70957-7

70957-7

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.

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APPELLANT'S OPENING BRIEF

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I. INTRODUCTION

Appellant Total Outdoor Corporation brings this appeal under the Land Use Petition Act ("LUPA"), RCW 36.70C. The primary issue on appeal is whether Total Outdoor can continue to use a legal non-conforming rooftop sign on the Centennial Building in downtown Seattle (the "Sign") at its vested size. Total Outdoor is an outdoor advertising company that now operates the Sign.

The City determined that the rights to use the Sign at its vested size were partially (but not entirely) abandoned in 1981 based on a permit seeking to use additional electrical circuits to light new advertising copy on the existing Sign structure. That determination is at odds with the principle that a legal conforming use is a vested right, not easily voided. It is also flawed because the burden of establishing abandonment is on the City, which failed to meet that burden. Moreover, the City's determination conflicted with its own decision that the property owner had not abandoned its vested right to use the property for off-premises advertising. The City compounded its legal errors by concluding that repairs performed in 2012 increased the Sign's size, but did not base this determination on any measurements it took of the pieces that were replaced. In fact, DPD chose not to review the old pieces when invited to do so. Finally, DPD determined that the Sign's wattage must be reduced

to 816 watts, even though the Sign at the time its non-conforming attributes vested, had been illuminated at a much higher wattage level.

Total Outdoor challenged DPD's decisions under LUPA, and the Superior Court denied Total Outdoor's LUPA petitions. Because neither the record nor the law supports DPD's determinations, the Court should reverse.

II. ASSIGNMENT OF ERROR

The Superior Court erred in denying Total Outdoor's LUPA petitions.

III. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

Three issues are presented. The first two relate to the Sign's size, and the third relates to the Sign's illumination:

1. Whether DPD has carried its "heavy burden" of establishing that any of the nonconforming rights associated with the Sign have been abandoned, where the property owner has disavowed any intent to abandon any of the property rights that were vested when the Sign became nonconforming in October 1975, and the City has conceded that the right to use the Sign for an off-premises advertising use has not been abandoned.
2. Whether substantial evidence supports DPD's determination that Total Outdoor's repairs increased the size of the Sign's structure

where the only evidence in the record shows that the repairs did not increase the size of the Sign structure and where DPD refused to inspect other available evidence.

3. Whether the Seattle Municipal Code's limitation on new lights applies to the Sign where the Sign has always been used as an illuminated sign with wattage greater than the current wattage, and the City Code allows this nonconformity to continue.

IV. STATEMENT OF THE CASE

A. Definitions

This appeal involves the interpretation of various terms defined by local ordinances, which are compiled here for the Court:

- Sign: "[A]ny medium, including structural and component parts, which is used or intended to be used to attract attention to the subject matter for advertising, identification or informative purposes." SMC 23.84A.036; *see also* Seattle Building Code ("SBC") 3107.3. In this brief, Total Outdoor uses the term "Sign" to refer to and include all of the Sign's parts, including the Sign's structure, which includes a base.

- Sign Structure: "Any structure which supports or is designed to support any sign." SBC 3107.3.

- "Advertising copy" or "copy": synonymous with "message on . . . [a] sign[]". SBC 3107.4.2.

- Nonconforming Use: "[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.

- Structure Nonconforming to Development Standards: "[A] structure, sight 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 includes, but are not limited to height, . . . lighting, maximum size of nonresidential uses. . . ." SMC 23.84A.026.

B. The Sign's First 55 Years: 1926-1981.

In June 1925, the City of Seattle issued a permit to construct the Centennial Building on the corner of 4th Avenue and Stewart, in downtown Seattle. R 00003.[1] Seven months later, the City issued another permit—this time, to erect an illuminated rooftop sign atop the Centennial Building. R 00004-5. In the nearly 90 years since the Sign was built, it has featured advertising copy on the same structure that exists today. That Sign structure includes a base that is approximately 4.5 feet high and is made up of horizontal metal beams and concrete pedestals. On top of the base, there is a steel lattice. *See, e.g.*, R 00759.

For decades, the copy on the Sign advertised the Great Northern Railway, and its successor Burlington Northern Railroad. *See* R 00575-77 (photographs of the Great Northern Railway copy from 1927 and 1928); R 00579-80 (photographs from 1937 and 1939); R 00581 (photograph from 1962). As of 1941, the Sign was 55 feet by 68.5 feet. R 00008 (1941 permit with dimensions).

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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.

Historical Photograph of Sign with Great Northern Copy. R 00575. Dimensions from 1941 permit superimposed onto image.

For purposes of this case, the date October 24, 1975 is crucial. On that date, a new City ordinance took effect, prohibiting advertising signs on rooftops in the downtown zone where the Sign was located. R 00125; 00134; 00136. From that point forward, the Sign became a legal non-conforming use and a structure non-conforming to development standards. On the date the zoning became effective and the Sign became nonconforming, the Sign was displaying the Burlington Northern Railroad copy, which measured 55 feet high (above the base or parapet) by 68.5 feet wide. R 00558; 00562.

In late November 1975, new advertising copy was placed on the Sign, changing the Sign's copy from an illuminated advertisement for Burlington Northern to an illuminated advertisement for Alaska Airlines. R00562. The Alaska Airlines advertising copy required additional electrical circuits for lighting, and the City issued one permit to install two new electrical circuits (1,650 watts each) for the proposed Alaska Airlines copy and a supplemental permit so that "8 additional [circuits]" (1,650 watts each) could be installed to illuminate the Alaska Airlines copy. R 00012-14. In total, these two electrical permits granted an additional 16,500 watts to illuminate the Sign's copy. In installing the Alaska Airlines advertising copy, the Sign structure was altered to reduce the height to 30 feet from the roof parapet "to make it conforming to exist[ing] sign code." R 00012; *see also* R 00097 (contemporary ordinance SMC 102929(15)(b), limiting sign height to 30 feet above the nearest parapet). The Alaska Airlines copy hung on this structure measured 26 feet by 60 feet. R00012.

In December 1975, the City received a letter from a citizen questioning the legality of the Sign after the copy changed to advertise Alaska Airlines. R 00562-63. The City responded by explaining that the new zoning ordinance "prohibits the installation of new advertising signs" but "does not cause the removal of existing advertising signs." R 00020

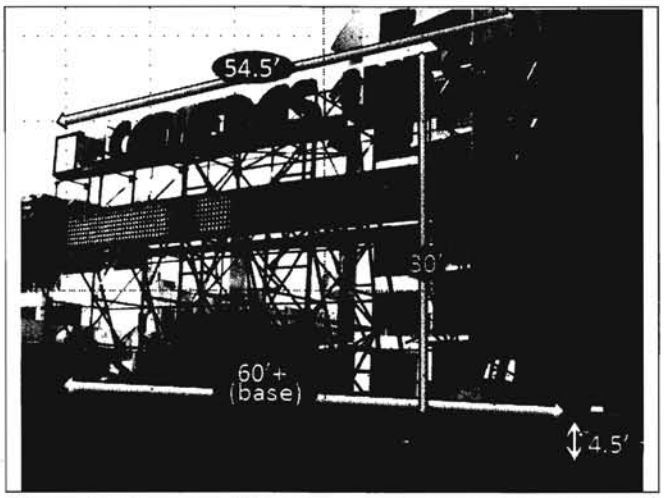
(emphasis in original). The City went on to say that the Sign was "a legal non-conforming advertising sign and can remain at its present location under the existing ordinances." *Id.* The City specifically noted that "[c]hanging of the advertising copy is also permitted." *Id.*

C. The Sign's Copy Changes to Advertise for "Cameras West": 1981-2011.

In 1981, the Sign's copy changed again—this time to display a neon illuminated advertisement for Cameras West, featuring the company's name and logo. The Cameras West copy did not alter the Sign's structure or base, but as with the Alaska Airlines copy, a permit was needed to install additional electrical circuits. In October 1981, the City issued a permit for five additional 1,650 watt circuits to illuminate the company's logo and the letter-shaped neon lights reading "CAMERAS WEST." R 00024-25 ("1981 lighting permit").

A hand-drawn sketch on the 1981 lighting permit noted that the letter-shaped neon lights would be five feet tall, and the length of the copy, including the logo running alongside the lettering, would be 54.5 feet long. R 00024. The sketch did not show the base of the Sign structure; it only outlined the proposed copy that needed illumination. *See id.* But the 1981 lighting permit stated that the Cameras West 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. *See* R 00751 (photograph of Cameras West copy on same structure).



Sign with Cameras West Copy Before Repairs. R 00751. Measurements superimposed onto image.

D. 2011-Present.

1. Cameras West Copy Is Taken Down, and the Sign's Rusted Support Beams Are Repaired.

In November 2011, Westlake Park Associates, the long-term lessee of the Centennial Building, with rights to maintain advertising on the Sign, informed the City's Department of Planning and Development that "Cameras West no longer wishes to use the sign." R 00597. After pointing out that "[t]he sign on the roof of the Centennial Building has been used for off premise advertising since 1926," Westlake Park Associates informed the City that the lessee "now plans to utilize the sign for other advertising copy, beginning with a message intended to draw

shoppers downtown for the holidays." *Id.* Later that month, Total Outdoor (an outdoor advertising company) took down the Cameras West copy and installed new copy on the preexisting sign structure, with a holiday message from the Downtown Seattle Association. R 207-10.

A few weeks later, on December 6, 2011, Total Outdoor formally requested that DPD issue a sign registration number for the Sign, in a letter providing back-up for Total Outdoor's position, R 00211-69, pursuant to SMC 23.55.014.[2] The City did not respond until February 2012, when it declined Total Outdoor's request. R 00300-03.

After replacing the copy, Total Outdoor noticed that the Sign needed significant repairs. As Total Outdoor informed DPD, the "elements, members, and connections of the [Sign] structure" had badly "deteriorated due to corrosion," after nearly 90 years atop the Centennial Building," R 00602. The structure's upper lattice (above the base) had corroded, and needed to be replaced in order to ensure the Sign's safety and stability. *Id.* But because "the main horizontal foundation beams and girder [*i.e.*, the base] did not show signs of corrosion that would warrant maintenance," they could be "left as-is with additional bracing elements to

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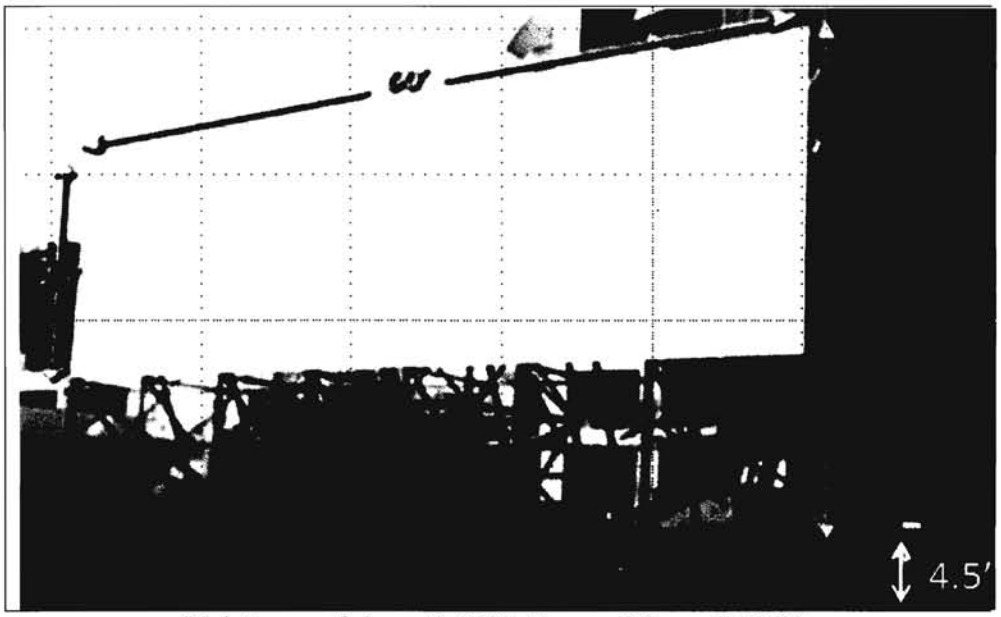
[2] SMC 23.55.014(F) requires the owner of an off-premise advertising sign to file a written report identifying the number and location of advertising signs maintained by the owner at any time during the previous year, and pay a fee. Upon submission of the report and fee, SMC 23.55.014(F) provides that "DPD shall assign a registration number to each sign face."

provide additional stability and safety." *Id.* *See also* R 00757 (showing corroded support beam); 00767 (same); 00769 (same).

Total Outdoor contracted with KLN Media LLC to conduct these repairs. R 00602-06. Because the maintenance consisted of "piece for piece" repairs of the Sign structure, the size of the structure did not change. *See* R 602-05 (schematics for the repair work). The base remained 4.5 foot high from the rooftop, and the Sign structure (beginning at the 4.5 foot mark) remained 30 feet high by 60 feet wide. *See* R 00602 (displaying pre-existing sign structure with blank face for future copy).

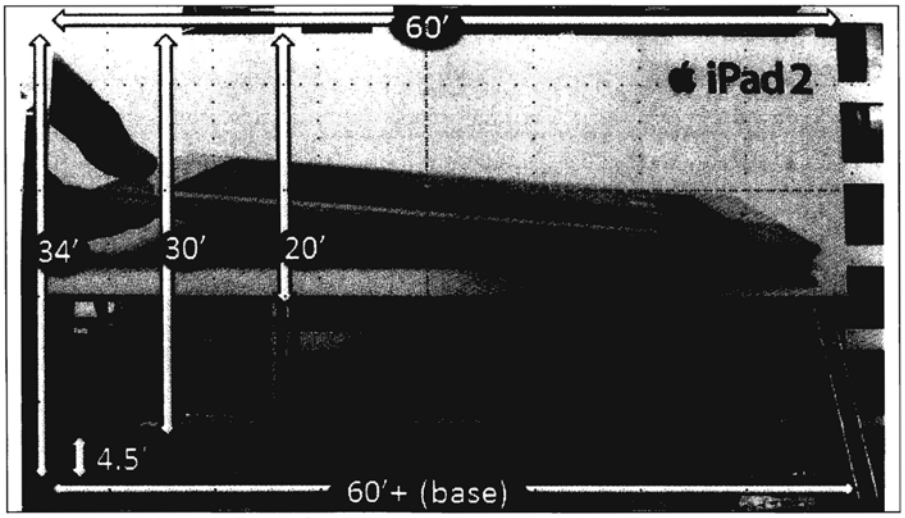


Maintenance Schematic With Proposed Copy. R 00602.
Measurement of base superimposed onto image.

Rusted Support Beams Needing Replacement. R 00757.

2. Apple Copy Is Placed on Sign After Repairs.

After the repairs, Total Outdoor placed new copy on the Sign, advertising the "iPad 2" for Apple. R 00765. The Apple copy measures 20 feet high by 60 feet wide and begins 10 feet above the base—making the top of the copy approximately 34.5 feet above the rooftop (4.5 foot high preexisting base + 30 foot preexisting structure = 34.5 feet from the rooftop). See R 00607 (roof sign maintenance plan with measurements); 00765 (photo). While larger than the Cameras West copy, the Apple copy is smaller than the Burlington Northern copy that had hung on the sign structure in 1975 when it first became a nonconforming use and nonconforming to development standards.



Apple Copy on Same Structure, Base Visible in Foreground. R 00765. Measurements superimposed onto image.

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 a single observation by DPD's Senior Electrical Inspector, Bob Hoyos, who believed that "[t]he new sign structure appeared to be larger, wider, and taller than the original sign structure and the sign face." R 00313. From that street-level observation, DPD determined that the "existing roof sign structure has been completely demolished and a new sign structure erected," *id.*, even though the repairs did not affect the base. Total Outdoor appealed this decision to Municipal Court, which has jurisdiction over code enforcement matters. That appeal has been stayed.

DPD also denied Total Outdoor's December 2011 request for a registration number, and claimed that the Sign could not be used for off-

premises advertising. R 00300-03. In that denial letter, DPD asserted 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 00302.

While the City acknowledged that any abandonment of a nonconforming right requires evidence of intent and an overt action by the property owner, DPD reasoned that the "1981 permit . . . is the required evidence of intent and overt action on the part of the property [owner] to convert to an on-premises sign use." *Id.* Although DPD indicated that it would be willing to consider "additional information" on this issue, DPD then articulated a new evidentiary requirement. *Id.* For Total Outdoor to go ahead with the Sign, DPD would require that any "written documentation of what the building owner intended in its practice of leasing out the rooftop structure . . . should either come from parties *other than the owner*, who have *no financial interest* in the property or be in the form of historic documents that show how the sign was intended to be used." R 00303 (emphasis added). DPD cited no legal authority warranting this stringent requirement, nor did DPD explain why the property owner could not speak to its own intent.

3. Total Outdoor Provides Evidence Showing That None of the Vested Rights Associated With the Sign Had Been Abandoned.

Since 1968, the Centennial Building has been owned by the Corporation of the Catholic Archdiocese of Seattle ("the Archdiocese"). R 00587. In response to DPD's February 3, 2012, determination that the Archdiocese had abandoned its vested rights in the Sign, the Archdiocese sent DPD a letter stating that it had "conducted a thorough review of our records [and found] no indication in them that the Archdiocese intended to limit its ability to use the sign for advertising." *Id.* Nor did the Archdiocese "authorize any third party to take this action on its behalf." *Id.* The Archdiocese explained that it had not abandoned *any* of the vested rights associated with the Sign, adding that "there is no other party who is in a better position to know about the Archdiocese's intent than the Archdiocese itself." *Id.*

DPD refused to consider the Archdiocese's letter, insisting that evidence about the property owner's intent 30 years ago could not come from the property owner itself. R 00303. Instead, DPD said that it would require evidence from a disinterested party with no financial stake in the Sign and with direct knowledge about the Archdiocese's intentions thirty years ago when its *lessee* was awarded a permit to illuminate the Cameras West copy. *Id.*

In response, Total Outdoor presented a declaration from former Seattle Mayor Paul Schell. R 00648. In 1981, before he was mayor, Mr. Schell managed the Centennial Building. *Id.* But by 2012, Mayor Schell no longer had any financial stake in the building or the Sign. In his declaration, Mr. Schell explained that when the "sign copy was changed to advertise Cameras West in 1981 . . . [the lessee] did not intend to abandon or forego any rights to the use as an off-premise sign." *Id.*

4. DPD Concedes That Sign Can Feature Off-Premises Advertising, But Continues to Insist That the Sign Structure and Copy Are Too Big.

On October 26, 2012, DPD issued its "Proposed Decisions" concerning the Sign. First, DPD conceded that the Sign was a valid nonconforming, off-premises sign, and that the right to off-premises use had not been abandoned. R 00656. In reaching this conclusion, DPD did not cite the Archdiocese's letter, but instead focused entirely on former Mayor Schell's declaration as a representative of the former lessee. *Id.* DPD pointed out that Mr. Schell's statement "appears to be from an individual who once had an ownership interest in the property but has not had any interest for many years, and this statement indicates intent to maintain the subject roof sign as an off-premises sign." *Id.*

But even after conceding that the 1981 lighting permit did not evidence intent to abandon the right to off-premises use, DPD continued to

insist that the 1981 lighting permit *did* establish an intent to abandon certain vested rights associated with size. Specifically, DPD reasoned that the hand-drawn sketch for 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—even though that sketch was not a construction plan for the structure, which was pre-existing, and did not show the Sign's base, *see* R 00024. In its Proposed Decisions, DPD did not explain how or why a hand-drawn sketch accompanying a permit for electrical work should determine the correct and legally allowed dimensions of the pre-existing sign structure. But relying on this sketch, DPD concluded that what it called the "sign face" was now limited to the size of the Cameras West copy. R 00657. It therefore determined that the Apple copy represents an invalid expansion of a nonconforming structure because the Apple copy is larger than the Cameras West copy. R 00657-59.

In addition to pegging the copy's maximum size to the size of the Cameras West copy, DPD determined that the Sign's structure is limited to 30 feet in height by 54.5 feet wide (ignoring the 4.5 foot base), and that the sign face is limited to a total area of 440.5 square feet—relying once again on the 1981 lighting permit and its hand-drawn sketch. R 00657. DPD's determination that the height is limited to 30 feet in height from the

rooftop—rather than 30 feet in height from the top of the 4.5 foot high base—was based on the hand-drawn sketch, *which does not depict the preexisting base at all.*

DPD also concluded that Total Outdoor's repair work—which replaced like-for-like and piece-for-piece corroded parts of the Sign for safety and stability—had created a "new and different structure" that was bigger than before, thereby increasing the Sign's nonconformity. R 00659. DPD explained that its conclusion was based solely "on two site inspections on January 31, 2012 and February 1, 2012, by DPD Sign Inspector Bob Hoyos," which did not include a visit to the roof to inspect the Sign. *Id.* DPD did not rely on any measurements of the replacement metal pieces, or any direct comparisons between the new pieces and the 90-year-old corroded pieces that had been replaced and were available for inspection. In fact, a later internal City report explained that DPD's conclusion that the Sign was now larger was based on the "shop drawing" dimensions—that is, the hand-drawn sketch of the Cameras West copy from the 1981 lighting permit. R 00723.

In sum, DPD determined that the 1981 lighting permit's hand-drawn sketch was legally determinative of the Sign's structure and face, even though the sketch did not show the structure, and from there concluded that the structure now was limited to 30 feet high from the

rooftop by 54.5 feet wide. Further, based on the eyeball impressions of its electrical inspector (rather than any measurements or comparisons), DPD also concluded, incorrectly, that the repairs had increased the Sign's size.

Total Outdoor replied to the proposed decision on November 30, 2012, providing additional information showing "that the Centennial Sign structure is the same size today as it was immediately prior to Total Outdoor's repair work." R 00744. It pointed out that the supporting uprights are still 30 feet high (from the top of the roof parapet, which is about 4.5 feet high), by 56.5 feet wide (measured from the edges of the outermost uprights). *Id.* Total Outdoor also provided "before and after" photographs. Photographs before the repair work, Exhibits A, B, and C, show eight vertical beams, while Exhibit D shows a typical 90-year-old rusted beam that needed replacement, R 00757. Exhibits A, B, and C, also show the *foundation* beam, on which "[n]o repair work was done." R 00745; 00749-55. The foundation beam (which is part of the Sign's base) is not even shown on the hand-drawn sketch that DPD claims should now control the dimensions of the Sign's base, structure, and face. Exhibits A and E both show the Cameras West copy *and* the 4.5 foot base on which the sign structure stood. R 00751; 00759. Total Outdoor explained (and showed photographically) that the repair work "was conducted by removing and replacing the steel beams in one vertical

section . . . moving from the left hand side of the photographs to the right hand side." R 00758-65 (Exhibits E, F, and G).

In particular, Exhibit F shows that two sections of the metal pieces (on the left) had been replaced, piece-for-piece, and a third section had been removed, but not yet replaced—leaving a gap in the middle. R 00761. To the right of that gap, the final five sections (which had not been replaced yet) are shown. *Id.* That photo illustrates that the repairs did not increase the Sign's size: the replacement sections on the right are the same height and width as the sections that have yet to be replaced on the right. *Id.* If the replacement parts had been *larger* than the old parts, the gap in the middle would not be large enough for the next replacement beam.

Exhibit F, showing repairs in progress. Completed repairs on left, and old sections remain on right. Each section is same height and width, as gap illustrates. Preexisting base is also shown. R 00761.

Thus, Total Outdoor's schematics and photographs showed that neither the height nor the width of the structure had expanded. But as further evidence, Total Outdoor retained every piece of the old rusted metal that had been removed, and it invited DPD to view and measure them to verify that they were the same size. R 00746. DPD declined the invitation. R 00736. *See* R 00736 (asserting that it would be "unnecessary" and not "helpful to DPD").

5. DPD's Final Decision Concludes That the Sign's Structure and Copy Are Too Big, and the Sign's Wattage Too High.

DPD issued its final decisions on the Sign on December 14, 2012, which echoed the determinations and reasoning contained in its Proposed Decisions from October 2012 (collectively the "Land Use Decisions"). R 00789. Again, DPD concluded that "the sign is eligible to be established for the record as an off-premises advertising sign," based on the Schell declaration. *Id.*

DPD conceded that Total Outdoor's "argument that the current sign frame structure and sign face [are] the same size as [they were] immediately prior to [the repairs] . . . *may or may not be true*." R 00790 (emphasis added). It reasoned that because the repairs were already complete, "the actual dimensions of the [previous] rooftop structure are not known with certainty." *Id.* In the letter containing its final decisions,

DPD did not acknowledge that it had been invited to view and measure the replaced metal parts.

Despite having concluded that Total Outdoor *may be* correct that the size has not increased, DPD 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 00791. In making that determination, DPD relied on an "abandonment" theory. *See* R 00795 (asserting that "the size of the structure and sign face that exist[ed] in 1975 was abandoned when the sign structure and face became smaller in 1981"). Based on that theory, DPD concluded that the advertisement featuring the Apple copy was a "clear expansion" of a nonconforming structure, and that the structure's height had to be reduced by 4.5 feet. R 00793.

DPD also determined that the Sign's wattage must be reduced to 816 watts. R 00800. DPD stated that the 816-watt restriction is based on the Seattle Energy Code in effect in 2013, denying the existence of any nonconforming right whatsoever with regard to lighting. *Id.*

Total Outdoor appealed DPD's determinations regarding size and wattage to Superior Court, under LUPA. CP 1. The Superior Court appeals were consolidated under Cause No. 12-2-06852-6. CP 44. The Superior Court affirmed DPD's Land Use Decisions on September 6,

2013. CP 1012. Total Outdoor timely appealed that decision to this Court. CP 1015.

V. STANDARD OF REVIEW

This is a LUPA review of an administrative decision. The Court reviews the record de novo, without reference to the superior court decision. *HJS Dev., Inc. v. Pierce Cnty*, 148 Wn.2d 451, 468, 61 P.3d 1141 (2003). As the party that filed the LUPA petition, Total Outdoor must establish that DPD erred under any one of the six standards articulated in RCW 36.70C.130(1). *Rosema v. City of Seattle*, 166 Wn. App. 293, 297, 269 P.3d 393 (2012). Of those six, the three standards at issue in this appeal are:

> (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.

RCW 36.70C.130(1). Standard (b), whether DPD erroneously interpreted the law, is a question of law this Court reviews *de novo*. *Abbey Rd. Grp., LLC v. City of Bonney Lake*, 167 Wn.2d 242, 250, 218 P.3d 180 (2009). Standard (c) involves a factual question that the Court reviews for substantial evidence. *Id.* "Substantial evidence is evidence that would

persuade a fair-minded person of the truth of the statement asserted." *Id.* Under standard (d), "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." *Wenatchee Sportsmen Ass'n v. Chelan Cnty.*, 141 Wn.2d 169, 176, 4 P.3d 123 (2000).

Though Total Outdoor has the burden of establishing that one of the LUPA standards has been met, DPD has the burden of establishing that any of the nonconforming rights associated with the Sign have been abandoned. *City of University Place v. McGuire*, 144 Wn.2d 640, 647, 30 P.3d 453 (2001). The party claiming abandonment "has a heavy burden of proof." *Van Sant v. City of Everett*, 69 Wn. App. 641, 648, 849 P.2d 1276 (1993).

VI. ARGUMENT

The parties agree that in 1975 the Sign became both a legal nonconforming use, and a structure nonconforming to development standards, as a rooftop sign featuring off-premises advertising. *See* R 00658. The parties also agree that when the Sign became nonconforming, it featured off-premises copy that measured 55 feet high by 68.5 feet wide. But the parties dispute (a) whether the property owner abandoned any nonconforming right to display copy larger than the

Cameras West copy; and (b) whether Total Outdoor's repairs and subsequent installment of the Apple copy increased the Sign's nonconformity.

As explained below, DPD's Land Use Decisions should be reversed because no vested nonconforming rights have been abandoned, nor have the Sign's nonconformities expanded.

A. The Vested Rights Concerning the Sign's Size Have Not Been Abandoned.

DPD carries the burden of establishing that any of the nonconforming rights associated with the Sign have been abandoned. *Van Sant*, 69 Wn. App. at 648 ("[O]nce a nonconforming use is established, [the] burden shifts to the party claiming abandonment or discontinuance of the nonconforming use to prove such."). This is "a heavy burden of proof." *Rosema*, 166 Wn. App. at 299. DPD can meet that burden only by showing the 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.*; *see also Van Sant*, 69 Wn. App. at 648 (quoting 8A. E. McQuillin, *Municipal Corporations* §§ 25.191, 192 (3d ed. 1986)). Applying that framework here, DPD must establish that the property

owner *intended* to abandon the right to display copy as large as that which vested in 1975, and committed an *overt act* to abandon that right.

DPD has not satisfied its burden to show either of the required prongs necessary to establish abandonment.

1. DPD Has Not Established Any Intent to Abandon the Right to Display Copy Larger Than the Cameras West Copy.

DPD cannot meet its burden to show an intent to abandon because the only evidence in the record that speaks to intent shows that the Archdiocese never intended to abandon any of its vested property rights. R 00587. The Archdiocese's letter explains that it never authorized any of its lessees to abandon its nonconforming rights. *Id.* And the Archdiocese's letter and the Schell declaration are the *only evidence* in the record that directly pertain to the property owner's intent at the time the Cameras West copy was placed on the Sign. DPD's analysis in the Land Use Decisions fails to even mention the Archdiocese's letter. And while DPD had previously stated that it would only consider evidence from parties "other than the owner who have no financial interest" in the Sign, at no point has it ever explained how it can permissibly ignore probative evidence about the property owner's intent, especially where DPD carries the burden of proving abandonment. R 00303. Changing copy on an off-

premises sign is consistent with the legal use and therefore cannot be considered partial abandonment of vested rights.

Moreover, any argument that the property owner intended to abandon the right to display copy larger than the Cameras West copy cannot be reconciled with DPD's concession that the right to off-premises advertising was not abandoned. *See* R 00656 (acknowledging that the Sign is "eligible to be established for the record" as a "nonconforming off-premises sign"). Earlier, DPD had attempted to advance the same abandonment theory concerning the right to *off-premises* advertising, arguing that the 30-year run of the Cameras West copy, which was *on-premises*, evidenced abandonment of any right to go back to *off-premises* advertising. R 00302. But after receiving former Mayor Schell's declaration, DPD conceded that installing the on-premises Cameras West copy—and leaving it there for 30 years—did not mean that the nonconforming right to off-premises advertising had been abandoned. R 00656.

The same logic applies to the right to copy that is larger than the letters in Cameras West. If the nonconforming right to off-premises advertising was not abandoned even though the Sign carried on-premises advertising for 30 years, then the fact that the copy was a certain size for

30 years should not mean that there was any intent to abandon the vested right to a larger copy size.

2. DPD Has Not Established an Overt Act to Abandon Based on the 1981 Lighting Permit.

DPD's argument also fails for the independent reason that there has been no "overt act" to abandon the vested rights to use the Sign. *See Rosema*, 166 Wn. App. at 299. In *Rosema*, a property owner filed an application with the City of Seattle DPD to establish the "duplex" use of his property for the record. *Id.* at 297. The house was once permitted and used as a duplex but had been used as a single family residence for almost 20 years. *Id.* at 296. Nevertheless, DPD agreed that the duplex use was a legal nonconforming use. *Id.* at 297. Challenging DPD's decision, the LUPA petitioner argued that the prior property owner had intended to abandon the nonconforming right to use a single-family residence as a duplex. *Id.* The petitioner even presented evidence from that property owner documenting this intent to abandon. *Id.* at 299. But the Court rejected this argument because "intent alone is not enough." *Id.*

As in *Rosema*, here there was no "overt act" to structurally change the Sign. DPD's own briefing in the *Rosema* case is instructive. In that case DPD argued that the right to use the residence as a duplex was *not abandoned*, even though the prior owner had intended and used the house

as a single family residence. In its briefing to the Superior Court, DPD rejected the very "use it or lose it" theory it now espouses:

> 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.

Rosema v. Seattle, No. 09-2-43983-4 SEA, City of Seattle's Response to Petitioner's Opening Br., at 12 (filed: Apr. 9, 2010) ("City's brief in *Rosema*"; a copy of which is attached as an Appendix to this brief.) Here, just because the Cameras West copy did not use the same amount of space that the Burlington Northern copy used does not mean the Sign was not "still 'designed' or 'arranged' to be occupied" by copy as large as before. The space the Cameras West copy did not occupy is like the empty basement unit in *Rosema*. DPD's argument from *Rosema* applies equally here: because the Sign at all times featured copy, while retaining the ability to accommodate the size of copy that vested in 1975, means "that the nonconforming use had not been discontinued." *Id.* at 16.[3]

[3] An analogy can be drawn to a 10-story building, where the first seven floors are occupied, but the top three floors have been vacant for years. Simply because the property owner did not lease the top three floors does not mean that property owner intended to abandon them—especially because the building has retained the ability to lease that space.

DPD ultimately places the weight of its abandonment theory on one document: the 1981 lighting permit. In particular, DPD relies on the hand-drawn sketch of the Cameras West copy to suggest that the permit was an overt act to limit future copy to those dimensions. DPD's reliance on the 1981 lighting permit is misplaced because that permit had nothing to do with size.

The 1981 lighting permit was for electrical work to illuminate a neon sign copy on the "*existing structure*," rather than a permit to conduct structural changes to the Sign itself. R 00027 (emphasis added). Just like the two previous electrical permits for the Alaska Airlines copy preceding it (which added 10 electrical circuits up to a total wattage of 16,500), the purpose of the 1981 lighting permit is to add five "electrical circuits" because each letter in "Cameras West" would be self-illuminated. *See* R 00028 (noting that the "letters and logo" would have "self-contained illumination"). But unlike a routine change in copy from one advertisement to the next, those electrical circuits could not be installed without a permit and subsequent approval by the City's electrical inspector. In fact, then (and still today) no permit was required to change copy on a pre-existing legal nonconforming sign. SBC 3107.4.2. That a permit was filed in the first place indicates that the real purpose did not concern the copy, but rather electrical work.

Nevertheless, DPD relies on the hand-drawn sketch of the proposed Cameras West copy to assert that there was an intent to limit *future* copy (and Sign structure) to this size. But the flaws and inaccuracies in this sketch illustrate the limited nature of this permit: the picture leaves out the Sign's base, the message center, and most of the structure. That the sketch left those items out makes sense because neither the size of the Sign nor the size of the copy was particularly relevant to the real purpose of the 1981 lighting permit: installing five additional electrical circuits to internally illuminate each letter in the copy. Notably, in its Land Use Decisions, DPD never cites any authority for the proposition that a hand-drawn image on an electrical permit has the kind of legal force that DPD would ascribe to it.

But by repeatedly stating that the copy would be installed on the "*existing* structure," the permit signaled an intent *not* to abandon or change any rights associated with the Sign's use. *See* R 00024 (noting that copy would be placed "on existing structure"); R 00028 (noting that proposed Cameras West copy would hang from the "existing angle iron frame"). Nowhere does the permit or the sketch suggest that *any* structural changes would occur to the Sign. The lack of any physical alterations to the Sign's structure is important. As in *Rosema*, where the house was never structurally altered—meaning it retained the physical capability of serving

as a duplex—here the 1981 lighting permit never changed the Sign's physical structure, which retained the ability to accommodate copy larger than the Cameras West copy. *See Rosema*, 166 Wn. App. at 300-01. The same reasoning that this Court applied in *Rosema* to find that the nonconforming use had not been abandoned applies equally here.

Ultimately, DPD's argument that the 1981 lighting permit signaled an abandonment of the right to install copy larger than Cameras West cannot withstand scrutiny. At most, the permit shows that the copy would be changing, and that this particular change would require electrical work. To the extent the 1981 lighting permit is relevant to any abandonment analysis, it confirms that there was no intent or overt act to abandon any rights associated with the Sign.

B. DPD Erred in Concluding That the Sign's Nonconformity Has Expanded.

Not only did DPD clearly err in concluding that the vested rights to the use of the Sign were abandoned by the 1981 permit, but the DPD further erred in concluding that the Sign's nonconformity expanded during the 2012 repairs to the Sign. The latter conclusion is based on three flawed determinations, each of which is an independent basis for reversing the City's Land Use Decisions. First, DPD determined that Total Outdoor's repairs increased the Sign's size, a decision at odds with the

evidence. Second, DPD determined that the nonconformity increased simply because the Apple copy is larger than the Cameras West copy, even though the Apple copy is substantially smaller than the copy in place at the time the Sign became a legal nonconforming use. Third, DPD pointed to a general "policy" disfavoring nonconforming uses, which is trumped by the actual and specific policy of the Seattle Municipal Code allowing most nonconforming uses to continue.

1. Substantial Evidence Does Not Support DPD's Determination That Total Outdoor's Repairs Increased the Sign's Size.

Ultimately, most of DPD's objections against the Sign are based on one flawed assumption: that the Sign structure is larger today than it was before Total Outdoor conducted its repairs. But on this point, DPD is simply wrong, and its fact finding, which relied on speculative observations, cannot withstand scrutiny.

Whether the Sign's size has increased is a factual determination that the Court reviews for substantial evidence. Under that standard, a court asks whether a "fair-minded person" would agree with how DPD arrived at this conclusion. *Bierman v. City of Spokane*, 90 Wn. App. 816, 821, 960 P.2d 434, *review denied*, 137 Wn.2d 1004, 972 P.2d 466 (2008). If DPD's factual determinations are not supported by evidence "that is substantial in view of the entire record," then the Court will not defer to

DPD's finding. *Miller v. Bainbridge Island*, 111 Wn. App. 152, 162, 43 P.3d 1250 (2002). Substantial evidence does not support the City's determinations for three reasons.

First, Total Outdoor showed DPD, in its letter and accompanying schematics and photographs, that it repaired the Sign "piece for piece"—that is, Total Outdoor replaced the old, rusted and corroded metal pieces with new metal pieces of the same size, which means the repairs did not increase the Sign structure's *size*. *See* R 744-65. At no point in its Land Use Decisions does DPD ever explain how or why these schematics and photos are somehow inaccurate. And aside from the 1981 lighting permit, DPD points to no other evidence that would suggest the size has increased, other than its own internal claims and reports. *See, e.g.*, R 00314 (internal DPD report concluding, without taking any measurements, that "[t]he new sign structure *appears* to be larger, wider, and taller than the original sign structure and the sign face") (emphasis added).

Second, Total Outdoor never repaired or replaced the Sign's base, which means the 4.5 foot high base remained. This is important because DPD's determination that the Sign is now 4.5 feet too high assumed that the 90-year-old base and foundation beams did not exist. That the base exists in the first place—which can be seen clearly in the photographs depicting the Cameras West copy before the repairs—demonstrates that

DPD was wrong to conclude that the Sign's highest point was only 30 feet from the rooftop, rather than 30 feet from the 4.5 foot parapet or base.

Third, Total Outdoor repeatedly asked DPD to inspect and measure the old metal pieces which Total Outdoor preserved and stored. R 00746. Had DPD inspected these corroded metal pieces, it could have resolved any lingering doubts about whether the repairs increased the Sign's nonconformity. But instead of analyzing this objective and available evidence, DPD expressly declined to view the readily available replaced metal. R 00736. Instead, DPD relied on its own speculation about the size increase. *See, e.g.*, R 00717 ("[I]t appears as though the dimensions [of the Sign] are larger.").

Taken together, DPD ignored the only evidence in the record showing that the repairs did not increase the Sign structure's size (the photographs and schematics submitted by Total Outdoor), relied on an assumption that is objectively flawed (because it assumes the nonexistence of a base that is clearly there), and expressly declined to consider other probative evidence (the old metal pieces). Given this flawed fact finding, it is no surprise that DPD conceded in its Land Use Decisions that Total Outdoor "may or may not" be correct that the Sign's size had not increased. R 00790. This concession is critical because it shows that

DPD itself acknowledged that substantial evidence did not support its factual determination concerning size.

Ultimately, DPD's findings were based on substantial speculation, rather than substantial evidence. But "mere speculation is not substantial evidence." *Little v. King*, 160 Wn.2d 696, 705, 161 P.3d 345 (2007); *see also Ayers By & Through Smith v. Johnson & Johnson Baby Products Co.*, 59 Wn. App. 287, 291, 797 P.2d 527 (1990) (same); *State v. Hutton*, 7 Wn. App. 726, 728, 502 P.2d 1037 (1972) ("[T]he existence of a fact cannot rest upon guess, speculation or conjecture."). No fair-minded person would have ignored the only probative evidence in the record, while at the same time declining to consider other available evidence. Nor would a fair-minded person, in the face of all this evidence, still conclude that the Sign's size had increased. *See Weyerhaeuser v. Pierce Cnty.*, 124 Wn.2d 26, 35-36, 873 P.2d 498 (1994) (hearing examiner's factual findings were "clearly inadequate" where those findings failed to deal "fully and properly" with all the evidence).

This Court should reverse DPD's determination that Total Outdoor's repairs increased the Sign structure's size.

2. DPD's Determination That the Apple Copy Increased the Sign's Nonconformity Ignores the Law and Facts.

In addition to its flawed assumption that Total Outdoor's repairs increased the Sign's size, DPD also determined that the Sign's nonconformity has increased because the Apple "sign face" is larger than the Cameras West copy. The City's position is directly contrary to the City Code provisions and common law governing nonconforming uses, and the facts of this case.

Under the City Code and common law, the property owner has the legal nonconforming right to use the entirety of the Sign structure for advertising copy. The City Code's definition of "use" explicitly recognizes the interdependence of "use" and "structure" by defining "use" as "the purpose for which land or a structure is designed, built, arranged, intended, occupied, maintained, let or leased." SMC 23.84A.040. Here, the purpose of the Sign is to display advertising copy—the display of copy is a "use" as that term is defined in the City Code.

Under the Seattle Municipal Code, a *nonconforming* use is one that "was lawful when established and that does not now conform to the use regulations of the zone in which it was located." *Id.* This definition is consistent with the common law, which establishes that "[a] nonconforming use is defined in terms of the use of the property lawfully

established and maintained *at the time* zoning was imposed." *Meridian Minerals Co. v. King Cnty.*, 61 Wn. App. 195, 207, 810 P.2d 31 (1991) (emphasis in original); *see also Miller v. City of Bainbridge Island*, 111 Wn. App. 152, 164, 43 P.3d 1250 (2002). In this case, "the time zoning was imposed" was October 24, 1975, the date the Ordinance took effect that made rooftop advertising a nonconforming use. R 00658. The City acknowledged this conclusion in its letter of October 24, 2012 ("after the effective date of Ordinance 104971, October 24, 1975, the subject sign structure on the Centennial Building became a nonconforming roof sign use and nonconforming structure, as a sign structure on the roof of a downtown building."). *Id.* The advertising copy "established and maintained at the time" (October 24, 1975) measured 55 by 68.5 feet. R 00558. Thus, under the Code and case law, this is the scope of the lawful nonconforming use established at the time zoning was imposed.

A nonconforming use may continue, but may not expand beyond the scope that existed on the date it became nonconforming. SMC 23.42.104.A; SMC 23.42.106.D; *Keller v Bellingham*, 92 Wn.2d 726, 600 P.2d 1276 (1979) (nonconforming use can continue and even increase in intensity if the increase does not effect a fundamental change in the nonconforming use). The advertising copy has not expanded beyond its size in October 1975 when it became nonconforming. To the contrary, it

is much smaller today than is legally allowed under the rights that vested then (the sign is only 30 feet above the parapet and base, rather than 55 feet). *See* 00765.

The periodic change from one copy to another—even where that copy is a different shape and size—is "the purpose for which [this] . . . structure is designed," and how the vested nonconforming use works. That the Cameras West advertising copy did not physically occupy as much space as the copy before it does not signal cessation or abandonment of that space, but is a normal part of the Sign's nearly 90-years of use.

3. DPD's Attempt to "Phase Out" the Sign's Nonconformity Cannot Be Reconciled With Seattle's Policy of Preserving Nonconforming Uses and Structures.

The City's final basis for trying to block the Sign with the Apple copy is a purported general policy disfavoring nonconforming uses. In Washington, "local governments are free to preserve, limit or terminate nonconforming uses subject only to the broad limits of applicable enabling acts and the constitution." *Rhod-A-Zalea & 35th, Inc. v. Snohomish County*, 136 Wn.2d 1, 7, 959 P.2d 1024 (1998). Seattle has established a clear policy to preserve nonconforming uses and developments:

> 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* so they may exist as an asset to their neighborhoods. . . .

SMC 23.42.100 (emphasis added); *See* City's brief in *Rosema* at 9 (quoting and emphasizing same in bold text). In Seattle, any "use or development" of the Sign that existed before October 1975 (when Seattle's ordinance changed to disallow rooftop signs), and which has not been abandoned, is recognized as an existing nonconformity. SMC 23.42.102(A). The SMC also provides that nonconforming structures "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." SMC 23.42.112(A) (emphasis added). In other words, Seattle has made a policy decision to allow most nonconformities to continue, and to allow those nonconforming uses and structures to be repaired, altered, and renovated. By contrast, other jurisdictions explicitly disfavor nonconforming uses and developments. *See, e.g.*, *Anderson v. Island Cnty.*, 81 Wn.2d 312, 323-25, 501 P.2d 594 (1972) (noting Island County's policy decision to disfavor nonconforming uses).

Unlike the City's position in its briefing in the *Rosema* case, the City now takes the position—newly minted for this litigation—that

nonconforming uses and structures should be phased out, as a general policy. R 00790. DPD reasoned that this general "phase out" policy supports using the 1981 lighting permit as a limitation on the size of any subsequent copy. *Id.* DPD also recast Total Outdoor's repairs as inconsistent with this general policy because the repairs necessarily extended the life of the Sign. *Id.* But DPD's reliance on this purported general policy is in direct conflict with the actual law governing nonconforming uses in Seattle.

First, DPD's "phase out" argument is inconsistent with Seattle's stated policy of allowing nonconforming uses and structures to continue indefinitely. Seattle's code articulates a specific policy that explicitly facilitates the "maintenance and enhancement of nonconforming uses and developments" so that these nonconformities can continue to "exist as an asset to their neighborhoods." SMC 23.42.100(B).

Second, the SMC permits repairs and maintenance. SMC 23.42.106D. ("A structure occupied by a nonconforming nonresidential use may be maintained, repaired, renovated or structurally altered but shall not be expanded or extended . . . ."). As explained above, the size of the structure never increased after Total Outdoor repaired it. But the Sign did undergo repairs, and Total Outdoor provided photographic and schematic evidence demonstrating that these repairs were necessary for safety

reasons. *See, e.g.*, R 00757 (photograph showing significant rust and corrosion). DPD's argument that these repairs were inconsistent with its "phase out" policy cannot be squared with the code's plain language, which not only permits repairs, but even permits other significant changes such as *structural alterations* and *renovations* to nonconforming structures. SMC 23.42.112A. Repairing the rusted-out metal piece-for-piece, or installing bracing elements is precisely the type of repair that the SMC contemplates.

Courts construe ordinances, which are simply "local statutes," according to normal rules of statutory construction. *HJS Developmen*, 148 Wn.2d at 472; *Neighbors of Black Nugget Road v. King Cnty.*, 88 Wn. App. 773, 778, 946 P.2d 1188 (1997). Unambiguous statutory language is not subject to construction. *Sleasman v. City of Lacey*, 159 Wn.2d 639, 646, 151 P.3d 990 (2007). In addition, land use ordinances "must be strictly construed in favor of the landowner" since they are "in derogation of the common-law right of an owner to use private property so as to realize its highest utility." *Id.* at 643 n.4. Here the City Code is unambiguous. SMC 23.42.100(B) establishes that nonconformities can continue as "assets" to their neighborhoods, and SMC 23.42.112(A) facilitates that principle by specifying that nonconforming structures (like the Sign) can be repaired and renovated. No amount of deference to

DPD's expertise can change the plain meaning of those provisions, which express specific councilmanic statements of policy that foreclose DPD's general argument against the Sign.

Third, DPD's focus on "phasing out" the Sign's nonconformities is in conflict with the absence of an "amortization" ordinance in the Seattle Code. *See Rhod-A-Zalea*, 136 Wn.2d at 10 ("Local governments, of course, can terminate nonconforming uses but they are constitutionally required to provide a reasonable amortization period.") (citation omitted). Thus, even if Seattle did not have *specific* provisions already favoring nonconformities, the *general* principle upon which DPD relies—namely that nonconforming uses should eventually become conforming—could not take the place of an ordinance that the Seattle City Council has chosen not to enact. *See Keller*, 92 Wn.2d at 730-31 (noting that it is up to the "legislative body of the city" to establish "the severity of limitations in phasing out [nonconforming uses]"); *Bartz v. Board of Adjustment*, 80 Wn.2d 209, 217, 492 P.2d 1374 (1972) (noting that the task of "phasing out a nonconforming use" falls upon "the legislative body of the city or county"). DPD cannot legislate on its own, especially in an ad hoc manner. To the extent any general principles can be divined from the Seattle Municipal Code, it would be that nonconforming structures like the Sign can continue to exist as "assets" to their neighborhoods, and can be

repaired, altered, and renovated in the manner that Total Outdoor accomplished in January 2012. That is the law, which cannot be superseded or circumvented by a general policy statement. *See Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384 112 S. Ct. 2031, 119 L.Ed.2d 157 (1992) ("[I]t is a commonplace of statutory construction that the specific governs the general[.]"); *Residents Opposed to Kittitas Turbines v. State Energy Facility Site Evaluation Council*, 165 Wn.2d 275, 309, 197 P.3d 1153 (2008) ("Under the general-specific rule, a specific statute will prevail over a general statute.").

The Court should decline DPD's request to override the clear language of the Seattle Municipal Code.

C. DPD Had No Legal Authority to Assert That Total Outdoor Must Decrease Its Wattage to 816 Watts.

In addition to its arguments concerning the Sign's size, DPD has also asserted that the wattage used to illuminate the Sign must be reduced to 816 watts—a fraction of the rights that vested with the Sign in 1975. R 00800. In support of its argument that Total Outdoor must dramatically reduce the Sign's wattage, DPD does not advance an abandonment theory. Rather, DPD reasons that Total Outdoor's repairs and installation of new copy—which removed the self-illuminated lettering of the Cameras West

copy—means that the Sign must now comply with existing wattage requirements. *Id.*

DPD's assertion that Total Outdoor can only use 816 watts to illuminate the Sign finds no support in the code. SMC 23.42.124 provides, "When nonconforming exterior lighting is replaced, new lights shall conform to the requirements of the *light and glare standards* of the respective zone." (emphasis added). This provision means that when exterior lighting is replaced—which happened here—the new lighting must conforming with the "light and glare" standards of the respective zone where the exterior lights are located.

Here, the Sign is in a "downtown zone." In downtown zones, the only "light and glare" requirement is that exterior lighting must be "shielded and directed away from adjacent uses." SMC 23.49.025. This provision does not include a wattage restriction. DPD cannot legislate on its own. The plain language of the ordinance contains a directional restriction. If the City Council had wanted to include a wattage restriction, it could have done so. For its part, Total Outdoor has shielded the lights used to illuminate the Apple copy in order to comply with SMC 23.49.025.

Even if DPD were pursuing an abandonment theory to limit the Sign's total wattage, that theory would also fail. As the record shows, the

permits for the Alaska Airlines sign granted 51,150 watts total. R 00012-14. Under the framework outlined above governing nonconforming use, the property owner should be entitled to the use of the full 51,150 watts that vested in 1975. *See* SMC 23.84A.026 (specifying that "lighting" is amongst the "development standards" that vest for nonconforming structures). DPD has not shown any intent or overt act to abandon that vested right.

In any event, DPD's focus on wattage is misplaced because, as a practical matter, Total Outdoor will not use the full vested wattage. Another way of looking at the lighting rights that vested in 1975 is the right to the then-existing level of brightness regardless of wattage. Given changes in lighting technology, Total Outdoor can adequately illuminate the Sign with far less wattage. Stated differently, to achieve the same level of brightness with current technology, the Sign does not require 51,150 watts. But it does need more than the 816-watt cap the City would like to impose.

VII. CONCLUSION

Total Outdoor respectfully asks this Court to reverse DPD's Land Use Decisions and grant its petitions under LUPA, and further to:

1. Reverse the City's determination that the Sign is limited in size to the size of the sign depicted in the 1981 lighting permit;

2. Reverse the City's determination that the Sign increased its nonconformity as a result of the 2012 repairs;

3. Reverse the City's determination that the illumination of the Sign is limited to 816 watts; and

4. Order the City to assign a registration number for the Centennial Building Sign without requiring any reduction in size, dimensions, or illumination.

DATED: January 28, 2014

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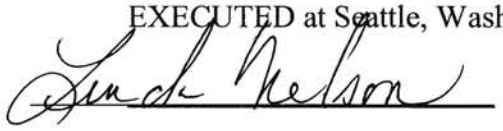
CERTIFICATE OF SERVICE

On January 28, 2014, I caused to be served upon the below named counsel of record, at the addresses stated below, via the method of service indicated, a true and correct copy of the foregoing document.

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

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

EXECUTED at Seattle, Washington, on January 28, 2014.



Linda Nelson

APPENDIX

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CASE NUMBER: 09-2-43983-4 SEA

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

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

Rosie Lee Hailey
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