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COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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CITY OF VANCOUVER, WA,

Respondent,

v.

LEE AND GINA HOLDER,

Appellants.

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BRIEF OF RESPONDENT

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## I. ASSIGNMENTS OF ERROR

Respondent, City of Vancouver, WA (“City” or “Vancouver”) contends that neither the Hearing Examiner for the City (“Hearing Examiner”) nor the Trial Court erred in affirming Violation Two, cited in Notice of Civil Violation and Order No. C05-000010 (“NCVO No. 10”).<sup>1</sup>

## II. RESPONDENT’S RESTATEMENT OF THE ISSUES

The City finds it necessary to restate the appellate issues and the statement of the case, as the opening brief by Appellants, Mr. and Mrs. Lee and Gina Holder (“Holder”)<sup>2</sup>, does not conform to the requirements contained in Rules of Appellate Procedure (“RAP”) 10.3(a)(3) – (5).

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<sup>1</sup> RP at 25 – 26. As explained, *infra*, the Hearing Examiner dismissed Violation One, and Holder did not appeal Violation Three.

<sup>2</sup> The City also cited Mrs. Gina Holder as a “violator” in Notice of Civil Violation and Order No. C05-000010 because she co-owns the property that is the subject of this appeal. However, Mr. Holder is the only person who has argued and appeared in this case; and, therefore, the City refers to the Appellants as “Holder” and uses masculine pronouns.

Therefore, Vancouver respectfully submits the following appellate issues for review by this Court:

A. Does res judicata prevent the City from issuing Holder a Notice of Civil Violation and Order (i.e., civil citation) for parking motor vehicles on an unimproved surface (i.e., gravel) in violation of former Vancouver Municipal Code (“VMC”) § 17.14.290? <sup>3</sup>

The applicability of res judicata in this case constitutes a matter of law, and this Court reviews issues of law de novo. <sup>4</sup>

B. Did the Hearing Examiner err by finding that Holder failed to satisfy his burden in demonstrating that he had established a legal, nonconforming use, allowing him to park vehicles on an unimproved surface?

The Hearing Examiner’s articulation of the doctrine of nonconforming use is a matter of law – subject to de novo review by this Court; <sup>5</sup> however, the question as to whether Holder satisfied his burden in proving that he had established a nonconforming use is a question of fact. <sup>6</sup>

Therefore, Holder must demonstrate that the Hearing Examiner’s decision was not supported by substantial evidence or that the Hearing Examiner’s holding was a clearly erroneous application of the law to the facts. <sup>7</sup>

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<sup>3</sup> The Vancouver City Council amended VMC § 17.14.290 after the issuance of NCVO No. 10. This brief considers the code provisions that were in effect on the violation date, cited in NCVO No. 10. The only difference between the old and new versions of the code section is that there is no reference to nonconforming uses in the new ordinance. Vancouver contends that individuals may still make a claim of nonconforming use under the common law.

<sup>4</sup> *City of University Place v. McGuire*, 144 Wash. 2d 640, 647, 30 P.3d 453 (2001) (quoting *Girton v. City of Seattle*, 97 Wash. App. 360, 363, 983 P.2d 1135 (1999), review denied, 140 Wash. 2d 1007, 999 P.2d 1259 (2000)).

<sup>5</sup> *Id.*

<sup>6</sup> *Id.* at 652 (quoting *Van Sant v. City of Everett*, 69 Wash. App. 641, 648, 849 P.2s 1276 (1993)).

<sup>7</sup> *Id.* (quoting Wash. Rev. Code § 36.70C.130(c), (d)).

Evidence will be viewed in the light most favorable to the party who prevailed in the highest forum that exercised factfinding authority, a process that necessarily entails acceptance of the factfinder's views regarding the credibility of witnesses and the weight to be given reasonable but competing inferences.<sup>8</sup>

C. Does Holder cite irrelevant Clark County Code provisions that regulate storage?

This Court reviews issues of law de novo.<sup>9</sup>

D. Did the Trial Court err in ordering Holder to submit an application for a nonconforming use determination to the City?

This Court reviews issues of law de novo.<sup>10</sup>

### III. STATEMENT OF THE CASE

On April 1, 2005, Code Enforcement Officer Lois Ziegler (“Ziegler”) issued Holder NCVO No. 10, citing him for three alleged violations of the VMC on his residential property, located in Vancouver, WA.<sup>11</sup> NCVO No. 10 referenced a violation date of February 18, 2005.<sup>12</sup> Violation One concerned temporary membrane structures<sup>13</sup> on Holder's parcel that he constructed without obtaining necessary permits and approvals in violation of VMC § 20.140.010.<sup>14</sup> Violation Two cited

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<sup>8</sup> *Id.* (quoting *State ex rel. Lige & Wm. B. Dickson Co. v. County of Pierce*, 65 Wash. App. 614, 618, 829 P.2d 217 (1992)).

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> CP at 65.

<sup>12</sup> *Id.*

<sup>13</sup> A “temporary membrane structure” is composed of metal or plastic framing, covered by a plastic or canvas tarp.

<sup>14</sup> CP at 65.

Holder for parking motor vehicles on “unimproved surfaces” (i.e., gravel) on his premises in violation of former VMC § 17.14.290.<sup>15</sup> Violation Three addressed a structure that Holder had erected on the southeast corner of his property without obtaining a building permit in violation of VMC § 17.08.090.<sup>16</sup> Violation Two is the sole subject of Holder’s appeal.<sup>17</sup>

After receiving NCVO No. 10, Holder filed a timely, administrative appeal,<sup>18</sup> and the Hearing Examiner conducted a public, appeal hearing on June 9, 2005.<sup>19</sup> Code Enforcement Supervisor Richard Landis (“Landis”) testified on behalf of the City that Vancouver annexed Holder’s property into the City from Clark County on January 1, 1997.<sup>20</sup> Landis also stated that he did not observe any membrane structures in Holder’s backyard as of 1999<sup>21</sup> nor did he observe gravel in the backyard, except along a gravel driveway.<sup>22</sup> Landis further testified that Holder had parked a number of motor vehicles under the membrane structures in the rear yard;<sup>23</sup> and that not all of the cars under

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<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *See* note 1, *supra*.

<sup>18</sup> CP at 50.

<sup>19</sup> *Id.* at 54.

<sup>20</sup> *Id.* at 127.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* at 149.

<sup>23</sup> *Id.* at 128.

the membrane structures were on the driveway.<sup>24</sup> The City submitted photographs of Holder's property, taken on February 18, 2006, to support Violation Two.<sup>25</sup>

In addition to the vehicles parked in the back yard, Ziegler related that she conducted an inspection of Holder's property on February 18, 2006 and that she observed a brown van, parked "in the dirt adjacent to the [front] driveway."<sup>26</sup>

Holder represented himself and testified that every vehicle located in his backyard was parked on gravel;<sup>27</sup> that the parking space adjacent to the front driveway was gravel;<sup>28</sup> and that all of the gravel used for parking had been placed on his parcel prior to annexation.<sup>29</sup> Therefore, Holder claimed that he maintained a nonconforming use on his property, allowing him to park motor vehicles on gravel. He also suggested that a prior settlement with the City evidenced that the parking surface issue had already been litigated -- in his favor.<sup>30</sup>

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<sup>24</sup> *Id.* at 148.

<sup>25</sup> *See* Exhibits 6(a) – 6(e), contained in the certified, administrative record in this case.

<sup>26</sup> CP at 126; *see also* Exhibit 6(e), contained in the certified, administrative record in this case.

<sup>27</sup> CP at 129.

<sup>28</sup> *Id.* at 146.

<sup>29</sup> *Id.* at 146 – 147.

<sup>30</sup> *Id.* at 130, 142.

In regard to Violation One, Holder argued that he could find no reference of “any membrane structures in that entire code [VMC].”<sup>31</sup> He also intimated that the membrane structures were tantamount to the tarps he placed over vehicles prior to annexation.<sup>32</sup>

In order to support the Vancouver’s contention that Holder needed to obtain permits for the membrane structures on his property, the City cited provisions from the International Building Code (“IBC”), which is adopted by Vancouver in VMC § 17.12.010, that specifically defined the type of temporary, membrane structures on Holder’s parcel.<sup>33</sup>

On July 13, 2005, the Hearing Examiner issued a Final Order that dismissed Violation One and affirmed Violations Two and Three.<sup>34</sup> The Hearing Examiner dismissed Violation One not because the VMC did not require Holder to obtain building permits for his temporary membrane structures, but because the City failed to include language in its citation that was “sufficiently clear to allow the Appellants to understand what code section the NCVO alleges they [were] violating.”<sup>35</sup> Vancouver did not adequately reference Title 20’s permit requirements, as stated in VMC

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<sup>31</sup> *Id.* at 133.

<sup>32</sup> *Id.* at 138 – 139.

<sup>33</sup> *See* Exhibit 13, Supplemental Staff Report (June 15, 2005) at 2, contained in the certified, administrative record in this case.

<sup>34</sup> CP at 55, 59 – 60.

<sup>35</sup> *Id.* at 57.

§ 20.140.010, and the City included a confusing cross-reference to inapplicable regulations.<sup>36</sup>

The Hearing Examiner went on to find that the temporary membrane structures on Holder’s property constituted “structures” under both Title 20 and the IBC, and that no exemption excused the structures from Vancouver’s permit requirements.<sup>37</sup> The Hearing Examiner also noted that the “membrane structures are not permitted as a nonconforming use, because they were not legally established on the Property prior to annexation by the City.”<sup>38</sup>

In respect to Violation Two, the Hearing Examiner found that Holder “failed to bear the burden of proof that all of the existing gravel parking areas on the Property were legally established prior to January 29, 2004, the effective date of VMC 17.14.”<sup>39</sup> Although Clark County accepted gravel as an approved parking surface, the Hearing Examiner found that there was no substantial evidence that all gravel parking areas were legally established on Holder’s parcel prior to annexation.<sup>40</sup> The Hearing Examiner identified “areas of the Property that are currently used for vehicle parking that were not graveled prior to annexation,” by referencing

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<sup>36</sup> *Id.*

<sup>37</sup> *Id.* at 57 – 58.

<sup>38</sup> *Id.* at 58.

<sup>39</sup> *Id.* at 59.

<sup>40</sup> *Id.*

photographs, submitted into the record.<sup>41</sup> The Hearing Examiner also noted that Holder seemed to imply that he had added gravel to his parcel after annexation.<sup>42</sup>

Furthermore, the Hearing Examiner held that “[f]ormer VMC 20.81.440.D, which was in force between the date of annexation [January 1, 1997] and the effective date of VMC 17.14 [January 29, 2004], required that all new parking areas must be surfaced with an all-weather surface.”<sup>43</sup> Therefore, Holder could not have legally created new, graveled parking areas on his property after the date the City annexed his property. Finally, the Hearing Examiner rejected Holder’s argument that prior code enforcement action or a prior code enforcement settlement agreement prevented the City from enforcing VMC § 17.14.290(a).<sup>44</sup>

The Hearing Examiner ordered— in part — Holder to pay \$1,250.00 in monetary penalties within thirty days of July 13, 2005 and he required Holder to “[p]ark all vehicles on the property on an improved weather surface as defined by VMC 17.14.030.aa, or on gravel areas legally established on the Property [*sic*] prior to annexation.”<sup>45</sup>

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<sup>41</sup> *Id.*

<sup>42</sup> *Id.* at 57; *see also* Exhibit 15, Holder’s Response to the City’s Supplemental Staff Report at p. 4. Exhibit 15 is contained in the certified, administrative record in this case.

<sup>43</sup> CP at 57.

<sup>44</sup> *Id.* at 60.

<sup>45</sup> *Id.* at 63.

In lieu of parking vehicles on an improved, all-weather surface, Holder could submit an application for a nonconforming use determination to Vancouver. Once the City approved a gravel parking area as nonconforming, Holder could continue to use the approved space for parking.<sup>46</sup> The crux of Holder’s appeal, however, concerns his contention that all – not just some -- of his gravel parking spaces are nonconforming.<sup>47</sup>

Subsequent to the issuance of the Hearing Examiner’s Final Order, Petitioners filed an appeal of the Final Order under the Land Use Petition Act (“LUPA”), Wash. Rev. Code Chapter 36.70C, on October 21, 2005.<sup>48</sup> After considering the briefs and arguments by the parties, Clark County Superior Court Judge James E. Rulli held that “Petitioners [Holder] failed to demonstrate that they are entitled to relief under Wash. Rev. Code § 36.70C.130 (2005).”<sup>49</sup> The trial court then dismissed Holder’s appeal with prejudice and ordered him to file an application for a nonconforming use determination with the City by a date certain.<sup>50</sup> Holder filed a timely appeal of Judge Rulli’s order, seeking review by this Court.<sup>51</sup>

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<sup>46</sup> *Id.*

<sup>47</sup> Appellant’s Opening Br. p. 12 (March 31, 2006) (“App. Br.”).

<sup>48</sup> CP at 13 – 33.

<sup>49</sup> *Id.* at 113.

<sup>50</sup> *Id.* at 114.

<sup>51</sup> *Id.* at 112 – 114.

#### IV. ARGUMENT

At each level of appeal, Holder has argued that prior code enforcement action or litigation should estop the City from applying or enforcing VMC Chapter 17.14's parking regulations against his property.<sup>52</sup> That is, Holder has repeated various arguments, based upon *res judicata*.

Holder also contends that the vehicles parked on his property do not violate any VMC provision because his parcel continues to comply with Clark County regulations that were in effect prior to the annexation of his property into the City on January 1, 1997.<sup>53</sup> Holder claims that he has maintained a legal, nonconforming use on his property that would allow him to park motor vehicles on gravel.

Finally, Holder suggests that he wants this Court to reverse the Trial Court's oral order that required Holder to submit an application for a nonconforming use determination to the City.<sup>54</sup>

As set forth below, Vancouver contends that neither *res judicata* nor the doctrine of legal, nonconforming use prevents Vancouver from enforcing VMC Chapter 17.14's parking regulations against Holder's property. Vancouver also contends that the Trial Court properly ordered

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<sup>52</sup> *Id.* at 130 (Holder's testimony from the administrative hearing.); *see also Id.* at 5 (Holder's first claim for relief cited in his LUPA petition.); *see also App. Br.* at p. 1.

<sup>53</sup> CP at 137 (Holder's testimony from the administrative hearing.); *see also Id.* at 5 (Holder's first claim for relief, cited in his LUPA petition); *see also App. Br.* at 1.

<sup>54</sup> App. Br. at 1.

Holder to submit an application for a nonconforming use determination to the City.

A. RES JUDICATA DOES NOT PREVENT THE CITY FROM ENFORCING VMC CHAPTER 17.14'S PARKING REGULATIONS (VIOLATION TWO IN NCVO. NO. 10) AGAINST HOLDER'S PARCEL.

Holder argues that the doctrine of res judicata should prohibit the City from enforcing Vancouver's parking regulations (i.e, Violation Two in NCVO No. 10) against his property. Res judicata occurs when a prior judgment has a concurrence of identity in four respects with a subsequent action. There must be identity of (1) subject matter; (2) cause of action; (3) persons and parties; and (4) the quality of the persons for or against whom the claim is made.<sup>55</sup> The issue of whether Holder can avail himself of the doctrine of res judicata constitutes a matter of law, and this Court reviews issues of law de novo.<sup>56</sup>

Holder alleges that he prevailed against the City in a previous code enforcement action that adjudicated the same issue that is the subject of this appeal. However, the doctrine of res judicata is not applicable to Holder's appeal because Violation Two is predicated upon a code provision – VMC Chapter 17.14, Minimum Property Maintenance Code

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<sup>55</sup> *Hilltop Terrace Homeowner's Ass'n v. Island County*, 126 Wash. 2d 22, 32, 891 P.2d 29 (1995) (citations omitted).

<sup>56</sup> *City of University Place*, 144 Wash. 2d at 647.

-- that has not been the subject of prior litigation between him and the City. Furthermore, Violation Two concerns a different set of facts that underlie an entirely different cause of action.

Almost six years before the issuance of NCVO No. 10, the City cited Holder for “parking vehicles on unimproved surfaces,” under former VMC § 20.81.440.D.<sup>57</sup> The preceding code section required, in part, that “[a]reas used for standing and maneuvering of vehicles, including driveways, shall be permanently surfaced and so drained as to avoid flow of water across sidewalks or onto adjacent properties.”

The Hearing Examiner for the '99 citation dismissed the violation because former “VMC 20.81.200 provides that the parking requirements of VMC 20.81 only apply to new structures and buildings, increases in capacity or floor area and changes in use of existing facilities, none of which are applicable in this case.”<sup>58</sup> In support of its previous citation, City staff only argued that Holder must park his vehicles on an “improved surface.”<sup>59</sup> There is no mention in the '99 record that Holder created new parking areas on his parcel or that he erected new structures (e.g., temporary membrane structures) to house his cars.

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<sup>57</sup> CP at 83.

<sup>58</sup> *Id.* at 88.

<sup>59</sup> *Id.* at 85.

In the present case, the City seeks to enforce a provision from VMC Chapter 17.14, Minimum Property Maintenance Code (“MPMC”). As stated above, the MPMC became effective on January 29, 2004.<sup>60</sup> According to the City Council, VMC Chapter 17.14 “imposes comprehensive minimum maintenance standards for buildings, yards, facilities and equipment to protect the public’s health, safety, and welfare and to help preserve property values.”<sup>61</sup> The MPMC is an ordinance predicated upon the City’s police power under Wash. Const. art. XI, § 11, and it regulates *existing* buildings and yards – not just new buildings or changes of use.<sup>62</sup> Specifically, VMC § 17.14.290(a) requires that persons park their vehicles “on improved all weather surfaces.”<sup>63</sup> An “improved all weather surface” includes asphalt, concrete, pavers or other materials approved by the City of Vancouver Planning Official.<sup>64</sup> Gravel is not an approved surface.

The subject matters between the two ordinances are not identical. Subject matters are not identical for purposes of res judicata if they differ substantially.<sup>65</sup> Although the language contained in the ‘99

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<sup>60</sup> CP at 59.

<sup>61</sup> Former Vancouver Municipal Code (hereinafter “VMC”) § 17.14.010 was in effect on the date of the issuance of NCVO No. 10, April 1, 2005.

<sup>62</sup> *Id.* (emphasis added).

<sup>63</sup> *Id.* § 17.14.290.

<sup>64</sup> *Id.* at § 17.14.030(aa).

<sup>65</sup> *Hilltop*, 126 Wash. 2d at 32 (citations omitted).

citation and NCVO No. 10 prove similar – the purpose of the ordinances substantially differ. New development triggered the provisions contained in former VMC § 20.81.440.D, whereas VMC Chapter 17.14’s regulations are health and safety provisions that apply to all existing buildings and properties.<sup>66</sup>

The two citations also concern a different cause of action. The City never argued, in support of its ’99 citation, that Holder created new, gravel parking areas after Vancouver annexed his property into the City; nor did Vancouver staff point out that Holder parked vehicles in newly erected structures on top of those gravel parking areas. NCVO No. 10 is predicated on an entirely different cause of action, supported by different facts. Furthermore, any alleged settlement between Holder and the City, concerning the ’99 citation did not address the City’s parking requirements – because the Hearing Examiner for the ’99 code enforcement hearing dismissed the parking violation that cited VMC § 20.81.440.D.

The Hearing Examiner for NCVO No. 10 and the Trial Court properly held that *res judicata* did not apply to Holder’s appeal of Violation Two.

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<sup>66</sup> Former VMC § 17.14.290(c), which was applicable to NCVO No. 10, did recognize legal, nonconforming uses. However, as argued *infra*, the doctrine is not applicable to the present appeal.

B. HOLDER FAILED TO SATISFY HIS BURDEN IN PROVING THAT HE ESTABLISHED A LEGAL, NONCONFORMING USE TO ALLOW HIM TO PARK MOTOR VEHICLES ON GRAVEL APPLIED TO HIS PARCEL AFTER JANUARY 1, 1997.

The initial burden of proving the existence of a nonconforming use is on the landowner making the assertion.<sup>67</sup> “To establish a prior nonconforming use: (1) the use of the property must actually be established before adoption of the zoning ordinance; (2) the use must have been a lawful use prior to the zoning ordinance; (3) the use must not have been abandoned after the zoning ordinance took effect; and (4) the use must have been more than intermittent or occasional.”<sup>68</sup> Under Washington common law, nonconforming uses may be intensified, but not expanded.<sup>69</sup>

The Hearing Examiner’s articulation of the doctrine of nonconforming use is a matter of law – subject to de novo review by this Court;<sup>70</sup> however, the question as to whether Holder proved, by a preponderance of the evidence, that he had established a nonconforming use is a question of fact.<sup>71</sup> Therefore, Holder must demonstrate that the Hearing Examiner’s decision was not supported by substantial evidence

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<sup>67</sup> *City of Univ. Place*, 144 Wash. 2d at 647 (citations omitted).

<sup>68</sup> *North/South Airpark Ass’n v. Hagen*, 87 Wash. App. 765, 772, 942 P.2d 1068 (1997) (citations omitted).

<sup>69</sup> *City of University Place*, 144 Wash. 2d at 649 (citations omitted).

<sup>70</sup> *Id.*

<sup>71</sup> *Id.* at 652 (quoting *Van Santt*, 69 Wash. App. at 648).

or that the Hearing Examiner's holding was a clearly erroneous application of the law to the facts.<sup>72</sup>

Evidence will be viewed in the light most favorable to the party who prevailed in the highest forum that exercised factfinding authority, a process that necessarily entails acceptance of the factfinder's views regarding the credibility of witnesses and the weight to be given reasonable but competing inferences.<sup>73</sup> The Hearing Examiner properly held that Holder failed to satisfy his burden in proving a legal, nonconforming use on his property.

The City and Holder strenuously contested when and where Holder applied gravel for parking because former VMC § 17.14.290(c) did not require property owners to install an improved, all weather, parking surface if the parking area proved acceptable under applicable development regulations at the time the space was created. "Properties that are legally non-conforming at the time of the adoption of this code and located in areas developed prior to the adoption of zoning, land use or building codes shall not be required to install improved all weather surfaces for parking."<sup>74</sup>

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<sup>72</sup> *Id.* (quoting Wash. Rev. Code § 36.70C.130(c), (d)).

<sup>73</sup> *Id.* (quoting *State ex rel. Lige & Wm. B. Dickson Co.*, 65 Wash. App. at 618, 829).

<sup>74</sup> Former VMC § 17.14.290(c).

During the June 9<sup>th</sup> hearing, Landis explained:

The intent of that [former VMC § 17.14.290(c)] . . . and that was explained at the public hearing the time this ordinance was approved by council, was that Clark County, in 1983 accepted gravel be . . . gravel as an improved all weather surface. And what the intent of the ordinance was, if you had established a parking spot prior to annexation while you were in the county of gravel, we would accept that as pre-existing, non-conforming use since it was accepted by the county. Once again, in 1999 when I was in his rear yard, the entire rear yard was not covered with gravel.<sup>75</sup>

While the City accepts gravel parking areas that were established under Clark County development regulations prior to annexation, the Hearing Examiner specifically found that Holder created new, gravel parking spaces – after January 1, 1997. The new parking areas became subject to Vancouver’s development regulations. “Former VMC 20.81.440.D, which was in force between the date of annexation and the effective date of VMC 17.14, required that all new parking areas must be surfaced with an all-weather surface.”<sup>76</sup> Furthermore, VMC Title 20 codifies the common law and prohibits expansion of a nonconforming use.<sup>77</sup>

The Hearing Examiner, then, correctly held that former VMC § 20.81.440.D. applied to new improvements. According to former VMC

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<sup>75</sup> CP at 128.

<sup>76</sup> CP at 59.

<sup>77</sup> *Id.* (citing VMC 20.930.030.B).

§ 20.04.100, no condition of or upon real property could be caused or maintained, unless the condition conformed with Title 20's requirements. Holder's newly applied gravel constituted a changed condition, thereby triggering VMC § 20.81.440.D's requirements that new parking areas be "permanently surface." Gravel does not constitute a "permanent surface." The newly applied gravel also implicated VMC § 20.81.200 because, as Landis testified, many of the newly created parking areas were covered by new structures – the temporary membrane structures in Holder's back yard.

The Hearing Examiner based his decision on "the testimony, photographs and other evidence in the record."<sup>78</sup> Specifically, the Hearing Examiner pointed out that the City's photographs depicted many areas, currently used for parking, were created after annexation – a finding that was consistent with Landis's observation of Holder's parcel, prior to and after January 1, 1997.<sup>79</sup> The Hearing Examiner also found that Holder implied that he applied gravel after annexation as well.<sup>80</sup>

Absent his unsubstantiated statements, Holder can point to nothing in the record to satisfy his burden in proving a legal, nonconforming use.

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<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

C. HOLDER CITES IRRELEVANT PROVISIONS FROM CLARK COUNTY CODE CHAPTER 9.24, NUISANCES ENUMERATED.

In Appellant’s Opening Brief, Holder argues that Clark County code requirements regarding “storage,” located in Clark County Code (“CCC”) Chapter 9.24, allow him to continue parking his vehicles on unimproved surfaces in violation of VMC Chapter 17.14.<sup>81</sup> That is, since he allegedly complied with the County’s “storage” requirements, Vancouver’s “parking” requirements do not apply.

Holder does not properly cite to the CCC, but, more importantly, he does not appreciate that the provisions contained in CCC § 9.24.010(1)(d), (2)(d) have nothing to do with parking requirements. The preceding regulations only concern the *types* of vehicles (e.g., limitations on inoperable vehicles) that can be parked or stored on one’s property.<sup>82</sup> Furthermore, Holder neglects to consider that the Hearing Examiner found that he created new, graveled parking areas after annexation.<sup>83</sup> Citations to CCC Chapter 9.24 prove irrelevant to this case.

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<sup>81</sup> App.’s Br. at 7.

<sup>82</sup> Clark County Code § 9.24.010(1)(d), (2)(d) (emphasis added).

<sup>83</sup> See notes 40 – 42, *supra*.

Holder also contends that the City failed to establish a nexus between application of gravel and parking.<sup>84</sup> Once again, the Hearing Examiner found, by referencing photographs and the testimony of Landis, that Holder parked vehicles on gravel areas – created after January 1, 1997.<sup>85</sup>

D. THE TRIAL COURT PROPERLY ORDERED HOLDER TO SUBMIT AN APPLICATION FOR A NONCONFORMING USE DETERMINATION.

The Trial Court ordered, orally, Holder to submit an application for a nonconforming use determination to the City.<sup>86</sup> Vancouver agrees with Holder that the Hearing Examiner's Final Order did not require the submission of the application. Previous City arguments to the contrary were in error. However, Vancouver contends that the Trial Court's oral order is justified because the Hearing Examiner could have required Holder to submit the application as a corrective action.<sup>87</sup> The Trial Court, then, exercised no greater authority than that of the Hearing Examiner. A nonconforming use application will further memorialize

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<sup>84</sup> App.'s Br. at 11.

<sup>85</sup> See note 83, *supra*.

<sup>86</sup> RP at 30.

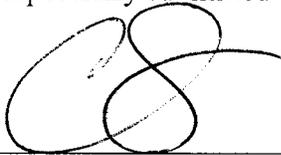
<sup>87</sup> VMC Title 22, Uniform Enforcement Code, provides the enforcement procedures for VMC Chapter 17.14. See VMC § 17.14.050. According to VMC § 22.03.050(E), Decision of the Hearing Examiner, the Hearing Examiner may require corrective action in a Final Order.

which areas of Holder's property are legal, nonconforming from those that are not.

#### V. CONCLUSION

Neither res judicata nor the doctrine of nonconforming use prevents the City from enforcing VMC Chapter 17.14's parking regulations against Holder's parcel. NCVO No. 10 concerns a different subject area and separate cause of action; and Holder failed to satisfy his burden of proving that he established a legal, nonconforming use on his property. The City respectfully asks this Court to uphold Violation Two by affirming both the Hearing Examiner's and the Trial Court's decisions.

Respectfully submitted this 17<sup>th</sup> day of May, 2006 by:

A handwritten signature in black ink, consisting of several loops and a long horizontal stroke extending to the right.

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Charles A. Isely, WSBA # 34130  
Assistant City Attorney  
Attorney for Respondent

**I. Wash. Rev. Code § 36.70C.130. Standards for granting relief**

(1) The superior court, acting without a jury, shall review the record and such supplemental evidence as is permitted under RCW 36.70C.120. The court may grant relief only if the party seeking relief has carried the burden of establishing that one of the standards set forth in (a) through (f) of this subsection has been met. The standards are:

(a) The body or officer that made the land use decision engaged in unlawful procedure or failed to follow a prescribed process, unless the error was harmless;

(b) 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;

(c) The land use decision is not supported by evidence that is substantial when viewed in light of the whole record before the court;

(d) The land use decision is a clearly erroneous application of the law to the facts;

(e) The land use decision is outside the authority or jurisdiction of the body or officer making the decision; or

(f) The land use decision violates the constitutional rights of the party seeking relief.

(2) In order to grant relief under this chapter, it is not necessary for the court to find that the local jurisdiction engaged in arbitrary and capricious conduct. A grant of relief by itself may not be deemed to establish liability for monetary damages or compensation.

## **II. Excerpts from VMC Chapter 17.08, Administrative Code.**

### VMC § 17.08.090(b). Permits

Except as specified in this code or technical codes, no building or structure regulated by this code or the technical codes shall be erected, constructed, enlarged, altered, repaired, moved, placed, improved, removed, converted, enlarged, or have its occupancy/use changed unless a permit has been obtained; and no building or structure shall have erected, installed, enlarged, altered, repaired, removed, converted or replaced any electrical, gas, mechanical, plumbing system, fire protection or fire alarm system, the installation of which is regulated by this code or technical codes unless a permit has been obtained.

## **III. Excerpts from former VMC Chapter 17.14, Minimum Property Maintenance Code.**

The following excerpts are the provisions that were in effect on the violation date (February 18, 2005), referenced in Notice of Civil Violation and Order C05-0000010 (“NCVO No. 10”). On May 23, 2005, the Vancouver City Council amended the provisions referenced below by Ordinance M-3702. However, the amendments are not applicable to this case, as the effective date of Ordinance M-3702 post-dates the issuance of NCVNO No. 10 by several months.

### VMC § 17.14.010. Purpose.

The city council of the City of Vancouver finds that buildings, yards, facilities and equipment not maintained in compliance with the requirements of this chapter threaten the public’s health, safety, and welfare and adversely affect the value, utility, and habitability of property within the city. This chapter imposes comprehensive minimum maintenance standards for buildings, yards, facilities and equipment to protect the public’s health, safety, and welfare and to help preserve property values.

VMC § 17.14.020(aa). Definition of “Improved All Weather Surface.”

“Improved all weather surface” means asphalt, concrete, pavers or other surface approved by the planning official.

VMC § 17.14.290. Limitations on the parking of motor vehicles, boats, trailers, commercial and heavy commercial equipment.

a. Motor vehicles. Motor vehicles shall be parked on improved all weather surfaces. Motor Vehicles, other than those in subsection (b) of this section, shall not be parked in the setbacks except in front yard or side street setbacks when in a driveway that provides access to an approved parking location and in conformance with VMC title 20. Parked motor vehicles shall not block access to required parking.

b. Recreational vehicles, boats, trailers. Recreational vehicles, boats, and trailers shall be parked, kept or stored on an improved all weather surface and shall not be parked, kept or stored in required front yard setbacks, except for a driveway. Recreational vehicle, boat, or trailer parking in the side or rear yard setbacks is allowed so long as emergency responders may access all sides of a structure. Access to parking shall be via an approved driveway approach and an improved all weather surface.

c. Truck tractors and semi-trailers. Truck tractors, as defined in RCW 46.04.655, and semi-trailers, as defined in RCW 46.04.530, shall not be parked, kept or stored in residentially zoned areas, on residential property in other zones or on sites that have not been permitted, improved and approved for such use. This requirement shall not apply to the parking, keeping or storage of agricultural machinery on residential premises to be used for agricultural use allowed by VMC title 20 or when equipment is used in conjunction with a permitted or allowed project.

d. Heavy commercial equipment. Heavy commercial equipment shall not be parked, kept or stored in residentially zoned areas, on residential property in other zones or on sites that have not been permitted, improved and approved for such use. This requirement

shall not apply to the parking, keeping or storage of agricultural machinery on residential premises to be used for agricultural use allowed by VMC title 20 or when equipment is used in conjunction with an ongoing permitted or allowed project.

#### **IV. Excerpts from current VMC Chapter 17.14, MPMC.**

##### VMC § 17.14.050, Enforcement.

The city manager, or his or her designate, shall appoint agents or officers, to be known as a “code official,” responsible for the enforcement of this chapter pursuant to VMC title 22.

#### **V. Excerpts from former VMC Title 20, Zoning.**

Excerpts from former VMC Title 20, Zoning, reference code provisions that applied to the Appellant’s parcel from the date of annexation, January 1, 1997, through the March, 2004. The following excerpts constitute the only City provisions regarding parking surfaces that were in effect from January 1, 1997 to January 29, 2004 – the date Vancouver adopted VMC Chapter 17.14, Minimum Property Maintenance Code.

##### VMC § 20.02.146. Building.

“Building” shall mean any structure having a roof, and used or built for the shelter or enclosure of persons, animals, chattel, or property of any kind.

##### VMC § 20.02.318. Structure.

“Structure” shall mean anything constructed or built, any edifice, building of any kind, or any piece of work artificially built-up or composed of parts joined together in some definite manner, which requires location on the ground or is attached to something having a location on the ground, including swimming and wading pools and covered patios, excepting outdoor areas such as paved areas, walks, tennis courts, and similar recreation areas.

VMC § 20.04.100. Compliance.

Except as provided in Section 20.04.200, et. seq., no building or other structure shall be constructed, improved, altered, enlarged, or moved, nor shall any use or occupancy of premises within the City be commenced or changed; nor shall any condition of or upon real property be caused or maintained, after the effective date of this Title, except in conformity with conditions prescribed for each of the several zones established hereunder. It shall be unlawful for any person, firm, or corporation to erect, construct, establish, move into, alter, enlarge, use, or cause to be used, any buildings, structures, or improvement or use of premises located in any zone described in this Title contrary to the provisions of this Title.

VMC § 20.04.230. Nonconforming uses.

A. The Planning Commission may grant an application for a change of use if, on

the basis of the application and the evidence submitted, it makes the following findings:

1. That the proposed use is classified in a more restrictive category than existing or pre-existing use by the district regulations of this Title. The classifications of a nonconforming use shall be determined on the basis of the district in which it is first permitted, provided that a conditional use shall be deemed to be in a less restrictive category than a permitted use in the same category.

2. That the proposed use will not more adversely affect the character of the district in which it is proposed to be located than the existing or pre-existing use.

3. That the change of use will not result in the enlargement of the space occupied by a nonconforming use, except that a conforming use of a building may be extended throughout those parts of a building which were designed or arranged to such use prior to the date when such use of the building became nonconforming, provided that no structural alteration, except those required by law, are made.

B.If a nonconforming use not involving a structure has been changed to a conforming use, or if the nonconforming use ceases, or if the building is vacant for a period of 1 year or more, said use shall be considered abandoned, and said premises shall thereafter be used only for uses permitted under the provisions in the district in which it is located. The Planning Commission may extend such use if the applicant shows good cause and makes application therefor.

C.A nonconforming use not involving a structure or one involving a structure other than a sign having an assessed value of less than \$1,000, shall be discontinued within 2 years from the date of passage of this Title.

D.A use which is nonconforming with respect to provisions for screening shall provide screening, meeting the requirements of this Title within a period of 5 years from the date of passage of this Title.

E.If an existing nonconforming use or portion thereof, not housed or enclosed within a structure, occupies a portion of a lot or parcel of land on the effective date hereof, the area of such use may not be expanded, nor shall the use or any part thereof, be moved to any other portion of the property not theretofore regularly and actually occupied for such use; provided, that this shall not apply where such increase in area is for the purpose of increasing an off-street parking or loading facility to the area specified in this Title for the activity carried on in the property; and provided further, that this shall not be construed as permitting unenclosed commercial activities where otherwise prohibited by this Title.

F.No structure, the use of which is nonconforming, shall be moved, altered, or enlarged unless required by law or unless the moving, alteration, or enlargement will result in the elimination of the nonconforming use.

G.No structure partially occupied by a nonconforming use shall be moved, altered, or enlarged in such a way as to permit the enlargement of the space occupied by the nonconforming use.

H.If any structure containing a nonconforming use is destroyed by any cause to an extent exceeding 75 percent of the appraised value

of the structure as determined by the records of the County Assessor for the year preceding destruction, a future structure or use on the property shall conform to the regulations for the district in which it is located. The Planning Commission may allow rebuilding in excess of 75 percent upon good cause through the public hearing process. When determining whether the structure which contained the nonconforming use may be reconstructed, the applicant must show that the following conditions can be met:

1. The applicant has requested review within one year of the date that the structure was destroyed.
2. The structures will be constructed to the configuration existing immediately prior to the time the structure was damaged.
3. Restoration can be completed within one year of Planning Commission approval.
4. The landscaping requirements of the zone can be met.
5. Off-street parking can be provided, providing that the original configuration and placement of the building on the lot will allow such.

The Planning Commission may impose additional mitigating provisions such as those described in Section 20.71.320, referring to conditional use permits.

VMC § 20.81.200. Application.

Off-street automobile parking, as hereinafter set forth, shall be provided and maintained:

- A. For any new structure or building erected.
- B. For additional seating capacity, floor area, guest rooms, or dwelling units added to any existing building or structure.
- C. When the use of the building or structure is changed, if the new use would require additional parking areas under the requirements of this Title.

VMC § 20.81.440. Development and Maintenance Standards.

Every parcel of land hereafter put to use as a public or private parking area, including commercial parking lots, shall be developed as follows:

A. Any off-street parking area other than for a 1-family or 2-family dwelling, shall be effectively screened by a site-obscuring fence, hedge, or planting on each side which adjoins property situated in an R District, or the premises of any school or like institution, as provided in Chapter 20.83. Screening along public streets shall be 3 feet in height. Screening between properties shall be 6 feet in height.

B. Any lighting used to illuminate the off-street parking areas shall be so arranged so that it will not project light rays directly upon any adjoining property in an R District. All off-street parking areas larger than 5,550 square feet shall be required to provide adequate illumination.

C. Except for 1-family and 2-family dwellings, groups of more than 2 parking spaces shall be so located and served by a driveway that their use will require no backing movements or other maneuvering within a street or right-of-way other than an alley.

D. Areas used for standing and maneuvering of vehicles, including driveways, shall be permanently surfaced and so drained as to avoid flow of water across sidewalks or onto adjacent properties. Individual spaces shall be marked with painted stripes. Parking lot design and drainage shall be subject to review and approval of the City Traffic Engineer.

E. Except for parking to serve residential uses, parking and loading areas adjacent to or within residential zones, or adjacent to

residential uses, shall be designed to minimize disturbance of residents.

F. Parking spaces along the outer boundaries of a parking area or space shall be contained by a curb or bumper rail so placed to prevent a motor vehicle from extending into any required setback area or over an adjacent property line or a street right-of-way, and to protect buildings and landscaping other than ground cover. With regard to a wheel stop curb placement, a two-foot bumper overhang will be construed to exist starting from the inside face of the wheel stop.

G. Property owners in Off-street Parking Improvement Districts are exempt. Whenever an Off-Street Parking Improvement District is approved by the City Council, and such property is duly acquired and appropriately developed, the Council may, by resolution, determine that the off-street parking needs of any designated block, parts of blocks, or groups of blocks in such District have been met; in such cases, such project shall supersede the requirements of these provisions for such area, and a building permit may be issued without conformance.

H. A private garage shall not have a capacity for more than 3 passenger automobiles for each dwelling unit, unless the lot whereon the dwelling and garage are proposed to be located, has an area of 2,000 square feet for each parking space in such garage.

## **VI. Excerpts from current VMC Title 20, Land Use and Development Code.**

Current VMC Title 20 became effective in March, 2004. Current provisions prove virtually identical to former VMC Title 20.

### VMC § 20.140.010. Compliance.

A. General. Except as specifically set forth elsewhere in this title, no building or other structure shall be constructed, improved, altered, enlarged or moved, nor shall any use or occupancy of premises within the city be commenced or changed; nor shall any condition of or upon real property be caused or maintained, after

the effective date of this title, except in conformity with conditions prescribed for each of the several zones established hereunder and with all applicable local, state and federal laws and regulations. It shall be unlawful for any person, firm or corporation to erect, construct, establish, move into, alter, enlarge, use or cause to be used, any buildings, structures or improvement or use of premises located in any zone described in this title contrary to the provisions of this title.

B. Obligation of successor. The requirements of this title apply to the property owner of record and/or the person undertaking the development or the use of structures or land and to that person's successors in interest.

C. Legality of pre-existing approvals. Any use of a structure or of land approved by the city prior to the effective date of this title, or by the county in annexed areas prior to annexation, may continue if consistent with such approvals.

VMC § 20.140.040. Meaning of specific words and terms.

**Building.** Any structure having a roof and walls, used or built for the shelter or enclosure of persons, animals or property of any kind.

**Structure.** Anything constructed or built, any edifice, building of any kind or any piece of work artificially built-up or composed of parts joined together in some definite manner, which requires location on the ground or is attached to something having a location on the ground, including swimming pools, wading pools and covered patios, excepting outdoor areas such as paved areas, walks, tennis courts and similar recreation areas. For the purposes of VMC 20.740.120, Frequently Flooded Areas, a structure is a walled and roofed building that may include a gas or liquid storage tank and that is principally above ground.

VMC § 20.930.030(B). Criterion for nonconforming situations.

B. **Nonconforming development.** Where a lawful structure and/or improvement exists at the effective date of this chapter that could

not be built under the terms of this title, such structure and/or improvement may be continued so long as it remains otherwise lawful, subject to the following provisions:

1. The nonconforming structure and/or improvement may not be enlarged or altered in a way which increases its nonconformity. However, any structure and/or improvement or portion thereof may be enlarged or altered in a way that complies with the requirements of this title or will decrease its nonconformity; or

2. The nonconforming structure and/or improvement may be rebuilt within its original footprint if it is destroyed by fire or other calamity, provided that an application to rebuild the structure must be filed within one year of the destruction.

3. Should such a structure and/or improvement be moved for any reason for any distance whatever, it shall thereafter conform to the regulations for the zoning district in which it is located after it is moved.

4. Exception: Legally-established detached accessory structures containing conforming uses in a single family residential districts may be structurally altered provided all of the following criteria are met:

a. Such addition shall not increase the gross floor area of the original accessory structure by more than 25%;

b. The addition shall not increase the structure's non-conformity as it relates to setbacks or distance from main structure (e.g. structure may not encroach into non-compliant setback areas further);

c. The height of the structure shall not be increased;

d. The addition shall meet minimum building and fire codes.

e. The addition shall be in conformance with all other development requirements.

VMC § 20.945.040(J)(1). General design standards for surface parking areas.

All areas used for the parking or storage or maneuvering of any vehicle shall be improved with asphalt, concrete or other permanent surface approved by the Planning Official; The Planning Official may approve the use of City and Department of Ecology alternative paving Best Management Practices to enhance on-site water quality where determined to be appropriate based on type and frequency of anticipated use.

**VII. Excerpts from VMC Title 22, Uniform Enforcement Code.**

VMC § 22.03.050(E), Decisions of Hearing Examiner.

Contents of final order. Except as provided in VMC 22.03.050(f), the hearings examiner shall issue a written final that contains the following information:

1. The hearings examiner's decision; and
2. Findings of fact and conclusions of law supporting the decision; and
3. The required corrective action, if any; and
4. The date and time by which the corrective action, if any, must be completed; and
5. If corrective action is required, the date on which monetary penalties shall continue to accrue; and
6. To the extent the appellant does not prevail in the appeal, the past and future monetary penalties according to VMC 22.02.040(c); and
7. A statement itemizing the cost of the appeal hearing or hearings examiner or both, if applicable under VMC 22.03.050(c); and
8. The date and time when the city may abate the unlawful condition if the required corrective action is not taken within the time provided in the final

order and that the appellant will be responsible for the city's necessary and reasonable costs.

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IN THE COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

LEE AND GINA HOLDER,  
Appellant,

vs.

CITY OF VANCOUVER, municipal  
corporation of the State of Washington,  
Respondent.

)  
)  
) Court of Appeals  
) Cause No. 34341-0-II  
)  
) Clark County No. 05-2-04039-8  
)

CERTIFICATE OF SERVICE

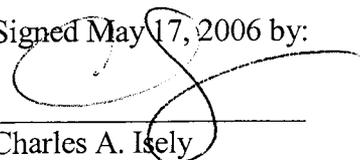
CERTIFICATE OF SERVICE

I certify that I hand-delivered, on May 17, 2006, the following document to Mr. and Mrs.

Lee and Gina Holder at 1601 SE 97<sup>th</sup> Ave., Vancouver, WA 98664:

- BRIEF OF RESPONDENT.

Signed May 17, 2006 by:

  
\_\_\_\_\_  
Charles A. Isely  
Attorney for Respondent  
WSBA # 34130  
210 E 13<sup>th</sup> St.  
Vancouver, WA 98660  
(360) 696-8251