); see also Potala Vill. Kirkland, LLC v. City of Kirkland, 183 Wn. App. 191,192, 334 P.3d 1143 (2014) ("Washington's vested rights doctrine originated at common law but is now statutory."). We have not been provided any compelling authority that an owner has any right as to the size of nonconforming structures beyond those provided in statute or ordinance.

conforming."[54] But when read in context, this passing reference does not reveal a concession by the Department that the common law abandonment doctrine applies here.

Wattage Limitations

Finally, Total Outdoor contends the City erred when it determined that the maximum wattage permitted for the sign was 816 watts. We agree.

In an apparent typographical error, the Department's decision refers to section 1132.1, "Lighting and Motors," of the 2009 Seattle Energy Code to support its determination that only 816 watts are permitted for the sign.[55] But section 1132.1 relates to "fenestration requirements" that involve the "areas . . . in the building envelope that let in light" and has nothing to do with "Lighting and Motors." It appears the City intended to refer to section 1132.3 of the 2009 Seattle Energy Code, which is entitled "Lighting and Motors." But that provision is also inapplicable because it requires compliance with current lighting standards only when 20 percent or more of the fixtures are replaced "in a space enclosed by walls or ceiling-height partitions." The rooftop sign is not in a space enclosed by walls or partitions. The Department provides no authority that the rooftop sign is subject to specific energy code wattage limitations.[56]

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[54] CP at 869 (emphasis added).

[55] CP at 874, 1113.

[56] Because Total Outdoor replaced nonconforming exterior lighting, it appears the "light and glare" standards of the respective zone where the exterior lights are located do apply. See SMC 23.42.124; SMC 23.49.025.

CONCLUSION

There are genuine distinctions between nonconforming uses and nonconforming structures in the Seattle ordinances. The actual dimensions of the demolished sign frame and sign face were not known with certainty because of Total Outdoor's failure to obtain a permit and its continuation of work in violation of the stop-work order. The Department's resulting decision to limit the sign frame and sign face to the dimensions documented in the 1981 permit and sketch was supported by sufficient evidence and was not clearly erroneous. But it was an error of law for the Department to conclude that specific wattage limits apply.

We reverse the Department's determination that Total Outdoor is limited to 816 watts in conjunction with the rooftop sign. We affirm the Department's other decisions.

Affirmed in part and reversed in part.

WE CONCUR:

No. 70957-7-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

TOTAL OUTDOOR CORPORATION, a Washington corporation,

Appellant,

vs.

CITY OF SEATTLE DEPARTMENT OF PLANNING AND DEVELOPMENT, a municipal corporation,

Respondent.

CITY OF SEATTLE'S MOTION TO PUBLISH

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Under RAP 12.3(e), the respondent, the City of Seattle ("City") moves to publish the Court's decision filed March 16, 2015 ("Decision"). The Decision should be published because it: clarifies three principles of law that apply to common regulatory actions of local government, and is a matter of general public interest and importance.

The first principle of law the Decision clarifies is an owner's right to maintain, alter, rebuild, or repair a nonconforming structure[1] is subject to the restrictions imposed by applicable zoning ordinances. Decision at 10-11. There is no Washington case law on this point as reflected by the Court's citation to treatises and case law from other states.

The second principle of law the Decision clarifies is an owner's right to alter or repair a nonconforming structure is not dictated by the common law test for abandonment of a nonconforming use. The appellants, Total Outdoor, alleged the City cannot distinguish between nonconforming uses and nonconforming structures affiliated with the use. Decision at 14.

The Court, however, rejected Total Outdoor's argument and determined there is a distinction between nonconforming use of land and nonconforming structure. Decision at 14. For that reason, the Court made

[1] A structure that is nonconforming to development standards. SMC 23.84A.026, Decision at 11.

clear the common law test for abandonment of nonconforming uses does not apply to nonconforming structures. Decision at 13-14.

A motion to publish would clarify and make explicit what was unstated but necessarily implied from *State ex rel. Miller v. Cain*, 40 Wn. 2d 216, 242 P.2d 505 (1952). Numerous published cases have been issued after *Miller v. Cain* involving nonconforming uses, but there is no Washington case distinguishing between a nonconforming use and nonconforming structure and stating the common law test for abandonment of a nonconforming use does not apply to a nonconforming structure. There is not any Washington law on this subject, as reflected in the Court's reliance on treaties and out of state case law. Decision at 14.

Local jurisdictions process many permits involving nonconforming structures and it is important for municipalities and the public to understand what test applies. A published decision would give certainty on this point.

The third principle of law the Decision clarifies is the doctrine of vested rights are inapplicable to nonconforming structures. Total Outdoor argued their rights that "vested" when the structure and use became nonconforming determined the outcome of this dispute. Decision at 17. This Court clarified that the rights are limited to the applicable code provisions (here, those governing nonconforming structures) and the vested rights doctrine, now dictated by statute, is inapplicable to

nonconforming structures.

Publishing the Decision is a matter of general public interest and importance because local jurisdictions regularly face these issues related to nonconforming structures.

For these reasons, the City respectfully request the Decision be published.

DATED this 6th day of April, 2015.

PETER S. HOLMES
Seattle City Attorney

By: Elizabeth E. Anderson

Elizabeth E. Anderson, WSBA #34036
Assistant City Attorney
Attorneys for Respondent
The City of Seattle

I certify that on this date, I sent a copy of the City of Seattle's Motion to Publish via the method of service indicated to the following parties:

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the foregoing being the last known address of the above-named parties.

Dated this 6th day of April, 2015.

Trudy Jaynes
TRUDY JAYNES

NO. 70957-7-1

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

TOTAL OUTDOOR CORPORATION, a Washington corporation,

Appellant,

vs.

CITY OF SEATTLE DEPARTMENT OF PLANNING AND DEVELOPMENT, a municipal corporation,

Respondent

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE HARRY McCARTHY

KING COUNTY'S MOTION TO PUBLISH

DANIEL T. SATTERBERG
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I. IDENTITY OF MOVING PARTY AND RELIEF REQUESTED

Pursuant to RAP 12.3(e), King County respectfully moves this Court to publish in its entirety the unpublished decision filed in this matter on March 16, 2015. *See Total Outdoor Corporation v. City of Seattle*, No. 70957-7-1 (hereinafter Opinion). Although not a party in this matter, King County believes the decision is of significant importance to local jurisdictions, developers and property owners who frequently grapple with the parameters of nonconformities to development standards. Because the Opinion is of public interest and clarifies the scope of nonconforming use and structure regulations, King County urges the Court to publish its Opinion.

II. ANALYSIS

The Court's analysis is of critical importance to property owners, developers and local government who seek clarity and guidance regarding their respective rights and responsibilities as related to legal nonconforming uses and structures.

King County seeks publication of the Opinion, first and foremost, because it elucidates the distinction between nonconforming *structures* and nonconforming *uses*, recognizing that these can be regulated independently of one another. Opinion at 14-15. The Court's citation to

treatises for this premise reflects the absence of relevant case law on this critical distinction. *Id.* While the Opinion is based on interpreting the City of Seattle's code, many jurisdictions, including King County, distinguish nonconforming uses from nonconforming structures. *See* King County Code at Ch. 21.32. A published opinion on this issue would be valuable to property owners and municipalities throughout the state.

Additionally of import to local jurisdictions is the Court's discussion on the distinction between rebuilding and repair of nonconforming structures and scope of repair allowable under the City of Seattle's code. Opinion at 12-13. While the City's code may be distinct from the regulations found in other jurisdictions, this Opinion should be published so that the Court's analysis of the City code can be used to guide other municipalities in interpreting their own code language. This can only be done reliably if the Opinion is published.

The Opinion also consolidates and clarifies case law on the use of amortization to phase out nonconforming uses. Opinion at 11. The Court's language on this issue succinctly summarizes and clarifies case law on this topic, providing clear guidance going forward for property owners and local government.

Each of these issues are of general public interest and importance. Property owners, developers and local municipalities who are charged

with applying regulations to nonconforming uses and structure are all impacted by the Opinion. Issues of nonconformities to development standards come up frequently in King County, and by extension, these issues are commonly confronted by property owners who seek direction on how their nonconforming structures may be used, rebuilt and repaired. Lower courts, local jurisdictions and the public should all have the full benefit of this Court's sound guidance here, which is only available if the Opinion is published.

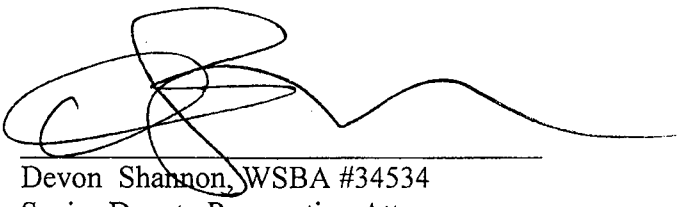
III. CONCLUSION

For the foregoing reasons, King County respectfully requests that the Court publish the entirety of its March 16, 2015 Opinion.

DATED this 6th day of April, 2015.

DANIEL T. SATTERBERG
King County Prosecuting Attorney

Respectfully submitted,



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I certify that on this date, I sent a copy of the King County's Motion to Publish via the method of service indicated to the following parties:

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Dated this 10th day of April, 2015.

By: Natalie Duran
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Senior Deputy Prosecuting Attorney

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 RESPONSE TO MOTIONS TO PUBLISH DECISION

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Total Outdoor Corporation

Appellant Total Outdoor Corporation ("Total Outdoor") submits the following response to the motions to publish filed by Respondent City of Seattle and King County. Total Outdoor does not object to the requests to publish the Court of Appeals' decision. Total Outdoor agrees that the decision is one of general public interest and importance to property owners and governmental entities like the City that regulate property owners' uses of their property, and thus publication is warranted under RAP 12.3(e)(5). Although Total Outdoor respectfully submits that the Court of Appeals' decision was erroneous, the decision does modify the law regarding the common law test for abandonment, and thus, publication is also warranted under RAP 12.3(e)(4).

Total Outdoor disagrees with much of the argument presented in the City's motion to publish, but Total Outdoor does not disagree that publication is warranted.

DATED: April 20, 2015

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that he/she/they caused a copy of the foregoing to be served upon the following counsel of record via messenger, before the hour of 5:00 pm, on April 20, 2015:

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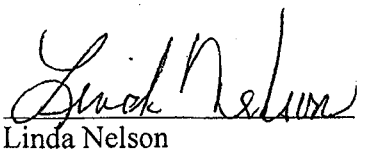

Linda Nelson

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

TOTAL OUTDOOR CORPORATION, a Washington corporation, Appellant, v. CITY OF SEATTLE DEPARTMENT OF PLANNING AND DEVELOPMENT, a municipal corporation, Respondent.	)	No. 70957-7-I ORDER GRANTING MOTIONS TO PUBLISH

Respondent City of Seattle and nonparty King County each filed a motion to publish the court's opinion entered March 16, 2015. Appellant filed a response, agreeing that publication is warranted. After due consideration, the panel has determined that the motions should be granted.

Now therefore, it is hereby

ORDERED that the motions to publish the opinion are granted.

Done this 7th day of May 2015.

FOR THE PANEL:

Verellen ACJ

IN THE MUNICIPAL COURT OF THE CITY OF SEATTLE
KING COUNTY, WASHINGTON

TOTAL OUTDOOR CORP., a Washington Corporation,

Plaintiff,

vs.

CITY OF SEATTLE, DEPARTMENT OF PLANNING AND DEVELOPMENT, a Municipal Corporation,

Defendant,

CORPORATION OF THE CATHOLIC ARCHBISHOP OF SEATTLE, a Washington nonprofit corporation,

Additional Party,

and

WESTLAKE PARK ASSOCIATES, a Washington corporation,

Additional Party.

No.

COMPLAINT FOR DECLARATORY JUDGMENT, INJUNCTIVE RELIEF AND CONSTITUTIONAL WRIT OF REVIEW

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This action involves the appeal of a Stop Work Order and administrative decision upholding the Stop Work Order issued by the City of Seattle. Plaintiff Total Outdoor Corp. ("Total Outdoor") believes the Superior Court has jurisdiction over this appeal and has filed a complaint in Superior Court. Total Outdoor also files this action in Municipal Court to preserve its rights in the event that the Superior Court determines that this appeal must first be heard by the Municipal Court. Total Outdoor states and alleges as follows for its complaint:

I. PARTIES

1.1 Plaintiff Total Outdoor is a Delaware corporation.

1.2. Defendant City of Seattle ("City" or "Seattle") is a municipal corporation of the State of Washington.

1.3. Additional Party Corporation of the Catholic Archbishop of Seattle ("Archdiocese of Seattle") is, on information and belief, a Washington nonprofit corporation. The Archdiocese of Seattle is named in this action solely due to its potential status as a necessary party. No relief is sought against the Archdiocese of Seattle.

1.4. Additional Party Westlake Park Associates is, on information and belief, a Washington limited partnership. Westlake Park Associates is named in this action solely due to its potential status as a necessary party. No relief is sought against Westlake Park Associates.

II. JURISDICTION AND VENUE

2.1 Jurisdiction. The Municipal Court has jurisdiction over this action under RCW 35.20.030.

2.2 Venue. Venue in the Municipal Court of Seattle is proper pursuant to RCW 3.66.040, since the Defendant is located in Seattle.

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III. FACTS

3.1 This action relates to the advertising sign located on the roof of the building known as the Centennial Building at 414 Stewart Street, Seattle ("Centennial Roof Sign").

3.2 Under the Seattle Municipal Code ("City Code" or "SMC"), a use that does not conform to existing zoning regulations, but conformed to applicable zoning regulations at any time and has not been discontinued, is considered a nonconforming use. A nonconforming use is allowed to continue.

3.3 Under the City Code, an off premise sign is one that relates, through its message or content, to a business activity, use, product or service not available on the premises. In contrast, an on premise sign is one used solely by a business establishment on the lot where the sign is located that displays either commercial messages that are strictly applicable only to a use of the premises on which the sign is located, including signs indicating the business transacted, principal services rendered, goods sold or produced on the premises, or name of the business occupying the premises.

3.4 The City issued a permit for construction of and display of off premise advertising on the Centennial Roof Sign in 1926. The Centennial Roof Sign was constructed and off premise advertising displayed pursuant to this permit. At that time, the City Code allowed off premise advertising signs. Now, the City Code does not allow new off premise advertising signs. When the City Code was amended to prohibit new off premise advertising on roof signs, the Centennial Roof Sign became a nonconforming use. At that time, the City acknowledged this fact in writing. This written decision of the City was not timely appealed or reversed.

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3.5 The City Code provides that a nonconforming use may be considered discontinued when a "permit to permanently change the use of the lot or structure was issued and acted upon." SMC 23.42.104.B.1. "Nonconforming uses are treated like vested property rights, and may not be voided easily." *University Place v. McGuire*, 144 Wn.2d 640, 652, 30 P.3d 453 (2001). In order to establish that the nonconforming use was abandoned, the City has the burden to show: (1) the owner's intent to abandon the use; and (2) an overt act implying that the owner does not claim or retain any interest in the right to the nonconforming use. *University Place, supra* at 652; *Van Sant v. Everett*, 69 Wn. App. 641, 648, 849 P.2d 1276 (1993); *Andrew v. King County*, 21 Wn. App. 566, 572, 586 P.2d 509 (1978).

3.6 The nonconforming status of the Centennial Roof Sign as an off premise advertising sign was not discontinued or abandoned. While on premise copy was displayed on the Centennial Roof Sign for a period of time, this did not permanently change the use of the sign. Further, the City has not met its burden to show the property owner's intent to abandon the off premise advertising use or an overt act by the owner implying that the owner does not claim or retain any interest in the off premise advertising use.

3.7 Total Outdoor conducted normal maintenance and repair activities on the Centennial Roof Sign. These activities are exempt from the requirement to obtain a building permit under the City Code.

3.8 Nevertheless, the City issued a stop work order ("Stop Work Order"), incorrectly stating that a sign structure was being installed without a permit. The City failed to post the Stop Work Order as required by the City Code.

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3.9 Total Outdoor timely requested administrative review of the Stop Work Order. The City issued the Stop Work Decision upholding the Stop Work Order. The Stop Work Decision includes erroneous statements of fact and inaccurate legal conclusions.

3.10 The errors in the Stop Work Decision include, but are not limited to, the following:

(a) The Stop Work Decision erroneously states that the Centennial Roof Sign was "completely demolished" and a "new structure" constructed.

(b) Based on this erroneous factual assumption, the Stop Work Decision erroneously concludes that the demolition and construction violated the City Code.

(c) The Stop Work Decision erroneously states that the Stop Work Order was posted.

(d) The Stop Work Decision falsely states that the manager of Cameras West handed the stop work order to Frank Podany, that Bob Hoyos confirmed with Mr. Podany that he was the person responsible for re-erecting the sign structure, and that Mr. Hoyos instructed Mr. Podany to stop work.

(e) The Stop Work Decision erroneously states that a sign face was installed on a new sign structure and that the sign structure is larger, wider and taller than the original sign structure and previous sign face.

(f) The Stop Work Decision erroneously determines that the existing roof sign structure was demolished and an entirely new structure erected.

(g) The Stop Work Decision erroneously determines that the work required a permit.

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(h) The Stop Work Decision erroneously determines that the Stop Work Order was properly posted, served and was effective.

(i) The Stop Work Decision erroneously determines work continued after the Stop Work Order was posted.

(j) The Stop Work Decision incorrectly determines that the Stop Work Order was properly issued and erroneously affirms the Stop Work Order.

(k) The Stop Work Decision erroneously requires that a permit be obtained or the Centennial Roof Sign be removed.

3.11 Total Outdoor assigns error to all or portions of each and every paragraph of the Stop Work Decision.

3.12 Due to the existence of the Stop Work Decision, the City refuses to issue an electrical permit for the Centennial Building Sign.

IV. FIRST CAUSE OF ACTION

Declaratory Judgment (Chapter 7.24 RCW)

4.1 There is an actual controversy between Total Outdoor and the City as to the lawfulness of the Stop Work Decision. Pursuant to the Uniform Declaratory Judgment Act, Chapter 7.24 RCW, Total Outdoor is entitled to a declaration that the Stop Work Decision is unlawful.

V. SECOND CAUSE OF ACTION

Injunctive Relief (Wash. Const. Art. IV §6; Chapter 7.40 RCW)

5.1 Total Outdoor is entitled to injunctive relief under Wash. Const. Art. IV and Chapter 7.40 RCW to prevent continuing harm to itself resulting from the Stop Work Decision.

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VI. THIRD CAUSE OF ACTION

Constitutional Writ of Review (Wash. Const. Art. IV §6)

6.1 In the Stop Work Decision, the City incorrectly determined that the Stop Work Order was properly posted, that a new sign was installed and that the sign structure and face are larger than the original sign and improperly upheld the Stop Work Order. The Stop Work Decision is arbitrary and capricious and illegal. Total Outdoor is entitled to a Constitutional Writ of Review under Article IV, Section 6, of the Washington Constitution directing the City to certify the record and Total Outdoor is entitled to judgment that the City did not have the authority to issue the Stop Work Decision, the Stop Work Decision violate rules of law affecting the rights of Total Outdoor, there is no competent proof of the facts stated in the Stop Work Decision and the Stop Work Decision is not supported by substantial evidence.

VII. RELIEF REQUESTED

Total Outdoor requests the following relief:

1. Declaratory judgment that the Stop Work Decision is unlawful;

2. Issuance of a temporary restraining order and preliminary and permanent injunction directing the City to lift the Stop Work Decision and Stop Work Order;

3. Issuance of a constitutional writ of review directing the City to certify the record and judgment that the City did not have the authority to issue the Stop Work Decision, the Stop Work Decision violates rules of law affecting the rights of Total Outdoor, there is no competent proof of the facts stated in the Stop Work Decision and the Stop Work Decision is not supported by substantial evidence;

4. Award of Plaintiffs' reasonable attorney's fees and costs;

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5. If the Court determines Total Outdoor seeks a remedy beyond the jurisdiction of the Municipal Court, an order removing this case to the Superior Court under CRLJ 14A.

6. Permission to amend this Complaint to conform to the proof; and

7. Such other further relief as the Court deems just and equitable.

DATED this 24th day of February, 2012.

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By: Courtney Kaylor

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IN THE MUNICIPAL COURT OF THE CITY OF SEATTLE,
KING COUNTY, WASHINGTON

TOTAL OUTDOOR CORP., a Washington Corporation,

Petitioner/Plaintiff,

vs.

CITY OF SEATTLE, DEPARTMENT OF PLANNING AND DEVELOPMENT, a Municipal Corporation,

Respondent/Defendant,

CORPORATION OF THE CATHOLIC ARCHBISHOP OF SEATTLE, a Washington nonprofit corporation,

Additional Party,

and

WESTLAKE PARK ASSOCIATES, a Washington corporation,

Additional Party.

No. 12-028

[PROPOSED] STIPULATION AND ORDER STAYING PROCEEDINGS

(Clerk's Action Required)

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STIPULATION

The parties to this action stipulate to a stay of this action in order to accommodate settlement discussions. The parties agree that the stay will remain in place until lifted by the Court on the motion of any party or on its own initiative.

ORDER

Based on the foregoing stipulation, the Court ORDERS:

1. The case schedule in this matter is stricken and this matter is stayed.

2. The stay will remain in place until lifted by the Court on the motion of any party or on its own initiative.

SO ORDERED.

JUDGE OF THE MUNICIPAL COURT

8/14/12

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Presented by; Agreed to as to form;
Notice of Presentation Waived:

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The Honorable Gregory P. Canova

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR KING COUNTY

KEITH ROSEMA and ANEE BRAR, Petitioners, vs. CITY OF SEATTLE, Respondent, and AN YU, SHUI-XIAN FU, and DAVID LEE, Additional Parties.	No. 09-2-43983-4 SEA CITY OF SEATTLE'S RESPONSE TO PETITIONERS' OPENING BRIEF

I. INTRODUCTION

The issue in this case is whether the Seattle Department of Planning and Development ("DPD" or "Department") properly determined that the property at 5211 21st Avenue is a legal nonconforming duplex. The City's determination came in the form of a formal code interpretation,[1] which was requested by Petitioners Keith Rosema and Anee Brar (Rosemas), and the subsequent issuance of a building permit authorizing interior alterations of the nonconforming duplex on the subject property from six to nine bedrooms (referred herein as

[1] DPD Interpretation 09-007, Documentary Record ("DR") 00003-00017.

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"Code Interpretation" or "Interpretation").[2] The Rosemas live next door to the nonconforming duplex, owned by Additional Parties An Yu and Shui-Xian Fu, and do not want it to be used as a duplex. Despite the neighbor's desire, however, the record shows that the subject property is a legal nonconforming duplex, a use which had not been abandoned according to fifty years of permit history and despite the prior property owner's stated intention that the structure was used as a single family home. The City's interpretation and issuance of the building permit were based on a correct interpretation and application of the law, are supported by substantial evidence, and should be upheld.

II. COUNTER-STATEMENT OF FACTS

The City generally agrees with many of the facts provided in Petitioners' Brief, including the fact that the subject property was constructed in 1914 and was originally converted to a duplex in 1955.[3] The City issued Seattle Building Permit No. 440978, on November 18, 1955, to "convert existing residence to duplex per plan,"[4] and that permit received final approval by a City Building Inspector in 1956. The City's permitting history indicates that since 1955 the City has issued several permits that recognize the use of the property as a two-unit building.

The record contains documents related to an unpermitted triplex use in the 1970s; however, no Seattle Building permit was ever issued for a triplex.[5] As determined by the City's permit files, the property continued as a nonconforming duplex.[6]

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[2] Construction Permit No. 6222157, DR 00001.
[3] DR 00111 and DR 00113, Permit No. 440978, DPD Interp. Finding of Fact No. 3, and Petitioners' Brief, p. 3.
[4] *Id.*
[5] DR 00129-00132.
[6] *See e.g.,* footnotes 9 and 11, infra; DR 00135, letter from Seattle Department of Buildings (now DPD), Superintendent of Buildings, Alfred Petty.

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On September 12, 1991, the property was conveyed from Jane Bogle to Jerry and Sue Nelson.[7] The Nelsons owned and occupied the property for 18 years, from 1991 until 2009.[8] During that time, the Nelsons applied for and received three approvals to alter or construct additions to the duplex. The City first granted the Nelsons permission to construct an addition to the *existing duplex* under Seattle Building Permit No. 582738, issued in April 1979.[9] The City granted the Nelsons permission again in 1992 to construct a balcony addition and window alternations to the duplex under Permit No. 663191.[10] The Nelsons applied for another permit, Permit No. 669645, in 1993 to alter the kitchen of "existing duplex bldg., subject to field inspection (STFI)."[11]

According to DPD's permit records, no permit has ever been applied for or issued since 1955 to change the use of the structure from a duplex back to single family, nor has any remodeling been done in that period that would have changed the configuration of the structure from a two-unit building to only one, such as removal of the second kitchen.

Despite Petitioners' claims that the Nelsons intended to terminate the duplex use, Petitioners do not dispute that critical features of the duplex remained and continued throughout the Nelson's ownership of the property. In fact, Mr. Nelson acknowledges in his declaration that during the eighteen years that they owned and resided in the home, two separate electrical meters were kept intact – one for 5211 21st Ave NE and one for 5215 21st Ave NE;[12] the second

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[7] DR 00037, DR Finding of Fact No. 4.
[8] DR 00037; Petitioners' Brief, at p. 3.
[9] DR 00141.
[10] DR 00154-00155, DR Finding of Fact No. 4. On June 11, 1992, the Nelsons applied for Seattle Building Permit No. 663191 to "construct 2nd floor balcony addition and window alterations to existing duplex subject to field inspection (STFI)."
[11] DR 00161-00163, DR Finding of Fact No. 4.
[12] DR 00058, Declaration of Jerry Nelson, handwritten no. 6; see also 00048 (letter from current property owner regarding the permitted use history and other evidence of continuous use; DR 00053 (Seattle City Light bill for 5211 21st Ave NE) and DR 00054 (Seattle City Light bill for 5215 21st Ave NE).

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entrance was left intact;[13] the owners paid for two garbage containers every month for eighteen years;[14] and the second kitchen in the basement was maintained during that period.[15]

There is no evidence in the record that the Nelsons ever sought a permit to convert the duplex to single family use, as required by code. Despite Mr. Nelson's declaration that City inspectors told him he would have to remove the electrical meter in order to convert his property to a single family use, the Code clearly provides that this is untrue: a structure can be converted to single family, so long as a permit to change the use is obtained, without meeting all development standards.[16] All Mr. Nelson would have had to do is apply for a permit, which he never did, likely because there was potential economic benefit to retaining the nonconforming duplex use.

The property was conveyed from the Nelsons to An Yu and Shui-Xian Fu on July 9, 2009. On July 31, 2009, the property owner's representative, David Lee, applied for Permit No. 6333157 to "establish the use of the record as duplex, and construct interior alterations per plan." The current owner, An Yu documented permit history and provided evidence of continuous use, including the statement that after the building was purchased in July 2009, it still had two kitchens and two separate entrances as shown on the Plan sheet A1.[17] Current property owners paid $650,000[18] in a "for sale by owner" transaction where no agents were involved, for a home with six bedrooms, two kitchens and three bathrooms.[19]

[13] DR 00058, Declaration of Jerry Nelson, handwritten no. 6.
[14] DR 00058, Declaration of Jerry Nelson, handwritten addition to no. 5.
[15] DR 00058, Declaration of Jerry Nelson, handwritten addition to no. 5.
[16] SMC 23.42.108; *see also* SMC 23.40.002.
[17] DR 00048-00054; 00084 (Plan Sheet A1).
[18] DR 00088, first page of purchase and sale agreement between the Nelsons and An Yu and Shui-Xian Fu.
[19] DR 00084, plans of existing building, dated June 2009.

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According to the current property owner, Mr. Nelson represented to them that the home was a duplex. In the current property owner's letter documenting this history, he states:

> Jerry Nelson sold this property to me on May 2009 as a duplex. This transaction is "sold by owner". Both seller and buyer have no agent.
>
> During the negotiation, Jerry told us that this building is duplex. Since it is a non-conforming use, King County record will not showing it is a duplex. I went to City of Seattle DPD Micro film library and copied all documents regarding this property in the film library. Also the building has two kitchens, two entries to each unit. Then I believe it is a duplex and paid $650,000 for this 95 years old but a duplex building. This "sale by owner" price shall equal to $698,000.00 if we use agent. This price definitely is not for a 95 year old single family house in that area under recent economic conditions.
>
> Since the property is a nonconforming use; King County record did not showing it is a duplex, all property transaction document did not showing that is a duplex use

DR 00050 (Letter to DPD from current property owner, An Yu, dated September 20, 2009).

This representation that Mr. Nelson made to the current owner, that the home was a duplex, is consistent with the King County Assessor data, because while it says "Returned to use as single family dwelling unit"; it also states in the "notes" section that there is an "ADU"- which is an acronym for "Accessory Dwelling Unit," [20] a separate dwelling unit in the same structure.[21] To the best of Respondent's knowledge, an ADU permit was never applied for or obtained; thus, the note refers to the second basement unit of the duplex. Petitioners assert as fact that the $650,000 purchase price paid for the property in 2009 was for a single-family residence.[22] However, the note on the Assessor's report makes it clear that the purchase price

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[20] The only difference between an ADU and duplex is that an ADU must be owner-occupied. In other words, the owner must live in one of the dwelling units in the structure in order for it to be recognized by DPD as an ADU.

[21] DR 00036.

[22] Petitioners' Brief, at p. 4, asserting that the 2009 purchase price of the property was "consistent with its assessed value in 2009, as a single-family residence."

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was based on *two* units, even though mischaracterized as an unpermitted ADU, really the second unit of the nonconforming duplex.

III. ARGUMENT

A. Standard of Review.

In reviewing a case under the Land Use Petition Act ("LUPA"), the Court may grant relief only if the Petitioner has carried the burden of establishing that one of the standards listed in RCW 36.70C.130(1) has been met. Therefore, LUPA clearly places the burden of proof on the Petitioners. RCW 36.70C.130(1).

In addition, a LUPA petition to Superior Court constitutes appellate review on the administrative record before the local jurisdiction's officer with the highest level of authority to make the final determination. *HJS Development, Inc. v. Pierce County,* 148 Wn.2d 451, 467, 61 P.3d 1141 (2003). The Interpretation was not subject to administrative appeal, so the finder of fact and final local decision maker in this case is the Department of Planning and Development (DPD).[23] Therefore, this Court sits in an appellate capacity reviewing the record before DPD.

Further, the appropriate standard of review varies depending upon which statutory basis is claimed for the granting of relief. *Peste v. Mason County*, 133 Wn. App. 456, 466-67 (2006). Here, Petitioners allege that the City's decision violated three of the LUPA standards: that DPD's decision is an erroneous interpretation of the law; that it is not supported by substantial evidence; and that it is a clearly erroneous application of the law to the facts. Under each of these standards, deference is due to the administrative body charged with interpreting and applying the law.

[23] 23.88.020(F)(2).

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Under the first standard, in considering whether the Department's decision is an erroneous interpretation of the law, this Court must give due deference to the construction of a law by DPD, the local agency with expertise.[24] While courts retain the ultimate authority to interpret legal issues *de novo*, this standard requires courts, where a statute is susceptible to more than one reasonable meaning, to defer to the City's interpretation of its Code where the Department has authority and expertise.[25]

Under the second standard, it is also a high burden for Petitioners to establish that DPD's decision is not supported by substantial evidence. Under LUPA, this evaluation must be made in light of the whole record before the Court[26] and with deference to findings of fact.[27] "Substantial evidence entails a relatively low threshold of proof." [28] "Substantial evidence is 'a sufficient quantity of evidence to persuade a fair-minded person of the truth or correctness' of the order."[29] The Court must "view the evidence and any reasonable inferences in the light most favorable to the party that prevailed in the highest forum exercising fact finding authority."[30] Under the

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[24] RCW 36.70C.120 (1) (b).

[25] *See Mall, Inc. v. City of Seattle,* 108 Wn.2d 369, 377-78, 739 P. 2d 668 (1987) ("It is a well established rule of statutory construction that considerable judicial deference should be given to the construction of an ordinance by those officials charged with its enforcement."); *Citizens for a Safe Neighborhood v. City of Seattle,* 67 Wn. App. 436, 440, 836 P.2d 235 (1992) (same); *Faben Point Neighbors v. City of Mercer Island,* 102 Wn. App. 775, 778, 11 P.3d 322 (2000) (rule under LUPA); *Young v. Pierce County,* 120 Wn. App. 175, 183, 84 P.3d 927 (2004).

[26] RCW 36.70C.130(1)(c).

[27] *Isla Verde Int'l Holdings, Inc. v. City of Camas,* 99 Wn. App. 127, 134, 990 P.2d 429 (1999), *aff'd on other grounds,* 146 Wn.2d 740 , 49 P.3d 867 (2002); *Schofield v. Spokane County,* 96 Wn. App. 581, 586, 980 P.2d 277 (1999).

[28] *Sunderland Family Treatment Servs. v. City of Pasco,* 127 Wn.2d 782, 801 n.10, 903 P.2d 986 (1995). Although this case was decided under pre-LUPA law, the Court noted that this standard of review remained unchanged under LUPA.

[29] *Schofield,* 96 Wn. App. at 586 (quoting *City of Redmond v. Central Puget Sound Growth Management Hearings Bd.,* 136 Wn.2d 38, 46, 959 P.2d 1091 (1998)); *see also Wenatchee Sportsmen Ass'n v. Chelan County,* 141 Wn.2d 169, 176, 4 P.3d 123 (2000).

[30] *Isla Verde,* 99 Wn. App. at 134 (quoting *Schofield,* 96 Wn. App. at 586-87).

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substantial evidence standard of review, the reviewing court also "defers to the fact-finder's assessment of witness credibility."[31]

Under the third standard, in order for Petitioners to prove that DPD's decision is "a clearly erroneous application of the law to the facts,"[32] the reviewing court must be left with the definite and firm conviction that a mistake has been committed based on the record.[33] The existence of credible contrary evidence is not sufficient to render a decision clearly erroneous.[34] And again, even under the "clearly erroneous" standard, deference is due to the administrative body charged with interpreting and applying the law.

Here, DPD, the highest forum with fact finding authority over the interpretation at issue here, determined that the nonconforming duplex use was legally established and had not been abandoned. DPD's decision is entitled to deference by this Court because the Department has many years of experience applying Title 23, the Seattle Land Use Code, and, in particular, the provisions related to a determination whether a use is nonconforming.

The Petitioners concede that they have the burden of proving that one of the alleged LUPA standards is met. However, Petitioners completely mischaracterize the burden of proving the existence of a nonconforming use, which will be discussed further below.

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[31] *Sunderland*, 127 Wn.2d at 801.
[32] RCW 36.70C.130(1)(d).
[33] *Wenatchee Sportsmen*, 141 Wn.2d at 176; *Schofield*, 96 Wn. App. at 586.
[34] *Providence Hosp. of Everett v. State, Dept. of Social & Health Services*, 112 Wn.2d 353, 355-356, 770 P.2d 1040 (1989).

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B. Petitioners fail to meet their burden of establishing that a legal nonconforming use was abandoned or discontinued.

Although nonconforming uses are generally disfavored, the right to continue a nonconforming use is treated like a "protected" or "vested" right and may not be voided easily.[35] In fact, Subsection 23.42.100(B) of the Seattle Municipal Code (SMC) specifically provides that:

> It is the intent of these provisions to establish a framework for dealing with nonconformity that **allows most nonconformities to continue**. The Code **facilitates the maintenance and enhancement of nonconforming uses and developments**...

Despite the desirability of eliminating nonconforming uses, this desire is countered by the strong private interests of property owners that have a nonconforming use. The Seattle Municipal Code attempts to balance those interests.

As previously mentioned, Petitioners mischaracterize the burden of proving the existence of a nonconforming use. Petitioners allege that the current owners have the burden of demonstrating that the subject property is a legal nonconforming duplex, suggesting that requires them to prove both that the use that was established in 1955 *and* was not discontinued for more than 12 consecutive months between 1955 and 2009.[36] Although the current owners *do* have the burden of demonstrating that the subject property was a legal nonconforming use at the time it was established in 1955, as was done here, "once a nonconforming use is established, **that burden shifts to the party claiming abandonment or discontinuance** of the nonconforming use to prove such."[37]

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[35] *City of University Place v. McGuire*, 144 Wn.2d 640, 652, 30 P.3d 453 (Sup. Ct., 2001) citing *Van Sant v. City of Everett*, 69 Wn. App. 641, 647-48, 849 P.2d 1276 (1993); *see also, Rhod-A-Zalea & 35th, Inc. v. Snohomish County*, 136 Wn.2d 1, 8, 959 P.2d 1024 (1998).

[36] Petitioners' Brief, pp. 7-8.

[37] *City of University Place v. McGuire*, 144 Wn.2d 640, 647, 30 P.3d 453 (Sup. Ct., 2001)

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The Washington Supreme Court and the Washington Courts of Appeals have all applied this burden-shifting framework in the context of nonconforming uses.[38] Petitioners even recognize this burden-shifting on p. 17 of their brief, citing *City of University Place v. McGuire*, 144 Wn.2d 640, 647, 30 P.3d 453 (2001), yet continue to mischaracterize it.

C. The City properly determined that the nonconforming use had been established; Petitioner fails to establish that Conclusion of Law No. 2 was not based on substantial evidence.

The City correctly determined that the nonconforming duplex use was properly established as a two-unit building or duplex – in this case, by Permit No. 440978, issued in 1955 and given final approval in 1956.[39] SMC 23.42.102.B provides that "Any use or development for which a permit was obtained is considered to be established." Here, a duplex use was established in 1955. In addition, several other permits obtained in the 1970s, 1980s and 1990s, were to make modifications to the duplex; however, DPD found no record of any application to change the duplex use to a single family structure. Moreover, plans provided by the current property owner depicting two separate units in the existing building were consistent with the duplex use authorized by Permit 440978.[40]

Based on consideration of DPD's permit history described above, DPD properly concluded that the residential structure at 5211 21st Avenue Northeast was established as a two-unit building and remains a legally established nonconforming use.[41] Contrary to Petitioners'

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[38] *McGuire, 144 Wn.2d at 647-48; Miller v. City of Bainbridge Island*, 111 Wn. App. 152, 43 P.3d 1250 (Div. 2, 2002) (stating that "[Plaintiff] is correct that once he establishes the legal nonconforming use, the burden to prove abandonment would shift to the [party challenging that use]."); and *First Pioneer Trading Co., Inc., v. Pierce County*, 146 Wn. App. 606, 614, 191 P.3d 928 (Div. 2, 2008)(holding that "Once the applicant establishes that such a legal nonconforming use existed before enactment of a contrary zoning ordinance, the burden of proof shifts to the [party claiming abandonment] to show that the applicant abandoned or discontinued the use after the ordinance's enactment.")

[39] DR 00111- DR 00113.

[40] *Id.*

[41] Interpretation, Conclusion of Law No. 2.

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assertions, the record contains sufficient evidence "to persuade a fair-minded person of the truth or correctness" of the City's determination that the duplex use was properly established.

D. The Department properly concluded that the use of the structure had not been discontinued or abandoned due to the prior property owner's actions.

Petitioners repeatedly claim that the Nelson's *intent* to discontinue the use is sufficient to establish that fact. However, Washington Courts consistently require more: to prove abandonment or discontinuance of a nonconforming use, the party asserting that claim must establish "'(a) [a]n 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."[42]

This two-factor standard for establishing abandonment or discontinuance of a nonconforming use is consistent with the Seattle Municipal Code, which provides that a use is discontinued under four circumstances:

> (1) permit to permanent change the use was issued;
>
> (2) the structure or portion of structure is not being used for the use allowed by the most recent permit...;
>
> (3) the structure is vacant. A multifamily structure with one or more vacant dwelling units is not considered to be discontinued unless all units in the structure are vacant; or
>
> (4) If a complete permit was submitted before the structure was vacated for 12 months, the use shall not be consisted discontinued unless the permit lapses or is denied.

SMC 23.42.104.B.1-4.

Although the declarations of Jerry Nelson appear to establish an intention to abandon the duplex use, Petitioners have failed to establish any overt act that shows the owners did not retain *any* interest in the right to the nonconforming use. In order to establish that, as illustrated in

[42] *City of University Place v. McGuire*, 144 Wn.2d 640, 652, 30 P.3d 453 (Sup. Ct., 2001) citing *Van Sant*, 69 Wn. App. at 649, 849 P.2d 1276.

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DPD's Interpretation, the physical configuration and other characteristics of the nonconforming use would have had to be removed; a permit to change the use obtained; or both units of the multifamily structure would have had to be vacant for more than 12 months.

Petitioners seem to argue that under SMC 23.42.104, a nonconforming use is considered discontinued when the structure or a portion of a structure is not being used for the established nonconforming use. First, the City disagrees that lack of use of the second unit constitutes discontinuance, because this is a multifamily structure and under SMC 23.42.104(B)(3), *both* units of the subject property would have to be vacant; here, one unit has been continuously occupied since the nonconforming use was established. Second, even if lack of use would constitute discontinuance, the City disagrees that Petitioners have shown any overt act to signal discontinuance of the nonconforming duplex use. Under SMC 23.84A.008, a dwelling unit is defined as:

> a room or rooms within a structure designed, arranged, occupied or intended to be occupied by not more than one household as living accommodations independent from any other household. The existence of a **food preparation area** within the room or rooms shall be **evidence of the existence of a dwelling unit.**

The Nelsons retained a second kitchen in the basement, so regardless of whether anyone lived there, a second dwelling unit continued to exist.[43] Simply not using one of the dwelling units would not carry the implication that the owner does not retain an interest in the nonconforming duplex use because the basement unit is still "designed" or "arranged" to be occupied by a household independent from another household. In addition, the following facts support the City's interpretation that no overt act showing abandonment had occurred: the Nelsons (1)

[43] Declaration of Jerry Nelson, handwritten addition to no. 5, DR 00058.

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retained two separate electrical meters;[44] (2) retained a separate entrance to the basement dwelling unit;[45] and (3) paid for two garbage containers every month for 18 years.[46]

Petitioners' argument that the Nelson's never removed the second electrical junction box because it was "prohibitively expensive" rings hollow in light of the fact that they paid for two garbage cans every month for almost twenty years. Further, property owners around the City routinely take these steps to comply with DPD administrative enforcement actions.

Moreover, Mr. Nelson's own actions belie Petitioners' argument that the Nelsons considered their home as a single-family residence. The Nelson's agent applied for and received three permits to make modifications to their home, which was acknowledged was a duplex;[47] This is consistent with Mr. Nelson's own declaration which states that "Twice we asked inspectors from the City to recognize that our home was not a conforming single-family residence. The inspector told us they would not do so unless we removed the electrical junction box in the basement...Even though we did not do this work..."[48]

In addition, Petitioners' argument that the current owner purchased the home for a cost that is consistent with the price of a single family home is both without merit and irrelevant. As mentioned above, regardless of how the home was advertised, when the prospective purchasers viewed the home, it was clear that it had six bedrooms, three bathrooms and two kitchens. It is also unclear that the cost of the home is consistent with a single family rather than duplex use. According to the property owners own declaration, which provides in relevant part:

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[44] Declaration of Jerry Nelson, handwritten no. 6, DR 00058.
[45] Declaration of Jerry Nelson, handwritten no. 6, DR 00058.
[46] Declaration of Jerry Nelson, handwritten addition to no. 5, DR 00058.
[47] The City first granted the Nelsons permission to construct an addition to the *existing duplex* under Seattle Building Permit No. 582738, issued in April 1979. DR 00141. The City granted the Nelsons permission again in 1992 to construct a balcony addition and window alternations to the duplex under Permit No. 663191. DR 00154-00155. The Nelsons applied for another permit, Permit No. 669645, in 1993 to alter the kitchen of "existing duplex bldg., subject to field inspection (STFI)." DR 00161-00163.
[48] DR 00058, no. 5 of Jerry Nelson Declaration.

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> Jerry Nelson sold this property to me on May 2009 as a duplex. This transaction is "sold by owner". Both seller and buyer have no agent. During the negotiation, Jerry told us that this building is duplex. ... Also the building has two kitchens, two entries to each unit. Then I believe it is a duplex and paid $650,000 for this 95 years old but a duplex building. This "sale by owner" price shall equal to $698,000.00 if we use agent. This price definitely is not for a 95 year old single family house in that area under recent economic conditions.

DR 00050 (Letter to DPD from current property owner, An Yu, dated September 20, 2009).

Moreover, even if the price of the home was consistent with that of other single family homes in the area, which has not been established, the sale price of property is not determinative: In McGuire, the court held that the "fact the property was sold without mention of [the nonconforming use] is potentially evidence of abandonment, but not conclusive. There is no act or omission that, as a matter of law, is proof of abandonment."[49] Likewise, the fact that the Nelsons did not expressly describe the property as a duplex – instead, referring to an "ADU" – is not evidence of abandonment.

Under the substantial evidence standard used in LUPA and other appellate review, it does not matter that other evidence might contradict the supporting evidence.[50] Even if an appellate court would prefer to resolve an actual dispute differently, it must affirm the factual conclusion below.[51] There is sufficient evidence in the record to persuade a fair-minded person of the correctness of the Department's decision that the nonconforming duplex had not been discontinued or abandoned, as defined by the Seattle Municipal Code and under Washington case law; Petitioners have failed to establish otherwise.

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[49] *City of University Place v. McGuire*, 144 Wn.2d 640, 653, 30 P.3d 453 (Sup. Ct., 2001).

[50] *In re marriage of Burrill*, 113 Wn. App. 863, 868, 56 P.3d 993 (2002), *rev. denied*, 149 Wn.2d 1007, 67 P.3d 1096 (2003); *State ex rel. Evergreen Freedom Found. v. Washington Educ. Ass'n*, 111 Wn. App. 586, 613, 49 P.3d 894 (2002), *rev. denied*, 148 Wn.2d 1010, 66 P.3d 639 (2003).

[51] *Beeson. v. Atlantic-Richfield, Co.*, 88 Wn.2d 499, 563 P.2d 822 (1977); *Keever & Associates, Inc. v. Randall*, 129 Wn. App. 733, 737, 119 P.3d 926 (2005), *rev. denied*, 157 Wn.2d 1009, 139 P.3d 349 (2006); *Spinelli v. Economy Stations, Inc.* 71 Wn.2d 503, 510, 429 P.2d 240 (1967)(stating that "under the 'substantial evidence standard', we will not substitute our views on disputed facts.")

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E. Contrary to Petitioners' argument, the Declarations submitted to the Department actually establish that the duplex use was not discontinued.

Petitioners allege that the current owners did not know how the subject property was used prior to their purchase and submitted no evidence to demonstrate that the use had not been discontinued. First, this is incorrect;[52] and second, Petitioner again mischaracterizes the burden-shifting framework that applies to nonconforming uses.

Since the current owners established the nonconforming use based on the 1955 permit, the burden shifted to the party challenging that use to prove it had been discontinued. The City properly considered the declarations of Mr. Nelson and Mr. Rosema and determined, not only that they failed to prove the duplex had been discontinued, they actually established that the duplex use continued to exist during the Nelsons' ownership. As discussed above, it is not enough for the property owner to intend to discontinue a nonconforming use.

F. DPD's analysis withstands scrutiny; Petitioners cannot meet their burden by relying almost exclusively on the Declaration of prior property owner who admits that he did not take the affirmative steps to convert the duplex to a single-family structure.

Although Petitioners are correct that this Court may review the facts set forth in the Interpretation *de novo*, they overlook the fact that the Court must give deference to the agency with expertise. Here, DPD determined that the nonconforming duplex use was legally established and had not been abandoned. DPD's decision is entitled to deference by this Court, because the Department has many years of experience applying Title 23, the Seattle Land Use Code, and, in particular, the provisions related to a determination whether a use is nonconforming.

Here, DPD's Interpretation is a correct interpretation of the law, supported by substantial evidence, and not clearly erroneous; Petitioners fail to prove that DPD incorrectly interpreted the

[52] DR 00045-00054.

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law, after giving appropriate deference to the administrative agency charged with its interpretation and enforcement. Petitioners also fail to prove that the decision is not supported by substantial evidence.

As discussed in detail above, all of Petitioners' arguments are based on the flawed assumption that the key to determining that a nonconforming use has been discontinued is 12 consecutive months of non-use, which they appear to define as actual use, as in someone living in the second dwelling unit. Petitioners have it wrong. First, intent alone is insufficient to establish abandonment. Second, the code defines "discontinued" in several ways and does not assume that use, in the context of a multifamily structure, means someone living in all of the units. The fact that structurally the building was maintained in such a way that a person could occupy both units and that fact that someone lived in one of the units, supports DPD's determination that the nonconforming use had not been discontinued.

i. Conclusion #2 – The nonconforming duplex use of the subject property is an established nonconforming use.

All parties agree that on November 18, 1955, the City issued Seattle Building Permit No. 440978, authorizing conversion of the existing residence to a duplex.[53]

As already discussed, the Interpretation provides that an application to "establish the use for the record" is unnecessary. Petitioners allege that this is "directly contrary to DPD's own Correction Notice," but fail to explain how this has any impact on the fact that the nonconforming use has been established since 1955. The Correction Notice expressly notifies the Current Owners that "the Department has received a request for a formal interpretation of the

[53] Petitioners' Brief, p.3, line 1; Building Permit No. 440978, DR 00113; *see also*, Interpretation No. 09-007, DR 00004.

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Land Use Code" and states that "[g]iven the information in this request, it is reasonable to ask that you provide some documentation that the structure has been used as a duplex since 1993."[54]

These statements are not at all contrary to the statement in the Interpretation that a permit to establish the use was unnecessary: a permit to establish use *was* unnecessary because, as discussed above, the nonconforming use was already established; however, it *was* reasonable, given the interpretation request, for the Department to ask for more information and to issue the permit establishing the use for the record to clear up any dispute. Petitioners fail to provide any persuasive arguments that would overcome the deference that is due to the Department on factual determinations and application of the Land Use Code.

ii. Conclusion #3 – The Department's interpretation of SMC 23.42.104(B) is appropriate.

Because the duplex use of the subject property was an established use, the burden shifts to the party challenging the nonconforming use – Petitioners – to establish that the use has been discontinued. They fail. The Department properly concluded that the use had never been discontinued or abandoned.

Contrary to Petitioners' assertion, the Department does not claim any right to exercise discretion to re-establish a nonconforming use that has been discontinued for twelve months. Rather, the City's interpretation properly concluded that the use had *never been discontinued.* DPD's practice is consistent with the burden-shifting framework adopted by Washington Courts, requiring a party challenging a nonconforming use, once the nonconforming use is proved to have been established, to prove it has lapsed. This practice is also consistent with the City's own code, which requires a balancing of the interests of nonconforming property owners and the desire to eliminate nonconforming uses.

[54] DR 00061-00062.

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There was ample information in the record to support the Department's determination that the duplex use was not abandoned or discontinued under the Land Use Code simply based on Mr. Nelson's intent that such use was abandoned and once again, Petitioners fail to advance persuasive arguments that would overcome the deference that is due to the Department on factual determinations and application of the Land Use Code.

iii. Conclusion #4 – Permit application references to the subject property as an "existing duplex" support the existence of the continuing nonconforming use of the subject property.

Petitioners argue that the Department records recognizing the property as a duplex do not support DPD's determination that the nonconforming duplex was established and continued to exist. Petitioners continue to rely on the assertion that unknown City inspectors at an unknown time, supposedly told the former property owner that to change the Department's records, he would have to remove the second electrical junction box. This "fact" is essentially irrelevant: the point is Mr. Nelson never took any affirmative action to discontinue the nonconforming duplex use, even though he could have. He could have followed the City inspector's advice and removed the electrical box and other physical features of the second dwelling unit *or* he could have applied for a permit to change the use.

Moreover, prior permits were not the only documentation DPD relied upon in making its determination that the nonconforming duplex use was established and had not been discontinued or abandoned. [55] DPD also considered the information provided by Petitioners, including the declarations of Mr. Nelson; the information provided by the current owners, include current owner's statement that Mr. Nelson represented to them that the home was a legal nonconforming

[55] DR 00058.

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duplex;[56] and the physical characteristics of the subject property, as represented on the plans provided by the current owners.[57] Petitioners fail to establish that DPD's reliance on Department records, in addition to information provided by Petitioners and the Additional Parties is not based on substantial evidence. Further, contrary to Petitioners' argument, the Department's decision was not a clearly erroneous application of law to the facts.

iv. Conclusion #5 – Failure to alter or remodel the basement unit supports the existence of the continuing nonconforming use of the subject property.

Again, Petitioners focus on only one way in which the Seattle Municipal Code recognizes the discontinuance of a nonconforming use and forget that discontinuance requires some overt act. Petitioners assert that it is inconsistent to consider the physical configuration now, since the physical configuration was held to be not determinative in 1976, with regard to establishing the subject property as a triplex, but they miss a key difference: The triplex use had *never been established*, so of course whether it was configured as one or not did not matter. In the present case, the use *was* established as a duplex and so the physical configuration *is* determinative.

Petitioners argue that a single-family home may be converted to single-family residential use even if the structure does not conform to the development standards for single-family structures. However, Petitioners fail to recognize that the Seattle Municipal Code requires a permit to change the use of any structure,[58] including single-family residences, and there is **no** evidence that the Nelsons ever applied for a permit to convert the use. Petitioners cite **no** authority for their proposition that "the code cannot be clearer that discontinuance of a

[56] DR 00045-00054, Letter from An Yu, current property owner, and supporting documentation.
[57] DR 00084.
[58] SMC 23.40.002(A).

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nonconforming use does not require one to obtain a permit to change the use."[59] To the contrary, SMC 23.40.002 specifically requires a permit for any change of use:

> The establishment or change of use of any structures, buildings or premises, or any part thereof, requires approval according to the procedures set forth in Chapter 23.76...

The former owners never applied for a permit to change the use of their property; asking unnamed City inspectors to recognize that the "home was now a conforming single-family residence" does not constitute a formal permit application to establish the use. Petitioners fail to demonstrate that the code interpretation and associated building permit was not based on substantial evidence. Similarly, Petitioners' allegations that the City erred when it concluded that the prior property owner, Mr. Nelson, never took affirmative step to change the use from duplex to single family, is factually wrong, is inconsistent with what the Code actually requires, and Petitioners have failed to carry their burden on this issue.

v. Conclusion #6 – The Assessor's records support the existence of the continuing nonconforming use of the subject property.

Petitioners claim that "the Assessor's records show that the subject property was assessed as a single-family residence to 2001 to the present," and that the note regarding the existence of an "ADU [accessory dwelling unit] in basement" does not create any ambiguity. However, the Assessor's data is clearly at odds with the permitted use of the property, as shown in the Department's records. First, no permit to change the use had ever been issued. Second, no permit for an accessory dwelling unit had ever been issued. SMC 23.40.002(A) requires a permit for *both* a change in use *and* an accessory dwelling unit. Therefore, the Assessor's records are not proof that the nonconforming use had been discontinued or abandoned. As noted above, the record contains sufficient evidence that the property is a legal nonconforming duplex use that has

[59] Petitioners' Brief, p. 14, lines 16-20.

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continued to the present and meets the requirements of SMC 23.42.102. Petitioners' evidence does not controvert the substantial evidence in the record. Petitioners also fail to prove that the Department committed clear error when finding that the property was a legal nonconforming duplex use and that the use was continuous and not abandoned.

vi. Conclusion #7 – The nonconforming use of the subject property was continuous.

Petitioners fail to prove that the Department's determination that "the evidence of discontinuance in the record is ambiguous" is clearly erroneous. Again, SMC 23.42.102(B) provides that a nonconforming multifamily structure, such as a duplex, is not considered discontinued unless *all* units in the structure are vacant for a period of more than 12 months. Since there is clear evidence that the structure was still physically constructed as a duplex[60] and clear evidence that a portion of that structure was continuously occupied, any evidence to the contrary only serves to make the issue ambiguous – Petitioners failed to prove that the use had been discontinued or abandoned. Again, the former owners purported intent to abandon the nonconforming use is not enough to prove abandonment without some overt act showing that the owners did not retain any interest in the right to continue the nonconforming use.[61]

Petitioners' substantive complaints about how the Department applied the Land Use Code and weighed the evidence provided by permit records, Petitioners and the current property owner fail to satisfy their burden of leaving this Court with the definite and firm conviction that the decision is an erroneous interpretation of the law or that the City misapplied that law or based its decision on insubstantial evidence. The conflicting testimony by Mr. Nelson, weighed against credible contrary evidence, is insufficient to render a decision clearly erroneous. The Court

[60] Declaration of Jerry Nelson, DR 00058.
[61] *City of University Place v. McGuire*, 144 Wn.2d 640, 652, 30 P.3d 453 (Sup. Ct., 2001).

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should reject Petitioners' arguments; Petitioner failed to prove that the City erred when it found that the nonconforming duplex use was established and continued to exist to present.

vii. Conclusion Regarding Parking – The proposed parking complies with the Code.

Petitioners allege that DPD erred by allowing five parking spots on the subject property, but fail to establish that this determination was clearly erroneous. As provided in the Interpretation, the subject property is located in the University of Washington parking impact area, where the parking requirements are as follows: 1.5 spaces per unit for units with 2 or more bedrooms, plus .25 spaces per bedroom for units with 3 or more bedrooms.[62] SMC 23.86.002(B) allows fractions of required parking, up to and including one half, to be rounded down. Therefore, under current standards, four parking spaces are required for the six room nonconforming duplex. The record reflects that the existing duplex has two legally established parking spaces pursuant to Permit No. 440978, and thus, a current legal parking deficit of two parking spots.

When the current owners applied for a permit to alter the duplex, DPD properly concluded that an addition of three bedrooms – from six to nine – would require five parking spaces.[63] As part of current owner's application to add three bedrooms, they proposed five parking spaces on its plans.[64] The declaration of Mr. Rosema states that the prior owners parked three vehicles on the property.[65] Even if the current plans fall short of satisfying the five parking space requirement, the parking requirement would still be met, because the Code allows existing

[62] SMC 23.54.015, Chart B, subsection M, and Map A.
[63] 1.5 spaces for each of the two units plus (.25 X 9= 2.25)= 5.25, rounded down to 5.
[64] DR 00084.
[65] DR 00050.

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legal parking deficits of legally established uses to continue.[66] The current legal parking deficit of two parking spots which are allowed to continue under the Code. Thus, Current owners must only provide three new parking spaces, which they have done on the plans.[67] In sum, DPD properly evaluated the parking standards and the legal parking deficit created by the legal nonconforming use.

Petitioners rely on SMC 23.44.016(C)(3) for the proposition that no more than three vehicles can be parking outdoors on any lot. While this provision applies generally, it does not take into consideration legal nonconforming uses that may authorize parking in excess of three vehicles outdoors or in required yards and legal parking deficits associated with legal nonconforming uses.

Petitioners do not meet their burden with respect to Conclusion of Law #8 related to parking. Therefore, Petitioners' arguments regarding parking should be disregarded.

IV. CONCLUSION

None of Petitioners arguments satisfy any of the three LUPA standards they allege: (1) DPD's determination was not an "erroneous interpretation of the law," especially allowing for deference due by a local jurisdiction with expertise;" (2) DPD's determination was supported by "substantial evidence," including significant permitting history, plan sets, and declarations, regardless of any conflicting evidence; and DPD's determination was not a "clearly erroneous

[66] SMC 23.54.015(J).
[67] DR 00084.

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application of the law to the facts."[68] Petitioners fail to establish any of the LUPA standards for relief and, therefore, the Department's Interpretation and permit decision must be upheld.

DATED this 19th day of April, 2010.

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[68] RCW 36.70C.130(1)(b), (c), (d).

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CERTIFICATE OF SERVICE

I hereby certify that on this date, I electronically filed the **City of Seattle's Response to Petitioners' Opening Brief** with the Clerk of the Court using the ECR system.

I further certify that on this date, I used the E-Serve function of the ECR system, which will send notification of such filing to the below-listed:

Patrick J. Schneider, schnp@foster.com
Elizabeth E. Anderson, liza.anderson@seattle.gov

Dated this 19th day of April, 2010, at Seattle, Washington.

Rosie Lee Hailey
ROSIE LEE HAILEY

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