No. 91863-5

IN THE SUPREME COURT
FOR THE STATE OF WASHINGTON

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

TOTAL OUTDOOR CORPORATION, a Washington corporation,

Petitioner,

vs.

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

Respondent.

CITY OF SEATTLE'S ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION AND SUMMARY

The two issues Total Outdoor Corp. ("Total") raised do not meet the criteria for review by the Court. Before the Court of Appeals reached its decision, Washington courts addressed how a property owner may relinquish a right to maintain a nonconforming *use*, but none had addressed relinquishment of a right to maintain a nonconforming *structure*. Given the absence of Washington case law addressing this point, the Court of Appeals appropriately filled the gap in Washington law. The Court of Appeals created no conflict with any Washington decision. *Cf.* RAP 13.4(b)(1)-(2). Although the Court of Appeals decision provided clarity on this point of law, the decision need not be revisited by this Court, which should await a genuine case law conflict to arise. *Cf.* RAP 13.4(b)(4).

Total's jurisdictional concern raises a fact-bound issue of interest to no one but Total. *Id.* It is factually limited to Total. To the extent the Court of Appeals decision addresses Total's alleged violations of City of Seattle ("City") law, the decision is the law of this case, not the law of the land. Total's jurisdictional concern is also misplaced. The Court of Appeals did not adjudicate an enforcement action against Total. The court merely addressed claims raised by Total that could have formed defenses to a future City enforcement action. The City is already on record—and

repeats here—that the City will bear the burden of proof in any enforcement action it brings against Total. Despite its inartful language, the Court of Appeals did not resolve that action.

II. IDENTITY OF THE RESPONDENT

The Respondent is the City of Seattle ("City").

III. STATEMENT OF THE ISSUES

This Court should decline review of the issues presented by Total because neither meets the criteria in RAP 13.4(b). If this Court nevertheless accepts review, the issues are as follows:

1. Total possessed a nonconforming structure—a sign that complied with development regulations in effect at the time it was built, but that eventually ceased to conform to later-adopted regulations. Total started with a large sign, but over time repeatedly obtained permits to replace the sign with smaller and smaller signs. Without seeking a new permit, Total demolished and replaced its last sign with a new one significantly larger than the sign that had existed for the past thirty years.

   Is Total legally unable to assert immunity from current development regulations by citing case law holding that a property owner abandons a nonconforming *use*, not a *structure*, only by manifesting an intent to abandon?

2. Total raised nonconformity and another claim because they would be potential defenses against a future enforcement action in which the City would bear the burden of proof. In rendering its decision, the Court of Appeals inartfully assumed that, absent the nonconformity defense, Total was required to obtain a permit for the new sign and violated a City-issued stop-work order.

Notwithstanding resolution of the nonconformity issue, does this Court have jurisdiction to correct the Court of Appeals' inartful assumption and clarify that the City retains the burden of proof in any enforcement action?

IV. STATEMENT OF THE CASE

For purposes of the petition for review, the City largely relies on the Court of Appeals statement of facts[1] and documents in Total's Appendix to Petition for Review.

V. ARGUMENT WHY REVIEW SHOULD BE DENIED

The Court will grant review only if one or more of the factors in RAP 13.4(b) are present. Total spends much of its petition for review rearguing the facts of the case; Total fails to demonstrate how this case meets a RAP 13.4(b) factor. This Court should deny review because the Court of Appeals decision is consistent with existing Washington case law and involves no issue of substantial public interest requiring determination by this Court.

A. The Court of Appeals decision fills a gap in Washington case law and does not conflict with existing case law.

The Court of Appeals decision filled a gap between case law about nonconforming uses and nonconforming structures. It engendered no conflict in Washington law. *Cf.* RAP 13.4(b)(1)-(2).

[1] The Court of Appeals decision is located at pp. A-7 – A-25 of Total's Appendix to Petition for Review ("Appendix to Petition"). If review is granted, the City will supplement its statement of facts.

A nonconforming use is a use that was lawful when it was established, but that fails to comply with the restrictions imposed by later-enacted law.[2] For example, if a property owner obtained a permit to operate an automotive repair business in a residential zone and the City Council later amended the law to prohibit automotive repair businesses in residential zones, the use of that property for that type of business becomes non-conforming. Under the City's current Land Use Code, nonconforming uses may be continued unless abandoned.[3]

By contrast, a nonconforming structure[4] is a structure that was lawful when it was constructed, but is no longer consistent with later-enacted development standards. For example, the automotive repair

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[2] *Andrew v. King County*, 21 Wn. App. 566, 569-572, 586 P.2d 509 (1978). Consistent with the common law, SMC 23.84A.040 defines a "nonconforming use" as "a use of land or a structure that was lawful when established and that does not now conform to the use regulations of the zone in which it is located, or that has otherwise been established as nonconforming according to section 23.42.102."

[3] SMC 23.42.104.

[4] For ease of reference, the City will refer to structures that are nonconforming to development standards as "nonconforming structures." SMC 23.84A.026 defines "Nonconforming to development standards" as:

> [A] structure, site or development that met applicable development standards at the time it was built or established, but that does not now conform to one or more of the applicable development standards. Development standards include, but are not limited to height, setbacks, lot coverage, lot area, number and location of parking spaces, open space, density, screening and landscaping, lighting, maximum size of nonresidential uses, maximum size of non-industrial use, view corridors, sidewalk width, amenity features, street-level use requirements, street facade requirements, and floor area ratios.

SMC 23.42.112, entitled "Nonconformity to development standards," regulates structures that are nonconforming to development standards.

business might operate in a building covering most of the lot, which was allowed under a standard in effect when the building was constructed. But if current standards would require structures to be set back further from the street and neighbors, the building would become a nonconforming structure. Under the City's current Land Use Code, nonconforming structures may be "maintained, renovated, repaired, or structurally altered" but not "expanded or extended" in ways that increase the extent of nonconformity or create additional nonconformity.[5]

Washington case law on nonconforming *use* holds that a property owner may no longer maintain that use if the owner abandons or discontinues the use, which requires proof of: (1) an intent to abandon;

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[5] SMC 23.42.112.A provides:

> A structure nonconforming to development standards may be maintained, renovated, repaired or structurally altered but may not be expanded or extended in any manner that increases the extent of nonconformity or creates additional nonconformity [except in limited circumstances not present here.]

To curb the expansion of nonconforming *uses*, this same standard applies to *structures* containing a nonconforming use:

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

SMC 23.42.106.D.1.

and (2) an overt act or failure to act that implies that the owner ceased to claim or retain any interest in the right to the nonconforming use.[6]

But that test is irrelevant here, where the only lasting debate is over the size of the structure, not the right to use the structure.

No Washington case has addressed a common law test to terminate a nonconforming structure—none explored the critical distinction between nonconforming uses and structures and the appropriate test regarding relinquishment of nonconforming structures. The Court of Appeals citation to numerous treatises and case law from other states reflects the absence of relevant case law on this distinction and relevant test.[7]

The Court of Appeals decision does not conflict with any Washington case law. Contrary to Total's argument, no Washington case applies the common law test for termination of nonconforming uses to nonconforming structures.[8] Both of the cases cited by Total involve termination of a nonconforming use.

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[6] *Rosema v. City of Seattle*, 166 Wn. App. 293, 269 P.3d 393 (2011). *See also*, *Van Sant v. City of Everett*, 69 Wn. App. 641, 849 P.2d 1276 (1993), and *City of University Place v. McGuire*, 144 Wn.2d 640, 30 P.3d 453 (2001), both of which involved abandonment of a nonconforming use.

[7] *See*, pp. A-16, A-17 and A-20 of Total's Appendix to Petition.

[8] Washington courts have upheld the City's regulation prohibiting the expansion of a nonconforming structure. *See, State ex. rel. Miller v. Cain*, 40 Wn.2d 216, 222, 242 P.2d 505 (1952), the Washington Supreme Court held that a Seattle ordinance prohibiting the enlargement of nonconforming structures was within the police power and upheld it as constitutional. This 1952 decision has not been overruled.

In *Rosema*, the Court affirmed DPD's interpretation that the owners of a legally nonconforming duplex use did not abandon the nonconforming use under the common law two-prong test for discontinuing a nonconforming use.[9] *Rosema* did not, as alleged by Total, "expressly appl[y] the abandonment test to a structural nonconformity."[10] Rather, *Rosema* concluded that because the owners did not modify the structure consistent with their intent to terminate the nonconforming use, the owners did not meet both prongs of the two-prong common law test. The present case does not involve termination of a nonconforming use so *Rosema* does not conflict with the Court of Appeals decision.

Total also alleges the Court of Appeals decision conflicts with *Rhod-A-Zalea*[11] because "the right to continue a lawful nonconformity is a vested right" and argues *Rhod-A-Zalea* held that "vested nonconformities are property rights which cannot be taken away without implicating constitutional interest in property."[12] *Rhod-A-Zalea* involved the law of nonconforming uses,[13] not nonconforming structures. Moreover, the

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[9] *Rosema v. City of Seattle*, 166 Wn. App. 293, 299-300, 269 P.3d 393 (2011) which provides that to prove abandonment or discontinuance, the party must show: (1) an intent to abandon; and (2) an overt act or failure to act that implies that the owner ceased to claim or retain any interest in the right to the nonconforming use test.

[10] Total's Petition at p. 17.

[11] *Rhod-A-Zalea & 35th, Inc. v. Snohomish County,* 136 Wn.2d 1, 9, 959 P.2d 1024 (1988).

[12] Total's Petition at pp. 15-16.

[13] *Rhod-A-Zalea & 35th, Inc. v. Snohomish County,* 136 Wn.2d 1, 959 P.2d 1024 (1988).

Rhod-A-Zalea court did not address whether a nonconforming use was a "vested right"; rather, it stated "pursuant to the "vested rights doctrine" a permit is considered under the rules in effect at the time of the permit application. This situation is not before the court."[14]

In addition to identifying no conflict in Washington law, Total fails to establish that its petition involves an issue of substantial public interest this Court should determine. *See,* RAP 13.4(b)(4). By filling a gap in Washington case law, the Court of Appeals decision rendered a substantial service to the law and the public. But that does not make the decision one the Supreme Court should review. Beyond citing distinguishable case law about nonconforming uses, Total identifies no grounds to question the Court of Appeals determination about nonconforming structures. That is because the Court of Appeals got it right.

Instead, Total spends pages rearguing the case, even making a new argument: that because the Code does not contain a legislative statement about the application of the two-prong common law test to nonconforming structures, that test must be extended to nonconforming structures.[15] These arguments do not establish any error by the Court of Appeals, and Total's desire for another chance to reargue its case cannot be transformed

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[14] *Id.*

[15] Total's Petition at pp. 11-13.

into an issue of substantial public interest that should be reviewed by the Supreme Court.

B. Total's jurisdictional concern raises a fact-bound question of interest to Total alone, and in any event, the City acknowledges that any enforcement action will occur in municipal court.

Total alleges in its Petition[16] that the Court of Appeals exceeded its jurisdiction by stating in the decision that the owner "without required permits, demolished those structures and then erects a new structure in violation of a stop-work order."[17] Total argues that due to the Court of Appeals jurisdictional overreach, this presents an issue of substantial public interest that should be determined by the Supreme Court. First, this jurisdictional issue raised by Total is factually limited to Total. Even if the Court of Appeals did exceed its jurisdiction, which it did not, the issue only applies to Total. If there is a jurisdictional defect, it is a one-time occurrence of import and interest to no one but Total. The issue is therefore not one of "substantial public interest" but rather the only interest affected would be that of Total. For this reason alone, the issue does not arise to one of substantial public interest that should be reviewed by the Supreme Court.

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[16] *See,* pp. 5-9 of Total's Petition.

[17] *See,* pp. A-7, A-10 and A-16 of Total's Appendix to Petition.

Total's jurisdictional concern is also without merit. The Court of Appeals did not exceed its jurisdiction because it did not "adjudicate the municipal court action" as alleged by Total Outdoor. The language in its decision simply addressed claims raised by Total that could have served as potential defenses to a future City enforcement action.

In order to adjudicate violations of the Seattle Municipal Code, the City would bear the burden of proof in any enforcement action. The City has admitted that an enforcement action, if needed, will occur in Seattle Municipal Court.[18] The City acknowledges here once again that the language in the Court of Appeals decision did not resolve the code enforcement action against Total. Even Total acknowledges a pending municipal court action between the parties which has been stayed[19] to address whether Total's modification of the nonconforming sign violated the Seattle Municipal Code. Further, the appropriate remedy in an enforcement action would be entry of a judgment awarding DPD

[18] *See,* Stipulated Order on City's Motion to Dismiss in Part (attached in the Appendix to the City's Answer to Petition).

[19] Total's Petition at p. 6 and 7.

penalties.[20] The Court of Appeal did not enter a judgment for monetary penalties against Total. For these reasons, the Court of Appeals did not resolve the enforcement action nor did it exceed its jurisdiction.

VI. CONCLUSION

Total has identified no basis that warrant Supreme Court review as required under RAP 13.4(b). The Court of Appeals decision simply filled the gap regarding the termination of rights associated with a nonconforming structure and such decision does not conflict with any Washington case law. Total raises no issue that constitutes an issue of substantial public importance that should be reviewed and decided by the Supreme Court. To the contrary, the matter concerns no one but Total and this fact-bound question does not merit Supreme Court review. For these

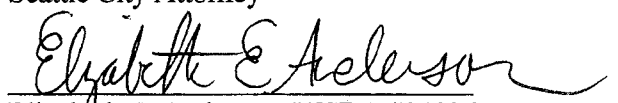
[20] SMC 22.100.010 adopting the International Building Code including Section 103.3 which authorizes the building official to issue a stop work order whenever any work is being done that is contrary to the Building Code and Section 103.5 which states that failing to comply with the provisions of the Building Code shall be subject to a cumulative civil penalty.

Further, SMC 23.90.010 of the Land Use Code prohibits any work or other activity at the site after a stop work order has been issued: "A failure to comply with a Stop Work Order shall constitute a violation of this Land Use Code." SMC 23.90.018.A provides civil penalties as a remedy for violations of the City's Land Use Code, stating "In addition to any other remedy authorized by law or equity, any person violating or failing to comply with any of the provisions of Title 23 shall be subject to a cumulative penalty ...until compliance is achieved."

reasons, the City respectfully asks the Supreme Court to deny Total's petition for review.

DATED this 2nd day of July, 2015.

PETER S. HOLMES
Seattle City Attorney

By: 

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SMC 23.42.104 entitled "Nonconforming uses" provides:

A. Any nonconforming use may be continued, subject to the provisions of this section.

B. A nonconforming use that has been discontinued for more than 12 consecutive months shall not be reestablished or recommenced. A use is considered discontinued when:

1. A permit to permanently change the use of the lot or structure was issued and acted upon; or

2. The structure or a portion of a structure is not being used for the use allowed by the most recent permit, except that interruption of a nonconforming use by a temporary use authorized pursuant to Section 23.42.040, if no structures are demolished, is not a discontinuation of the previous nonconforming use; or

3. The structure is vacant, or the portion of the structure formerly occupied by the nonconforming use is vacant. The use of the structure is considered discontinued even if materials from the former use remain or are stored on the property. A multifamily structure with one or more vacant dwelling units is not considered vacant and the use is not considered to be discontinued unless all units in the structure are vacant.

4. If a complete application for a permit that would allow the nonconforming use to continue, or that would authorize a change to another nonconforming use, has been submitted before the structure has been vacant for 12 consecutive months, the nonconforming use shall not be considered discontinued unless the permit lapses or the permit is denied. If the permit is denied, the nonconforming use may be reestablished during the six months following the denial.

C. A nonconforming use that is disrupted by fire, act of nature, or other causes beyond the control of the owners may be resumed. Any structure occupied by the nonconforming use may be rebuilt in accordance with applicable codes and regulations to the same or smaller configuration existing immediately prior to the time the structure was damaged or destroyed.

1. Where replacement of a structure or portion of a structure is necessary in order to resume the use, action toward that replacement must be commenced within twelve (12) months after the demolition or destruction of the structure. Action toward replacement shall include application for a building permit or other significant activity directed toward the replacement of the structure. If this action is not commenced within this time limit, the nonconforming use shall lapse.

2. When the structure containing the nonconforming use is located in a PSM zone, the Pioneer Square Preservation Board shall review the exterior design of the structure before it is rebuilt to ensure reasonable compatibility with the design and character of other structures in the Pioneer Square Preservation District.

Subsection D of SMC 23.42.106 entitled "expansion of nonconforming uses" provides:

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D.

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

1.

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

***

Subsection A of SMC 23.42.112, entitled "Nonconformity to development standards" provides:

A. A structure nonconforming to development standards may be maintained, renovated, repaired or structurally altered but may not be expanded or extended in any manner that increases the extent of nonconformity or creates additional nonconformity [except in limited circumstances not present here.]

SMC 23.84A.026 defines "Nonconforming to development standards" as:

[A] structure, site or development that met applicable development standards at the time it was built or established, but that does not now conform to one or more of the applicable development standards. Development standards include, but are not limited to height, setbacks, lot coverage, lot area, number and location of parking spaces, open space, density, screening and landscaping, lighting, maximum size of nonresidential uses, maximum size of non-industrial use, view corridors, sidewalk width, amenity features, street-level use requirements, street facade requirements, and floor area ratios.

SMC 22.100.010, entitled "Adoption of the International Building Code" provides:

The Seattle Building Code consists of: 1) the following portions of the 2012 edition of the International Building Code published by the International Code Council: Chapters 2 through 29, Chapters 31 through 33 and Chapter 35; 2) the amendments and additions to the 2012 International Building Code adopted by City Council by ordinance; and 3) Chapters 1 and 30 adopted by City Council by ordinance. One copy of the 2012 International Building Code is filed with the City Clerk in C.F. 313183.

The Seattle Building Code can also be found here:
http://www.seattle.gov/dpd/codesrules/codes/building/

Section 103.3 of the Seattle Building Code provides:

103.3 Stop work orders. The *building official* may issue a stop work order whenever any work is being done contrary to the provisions of this code, or in the event of dangerous or *unsafe* conditions related to construction or demolition. The stop work order shall identify the violation and may prohibit work or other activity on the site.

Section 103.5 of the Seattle Builidng Code provides:

> 103.5 Civil penalties. Any person violating or failing to comply with the provisions of this code shall be subject to a cumulative civil penalty in an amount not to exceed $500 per day for each violation from the date the violation occurs or begins until compliance is achieved, except that the penalty for violations of Section 3107.4.1 shall be $1500 per day. In cases where the *building official* has issued a notice of violation, the violation will be deemed to begin, for purposes of determining the number of days of violation, on the date compliance is required by the notice of violation.

SMC 23.90.010 entitled "Stop Work Order" provides:

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

Subsection A of SMC 23.90.018, entitled "Civil enforcement proceedings and penalties" provides:

A.

> In addition to any other remedy authorized by law or equity, any person violating or failing to comply with any of the provisions of Title 23 shall be subject to a cumulative penalty of up to $150 per day for each violation from the date the violation begins for the first ten days of noncompliance; and up to $500 per day for each violation for each day beyond ten days of noncompliance until compliance is achieved, except as provided in subsection 23.90.018.B. In cases where the Director has issued a notice of violation, the violation will be deemed to begin for purposes of determining the number of days of violation on the date compliance is required by the notice of violation. In addition to the per diem penalty, a violation compliance inspection charge equal to the base fee set by Section 22.900B.010 shall be charged for the third inspection and all subsequent inspections until compliance is achieved. The compliance inspection charges shall be deposited in the General Fund.

FILED
KING COUNTY WASHINGTON
APR 23 2013
SUPERIOR COURT CLERK
ANDRE JONES
DEPUTY

The Honorable Theresa B. Doyle

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

TOTAL OUTDOOR CORP., a Washington Corporation, Petitioner/Plaintiff, vs. CITY OF SEATTLE, DEPARTMENT OF PLANNING AND DEVELOPMENT, a Municipal Corporation, Respondent/Defendant, CORPORATION OF THE CATHOLIC ARCHBISHOP OF SEATTLE, a Washington nonprofit corporation, Additional Party, and WESTLAKE PARK ASSOCIATES, a Washington corporation, Additional Party.	No. 12-2-06852-6SEA STIPULATED ORDER ON CITY'S MOTION TO DISMISS IN PART [PROPOSED]

This matter came before the Court on the City's Motion to Dismiss in Part filed by Respondent the City of Seattle ("City"). Total Outdoor does not oppose the City's Motion to Dismiss in Part. The City acknowledges that the Seattle Municipal Court has jurisdiction to review the City of Seattle Department of Planning and Development (DPD) Stop Work Decision issued on February 3, 2012.

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Thus, the parties stipulate and the Court hereby ORDERS:

1. The City's Motion to Dismiss in Part is GRANTED because this Court does not have jurisdiction under the Land Use Petition Act (Ch. 36.70C RCW) to hear Plaintiff's/Petitioner's claims associated with the City's Stop Work Decision issued on February 3, 2012.

2. The City's Motion to Dismiss Total Outdoor's Request for Extraordinary Remedies associated with the City's Stop Work Decision is GRANTED because Total Outdoor has other available remedies at law including defending in the enforcement action currently in Seattle Municipal Court (Seattle Municipal Court Cause No. 12-028).

DONE IN OPEN COURT this 23 day of [signature], 2013.

THE HONORABLE B. ~~THERESA DOYLE~~

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I certify that on this date, I sent a copy of the City of Seattle's Answer to Petition for Review via messenger to the following parties:

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

Dated this 2nd day of July, 2015.

Rosie Lee Hailey
ROSIE LEE HAILEY

OFFICE RECEPTIONIST, CLERK

To: Hailey, Rose
Cc: Anderson, Liza
Subject: RE: Total Outdoor Corp. v. City of Seattle Department of Planning & Development; COA # 70957-7-I; Supreme Court No. not yet assigned

Rec'd 7/2/15

Supreme Court Clerk's Office

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

From: Hailey, Rose [mailto:Rose.Hailey@seattle.gov]
Sent: Thursday, July 02, 2015 12:43 PM
To: OFFICE RECEPTIONIST, CLERK
Cc: Anderson, Liza
Subject: Total Outdoor Corp. v. City of Seattle Department of Planning & Development; COA #70957-7-I; Supreme Court No. not yet assigned

Dear Sir or Madam:

Attached in .pdf format please find for filing the **City of Seattle's Answer to Petition for Review** in the following matter:

Case Name:	*Total Outdoor Corporation v. City of Seattle Department of Planning and Development*
Case Number:	Supreme Court No. not yet assigned COA No. 70957-7-I
Attorney:	Elizabeth E. Anderson, WSBA #34036 (206) 684-8201 liza.anderson@seattle.gov

All parties will be served via messenger according to the certificate of service at the end of the document.

Thank you.

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