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No. **65607-4-I**
King County Superior Court No. 09-2-43983-4 SEA
IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

AN YU, SHUI-XIAN FU, and DAVID LEE,
Appellants,

vs.

CITY OF SEATTLE, and
KEITH ROSEMA and ANEE BRAR

Respondents.

CORRECTED
APPELLANTS' OPENING BRIEF

Atty: Duana T. Koloušková, WSBA #27532
JOHNS MONROE MITSUNAGA KOLOUŠKOVÁ PLLC
1601 – 114th Avenue S.E., Suite 110
Bellevue, WA 98004
T: 425-451-2812
F: 425-451-2818

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NATURE OF THE CASE

An Yu and Shui-Xian Fu (“Yu”) purchased property containing a nonconforming duplex in 2009. Shortly thereafter Yu’s project designer David Lee (“Lee”), submitted an application on their behalf to remodel the duplex. As a result of Yu’s purchase and application for remodel, a neighboring property owner, Keith Rosema and Anee Brar (“Rosema”), requested a formal land use interpretation regarding whether the nonconforming duplex had been discontinued.

The City of Seattle (“City”) received information regarding the permit history for the property, statements supplied by both Yu and Rosema, and plans regarding the structural layout of the duplex. The City undertook a detailed review and investigation of the remodel application and Rosema’s request for interpretation. After weighing the evidence and applying the City Code, the City concluded that the nonconforming duplex was legally established and could continue. The City also issued the remodel permit and information regarding how it would calculate on-site parking.

Rosema has filed a Land Use Petition challenging the City’s interpretation and permit. Rosema did not dispute that the duplex was a legally established nonconforming use. However, Rosema contends the

duplex use has been discontinued and that the City improperly calculated the allowed and required on-site parking.

ASSIGNMENTS OF ERROR AND ISSUES RELATED THERETO

1. Assignments of error regarding the Superior Court's findings of fact and conclusions of law appear to not be necessary or appropriate under a Land Use Petition because "this court simply disregards such findings and conclusions as surplusage." *Wellington River Hollow, LLC v. King County*, 113 Wn. App. 574, 580 ftnt. 3, 54 P.3d 213, *review denied*, 149 Wn.2d 1014 (2003). In an excess of caution, Yu has set forth assignments of error in Appendix A, to the extent that this Court deems any assignment of error necessary.
2. Was the nonconforming duplex legally established?
3. Was the City's Land Use Decision that the nonconforming duplex may continue based on the standards adopted in City Code proper?
4. Was the City's Land Use Decision that the nonconforming duplex is ongoing, i.e. has not been discontinued, supported by substantial evidence above and beyond the City Code standards?

5. Did the City properly evaluate and calculate the required on-site parking for the duplex?

STATEMENT OF THE CASE

The subject property contains a duplex structure with two addresses of 5211 and 5215 21st Avenue N.E., Seattle (the “Property”). *See e.g. Documentary Record (“DR”) 00053-54.*¹ The Property is located approximately three blocks north of the University of Washington main campus. *DR 0003* (finding 1). The home was built in 1914 originally as a single family residence. *DR 00129* (finding 4); *00164*. However, the home and the surrounding neighborhood have undergone many changes over the subsequent decades. *See e.g. DR 00145* (private property owner complaint regarding use of several structures in the vicinity as multi-family dwelling units).

A. Property Background: Establishment of Legal Nonconforming Duplex and Subsequent Permits and Activity.

On November 18, 1955, the City approved a building permit to “convert existing residence to duplex per plan.” Final approval of the

¹ The full Documentary Record (“DR”) is found as Clerk’s Papers Sub No. 9; no Clerk’s Papers Page numbers were assigned thereto. All references herein to the DR are to the bates stamped page number.

conversion was issued on January 24, 1956. *DR 00110-113; 00129* (finding 4).

In 1957, the City changed its applicable zoning to no longer permit new duplexes. *DR 00129* (finding 4). As a result, the duplex for the property became a legal nonconforming use.

During the 1970's there was an attempt to convert the Property into a triplex, apparently along with similar attempted conversions on other Properties in the neighborhood. *DR 00114-136; --145*. The City's Hearing Examiner ultimately denied the proposed conversion. *DR 00129-131*. The City again expressly listed the Property as containing legal nonconforming duplex development/use in its records. *DR 00111*.

In 1979, the City granted a permit to construct an addition to the existing duplex: "Add to exist. [sic] duplex with porch & ramp per plans." *DR 00141*.

In 1991, Yu's immediate predecessors in interest, the Nelsons, applied for a permit to construct further additions and alterations to the duplex. *DR 00151-00153*. The Nelsons expressly noted on their materials that the structure was an existing, nonconforming duplex. The City granted the permit in 1992. *DR 00154-155*.

In 1993, the Nelsons again applied for and received a permit for further alterations to the kitchen of the existing duplex building. *DR 00161-163*. Once again, the permitting materials noted the structure was an existing, nonconforming duplex.

During the eighteen years that the Nelsons owned the Property, they paid for separate utilities, maintained two separate addresses, maintained two separate electrical meters, paid for two separate garbage collections, maintained two separate kitchens, and maintained two separate entrances. *DR 00058;00048-51; 00084*. The Nelsons also continually occupied the house for their eighteen years of ownership. *DR 00058*.

The Nelsons sold the Property to Yu in 2009. When offered for sale, the home contained all the physical attributes of a duplex which would be seen upon immediate visual walkthrough: two separate entrances, two kitchens, multiple bathrooms, multiple bedrooms, and two electric meters. *DR 00050; 00084*. The Nelsons appear to never have described the structure as either single-family or multifamily duplex in their sale materials (presumably this would be unnecessary due to immediate visual inspection). The Nelsons asserted that there were no “zoning violations, nonconforming uses, or any unusual restrictions that

would affect future construction or remodeling.” *DR 00100*. This was a reasonable statement since the Nelsons had previously obtained construction and remodeling permits expressly based on the structure’s nonconforming duplex status. *DR 00151-155; 00161-163*. As a result, the Nelsons would have had no reason to believe that the nonconforming duplex would “affect future construction or remodeling.”

B. Applications and City’s Review of Yu Remodel Permit and Rosema Request for Interpretation Regarding Nonconforming Duplex.

In July 2009, Yu, by and through Yu’s project manager David Lee (“Lee”), applied for a permit to construct interior alterations. *DR 00083*. The City required Yu to submit a set of plans showing the existing internal layout in addition to the proposed alterations. *DR 00084*. The plans showing the house as it existed in 2009 when Yu purchased it reflected the two kitchens, multiple bathrooms, multiple bedrooms, and separate entrances. *DR 00084*.

In August 2009, Keith Rosema and Anee Brar (“Rosema”), neighboring property owners, submitted a request for formal interpretation regarding whether the existing residential structure was established as a duplex and, if so, whether the duplex has been

discontinued or lapsed. *DR 00079-00080*. Mr. Rosema also provided a personal declaration. *DR 00081*.

Rosema also submitted a declaration from Mr. Nelson (Yu's predecessor in interest), which in part was typed and in part handwritten. *DR 00058*. The difference in print is significant because the handwritten provisions corrected and contradicted important inaccuracies in the typed statements. For example, in Paragraph 4, the term "duplex" was stricken and the statement corrected that Mr. Nelson made internal modifications to convert the structure from a triplex, not duplex. *DR 00058* (Paragraph 4). Mr. Nelson also wrote that he left the separate external duplex entrance in tact, directly contradicting the type-written statement that he had removed it. *Id* (Compare typed Paragraph 4 and handwritten Paragraph 6).

Yu and Lee also submitted written information and comments regarding their application and Rosema's request for interpretation. *DR 00045-54*.

As a result of Yu's permit application and Rosema's request, the City undertook a very detailed review of the Property's history, use and permitting activity. The City compiled as complete a record as possible

of all material related to the Property extending back to the original 1955 permit. *See DR, generally.*

C. City's Approval of Yu Permit and Interpretation Ruling Nonconforming Duplex is Ongoing, i.e. not Discontinued.

In reaching its decision, the City noted that the permit history demonstrates the Property contains a legally established duplex use. *DR 00003-4* (Finding 3). The City further explained that “[i]n most cases, DPD’s inquiry would end at this point, since permit records are typically and rightfully relied upon in determining the legally established use of land.” *DR 00014*. However, here, the City undertook a more detailed review in order to fully address Rosema’s specific concerns raised in its request. *DR 0014-16*.

The City looked closely at all the evidence, including the historical data and the statements from all parties. *DR 00003-17*. Despite the Nelsons subjective feelings stated in hindsight, the City found “they also pretty clearly stopped short of changing the design and arrangement sufficiently to establish only one dwelling unit.” *DR 00015* (Paragraph 7).

After weighing all the evidence and applying that to the City’s codes, the City found (a) that the duplex was legally established and (b) that there was sufficient evidence showing the duplex was never

discontinued and may continue. *DR 00016-17*. The City explained it would be unreasonable to conclude the duplex use was discontinued under the adopted City codes because the structure was in continual use and the basement unit was “designed and arranged as a second dwelling unit.” *DR 00016* (Conclusion 7). Therefore, the City determined that the duplex was legally established and had not been discontinued. *DR 00017*. The City addressed the parameters related to on-site parking for the Property. Even though that was not part of the formal request for interpretation, Rosema had questioned how on-site parking should be calculated. *DR 00016* (Conclusion 8). The also City issued Yu’s construction permit for the structural alterations. *DR 00001*. The City’s interpretation and construction permit are collectively referred to as the “City’s Land Use Decision” or “City’s Decision.”

Rosema filed a Land Use Petition in King County Superior Court. *Clerks Papers* (“CP”) 1-28. Therein, Rosema recognized that the duplex is an established nonconforming use and development. *CP 4* (Land Use Petition, Paragraph 14). However, Rosema argued the duplex had been discontinued and disputed the number of parking stalls which should be allowed on-site. *CP 3-6*. After a hearing on the merits, the Superior Court issued an order reversing the City’s decision and remanding to the

City for further action. CP 172-176. Yu and Lee timely appealed. CP 177-183. Subsequently, the Superior Court granted Yu's request for stay pending this court's *de novo* review.

ARGUMENT

A. **Presumption of Validity, Burden of Proof, Standard of Review and Deference to Local Jurisdictions.**

1. This Court's review is directly of the City's Land Use Decision and underlying administrative record.

This Court's review of the Land Use Petition constitutes "appellate review on the administrative record (in this case the 'documentary record') before the local jurisdiction's body or officer with the highest level of authority to make the final determination." *HJS Development, Inc. v. Pierce County ex rel. Dept. of Planning and Land Services*, 148 Wash.2d 451, 467, 61 P.3d 1141 (2003). In this case, the highest level of authority was the City of Seattle's Department of Planning and Development Services ("DPD"). Therefore, this Court reviews the evidentiary record as it existed before DPD and then reviews DPD's findings of fact and conclusions.

This Court stands in the shoes of the Superior Court and reviews the merits of the City's land use decision directly on the administrative record, without reference to the Superior Court decision.

HJS Development, 148 Wn.2d 451, 468; *Wellington River Hollow, LLC v. King County*, 113 Wn. App. 574, 580 ftnt. 3, 54 P.3d 213, *review denied*, 149 Wn.2d 1014 (2003); *Cingular Wireless LLC v. Thurston County*, 131 Wn. App. 756, 129 P.3d 300 (2006).

2. Rosema bears the burden of proof.

Consistent with the foregoing, the party who originally filed the Land Use Petition bears the burden of proof on all elements, irrespective of the superior court decision. *Quality Rock Products v. Thurston County*, 139 Wn. App. 125, 134, 159 P.3d 1 (2007); *Tahoma Audubon Society v. Park Junction Partners*, 128 Wn. App. 671, 681, 116 P.3d 1046 (2005).

In this case, Rosema bears the burden of proof.

3. Standards of review under the Land Use Petition Act.

The standards of review under the Land Use Petition Act are as follows:

- (a) The body or officer that made the land use decision engaged in unlawful procedure or failed to follow a prescribed process, unless the error was harmless;
- (b) The land use decision is an erroneous interpretation of the law, after allowing for such deference as is due the construction of a law by a local jurisdiction with expertise;
- (c) The land use decision is not supported by evidence that is substantial when viewed in light of the whole record before the court;

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

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

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

RCW 36.70C.130 (1).

a. The Court reviews factual findings under the substantial evidence standard, viewing evidence and all reasonable inferences therefrom in a light most favorable to Yu.

Factual findings are reviewed under the substantial evidence standard. *Bierman v. City of Spokane*, 90 Wash. App. 816, 821, 960 P.2d 434, review denied 137 Wash.2d 1004 (1998). Substantial evidence is “a sufficient quantity of evidence to persuade a fair-minded person of the truth or correctness of the order.” *City of Redmond v. Central Puget Sound Growth Mgmt. Hearings Bd.*, 136 Wash.2d 38, 46, 959 P.2d 1091 (1998). The Court “defers” to the City on factual determinations and will not overturn those findings “unless they are not supported by evidence that is substantial in view of the entire record” *Miller v. Bainbridge Island*, 111 Wn. App. 152, 162, 43 P.2d 1250 (2002).

All evidence, and reasonable inferences therefrom, must be viewed “in the light most favorable to the party who prevailed in the highest forum that exercised fact-finding authority.” *Freeburg v. City of Seattle*, 71 Wn. App. 367, 371, 859 P.2d 610 (1993). This standard is critical as the City’s decision was fact-specific and this case centers upon whether the City properly weighed the evidence.

The highest forum exercising fact finding authority was the City in making its Land Use Decision. The party who prevailed in the Land Use Decision was Yu. Therefore, the evidence, and reasonable inferences therefrom, must be viewed in the light most favorable to Yu.

b. The Court applies the law to the facts based on the clearly erroneous standard.

Application of the law to the facts is reviewed under the clearly erroneous standard: “a reviewing court may only reverse an administrative determination when, after considering the entire record, the court is left with the definite and firm conviction that a mistake has been made.” *Woodinville Water Dist. v. King County*, 105 Wash. App. 897, 904, 21 P.3d 309 (2001); *Quality Rock Products*, 39 Wn. App. 125, 133.

c. The Court reviews conclusions of law using the *de novo* standard.

A question of law is reviewed *de novo*. RCW 36.70C.130(1)(b), (e); *Quality Rock Products*, at 133. For example, construction of a city code provision (analogous to a statute), being a question of law, would be reviewed under the *de novo* standard. *See, e.g., Waste Management of Seattle, Inc. v. Utilities and Transportation Commission*, 123 Wn.2d 621, 627, 869 P.2d 1034 (1994). Due deference must be given to the local jurisdiction's interpretation of its codes and standards if there is any ambiguity or conflict. *Neighbors v. King County*, 88 Wn. App. 773, 778, 946 P.2d 1188 (1997).

B. Nonconforming Use.

1. Common law framework.

A legal nonconforming use is a vested right. *Van Sant v. City of Everett*, 69 Wn. App. 641, 649, 849 P.2d 1276 (1993); *Rhod-a-zalea v. Snohomish County*, 136 Wn.2d 1, 6, 959 P.2d 1024 (1988).

An applicant asserting a legal nonconforming use bears the initial burden of proving the existence of a legal nonconforming use. *Van Sant*, 69 Wn. App. 641, 649.

Once the nonconforming use is established, the burden shifts to the party claiming abandonment or discontinuance. According to *Van Sant*, this “burden of proof is a heavy one.” *Van Sant*, at 648.

The abandonment of a nonconforming use ordinarily depends upon a concurrence of two factors: (a) An intention to abandon; and (b) an overt act, or failure to act, which carries the implication that the owner does not claim or retain any interest in the right to the nonconforming use.

Id., citing 8A E. McQuillin, *Municipal Corporations*, §25.192; see also, *First Pioneer Trading Company v. Pierce County*, 146 Wn. App. 606, 614, 191 P.3d 928 (2008).

2. Seattle Municipal Code framework.

Beyond the foregoing, Washington defers “to local governments to seek solutions to the nonconforming use problem according to local circumstances. . . . 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*, 136 Wn.2d 1, 7.

Seattle Municipal Code (“SMC”) sets a clear policy of preserving nonconforming uses.

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. The redevelopment of nonconformities to be more conforming to current code standards is a long term goal.

SMC 23.42.100 (emphasis added).

This statement of intent can be contrasted with other jurisdictions which might instead frame their local regulations to pressure nonconformities to be discontinued. *Anderson v. Island County*, 81 Wn.2d 312, 313, 501 P.2d 594 (1972) (Island County decision-makers noting that County Code disfavors nonconforming uses).

A “use” is zoning term of art, defined as “the purpose for which land or a structure is designed, built, arranged, intended, occupied, maintained, let or leased.” SMC 23.84A.040. This is a permissive definition, meaning any of the listed actions constitutes a “use.” The zoning term “use” is not limited only to the manner in which the property is being used in the moment, but also refers to the design, construction or arrangement of the structure or land. SMC 23.84A.040.

A “use, nonconforming” is “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.

The City’s regulations are oriented toward the City’s perspective of valuing nonconforming uses and developments and allowing them to

continue. Any “use or development” that existed prior to July 24, 1957, and has not been discontinued as that term is defined under City Code, is recognized as an existing nonconformity. SMC 23.42.102 (A). If a permit was issued for a “use or development” before the City changed its regulations, that use or development is considered to be an established nonconformity without need for a further permit formally establishing it as such. SMC 23.42.102 (B).

The means of discontinuing a nonconforming use differs depending on the category of use, even among types of residential uses. The duplex on the Property is categorized as a multifamily use under the definitions and operation of City Code. *DR 00013-15* (Conclusions 3-6 identifying structure as duplex and multifamily and explaining that the second unit is not an “accessory dwelling unit” under City Code definitions). The City includes duplexes within its definition of a multifamily structure. SMC 23.84A.032 (definition for Residential Use: (12) “Multifamily residential use”).

City Code allows a nonconforming use or development to continue unless ‘discontinued’ as defined under City Code. Relevant to this case, “discontinued” for a multi-family structure (duplex) consists of:

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

* * *

(3) The structure is vacant . . . 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.

SMC 23.42.104.

The foregoing is reinforced by the City's requirement that change of use for any structure requires a City permit or approval. SMC 23.40.002(A). If a property owner wishes to affirmatively change the use of the structure, he or she can do so through a change of use permit.

C. Rosema does not dispute that the nonconforming nature of the duplex was legally established.

The duplex use and development was conclusively established by the 1955 duplex permit and final approval in 1956. *DR 00110-113*. The "use" was established by that permit and final approval because the purpose for which the land and structure is designed, built, arranged, and intended was then the multifamily duplex. SMC 23.84A.040. That permit was valid and the duplex established at the time the City Code changed in 1957. *DR 00129* (finding 4). As a result, the duplex use and development is considered a legal nonconforming use under SMC 23.42.102 (B).

Rosema did not dispute this chain of events and readily concedes the duplex constituted a legal nonconforming use. *See e.g. CP4* (Land Use Petition Paragraph 14).

D. The nonconforming duplex has never been discontinued under any of the means set forth in Seattle Municipal Code.

Rosema's above concession is critical because the burden is consequently on Rosema to demonstrate actual evidence of abandonment or discontinuance of the nonconforming duplex. *Van Sant*, 69 Wn. App. 641, 649. Intent alone is not sufficient to satisfy this burden. Instead, Rosema must also show an actual overt act or failure to act. *Van Sant* at 648. Such act or failure must satisfy the standards set for abandonment or discontinuance as defined by City Code. SMC 23.42.104.

The duplex has never been discontinued as a matter of City Code. Discontinuance is expressly defined in SMC 23.42.104. A nonconforming use is lost if discontinued for 12 months. SMC 23.42.104. The rules related to discontinuing a nonconformance apply to a broad spectrum of uses: single family residential, multifamily residential, small and large commercial, home occupations, small and large industrial, shoreline, marine, automotive and so forth.

For this multifamily structure, discontinuance would occur if the structure is vacant; this structure "is not considered vacant and the use is

not considered to be discontinued unless all units in the structure are vacant.” SMC 23.42.104 (B)(3).

The Nelsons readily stated that the structure has been consistently occupied for the length of their ownership. *DR 00058*. Rosema did not provide evidence that any other prior predecessor in interest left the structure vacant for more than 12 months. This ongoing occupancy of at least one unit in a multi-family structure is sufficient to keep the nonconforming use in effect. SMC 23.42.104 (B)(3).

Rosema did not dispute the foregoing. Instead, Rosema argued that the City should find the duplex was discontinued based on the provision that a “structure or portion of the structure is not being used for the use allowed by the most recent permit.” SMC 23.42.104 (B)(2). *AR 00079-80*. Rosema’s argument failed because this provision must be read harmoniously with SMC 23.42.104 (B)(3). *HJS Development*, 148 Wn.2d 451, 471-472.

If Rosema’s reading were correct, every nonconforming multifamily structure would be deemed either to have lost its nonconforming status in its entirety or with respect to select units each time each unit was “not being used for the use allowed by the most recent permit.” This would create an administratively chaotic and confusing

situation for the City to figure out how many units any given nonconforming multifamily structure is entitled to at any given year. The City would have to create a separate log system to track every unit in every nonconforming multifamily building year by year as to whether the building or the specific unit's nonconformity was lost (because the burden of providing discontinuance is on the party so alleging).

As a way to resolve such an untenable situation, the City Code contains more specific language related to a nonconforming multifamily use, i.e. that such "is not considered vacant and the use is not considered to be discontinued unless all units in the structure are vacant." SMC 23.42.104 (B)(3). Subsection (2) continues to be in effect for the multiplicity of other circumstances involving nonconforming uses.

Rosema's attempt to artificially isolate SMC 23.42.104 (B)(2) from the rest of the ordinance and practical application renders meaningless the rule for determining multifamily uses discontinued set forth in subsection (3). Conversely, Yu's explanation, above, and the City's application of its code comports with the requirement that ordinances are to be read as a whole in order to give meaning to and harmonize all provisions. *HJS Development*, 148 Wn.2d 451, 471-472.

Even if SMC 23.42.104 (B)(2) could be read in total isolation, the structure is actually being used as a duplex. By the City's definition of "use," the structure is and consistently has been designed, built and arranged as a duplex. This constitutes "use" under SMC 23.84A.040.

By operation of City Code, the nonconforming use has not been discontinued. The City's interpretation was proper and should be affirmed on this basis.

E. Substantial evidence further supports the City's decision that the nonconforming duplex is ongoing, i.e. has not been discontinued.

The City's decision fully took into account all the evidence submitted. The City demonstrated a detailed understanding, weighing and evaluation of the evidence within its interpretation. *DR 0002-00017*. The City took all the evidence and applied that to the adopted City Code standards.

Substantial evidence supports the City's decision that the duplex is an ongoing nonconformity. In this case, the Court reviews the evidence, and reasonable inferences therefrom, in light most favorable to Yu. *Freeburg*, 71 Wn. App. 367, 371.

The extensive permit history for this Property and actual structure reveal a consistent duplex use since 1955. That duplex use became

nonconforming as of 1957. *DR 00129* (finding 4). Every permit obtained for various alterations and remodels over the years, including all permits obtained by the Nelsons, were expressly based on the duplex use. *DR 00141; 00151-153; 00154-155; 00161-00163*. Conversely, no owner of the Property over the last fifty years ever applied for a permit, nor did the City ever issue any permit or approval, to convert the duplex back to a single family residence.

Therefore by operation of City Code, the original 1955 permit and subsequent inspection approval constitute the governing use for the property, i.e. a duplex, unless otherwise discontinued based on the methods set forth in City Code. SMC 23.40.002; 23.42.104.

Consistently since 1955, the structure's "use" as defined by City Code is a multifamily duplex. Since 1955, the structure has always had at least two internal units, two exterior entries, two addresses, two separate electrical meters and the series of property owners received two sets of utility bills. *See e.g. DR 00049; 00084; 00110-113; 00151-155*. Most recently before Yu purchased the Property, the Nelsons maintained two sets of garbage pick-ups for eighteen years and two electrical meters with full knowledge that such actions were evidence to the City that the structure's use is as a duplex. *DR 00058* (handwritten paragraph 5).

Despite Rosema's assertions, the Nelsons never took any overt action to discontinue the duplex use, such as applying for a conversion or removing any physical attributes of the duplex, during their ownership of the Property. To the contrary, when told by the City that they were required to maintain and pay for two garbage collections because the structure is a duplex, they did so for the full eighteen years of their ownership. *DR 00058*.

The Nelsons obtained permits to remodel the duplex and remove remaining illegal triplex alterations (apparently still remaining after the City's older determination that a triplex was unlawful). *DR 00058* (handwritten correction noting internal modifications were related to the triplex, crossing out 'duplex'); *00151-155*; *00161-163*. Since the Nelsons had hired professional designers and contractors for all their permits (who noted the structure was an existing duplex), it is reasonable to expect the Nelsons would applied for a permit to convert the structure to single family use and actually taken substantive steps in furtherance of an actual conversion. *DR 00151-153* (notations on application and plans labeling structure existing nonconforming duplex). However, the Nelsons did the opposite: they expressly preserved the duplex use as noted on all their applications. *DR 00151-155*; *00161-163*.

During the time they owned the Property, the Nelsons continued in all outward respects to perpetuate the duplex. The Nelsons retained all internal functional necessities such as two kitchens, multiple bathrooms, multiple bedrooms, and two separate external entrances. *DR 00084* (existing layout of structure). The maintenance of two kitchens is particularly significant as City Code lists such as a defining feature of a separate dwelling unit. SMC 23.84A.008.

The City had ample evidence to support its Decision that the nonconforming use was ongoing.

F. Rosema Failed to Demonstrate Discontinuance of the Nonconforming Duplex.

As reviewed above, Rosema's own evidence demonstrates that the duplex use and development is ongoing by operation of City Code. Rosema failed to provide any substantial evidence demonstrating the nonconforming duplex was discontinued even if the City Code limitations could be ignored.

1. The Nelson declaration does not provide substantial evidence that the nonconforming use was discontinued.

As part of their request, Rosema submitted a declaration by Mr. Nelson, written after Yu purchase the property. *DR 00058*.

Mr. Nelson's declaration contains three significant points of internal conflict between the pre-prepared portions and Mr. Nelson's handwritten statements. These three substantial discrepancies colored the reliability of Mr. Nelson's declaration.

First, Rosema appears to have tried to color the structural alterations that the Nelsons made. Mr. Nelson never made any internal or external physical modifications to remove any aspect of the duplex. Mr. Nelson did make internal modifications to convert the triplex, i.e. the remaining portions still unlawful as a result of the earlier Hearing Examiner decision ruling the structure could not be used as a triplex. However, Mr. Nelson expressly rejected the pre-prepared statement that he made modifications to convert the duplex nature of the structure. *DR 00058* (Paragraph 4).

Second, Mr. Nelson affirmatively hand wrote that he left the separate duplex entrance in tact. *DR 00058* (Paragraphs 4 and 6).² This directly conflicts with the typed portion of the declaration, presumably pre-prepared, which stated that he removed the external entrance. *Id.*

² The Superior Court finding of fact do not all accurately reflect the record. *CP 172-176*. There is no evidence to support the findings in Finding of Fact 2 that the Nelsons removed internal partitions and an external entrance to make the structure suitable for use as a single-family home. *CP 173*. To the contrary, Mr. Nelson's declaration expressly rejected that assertion. *AR 00058*.

Third, Mr. Nelson affirmatively admits the City retained both addresses for the Property: numbers 5211 and 5215. *DR 00058* (Paragraph 4). This again directly conflicts with the pre-typed statement that Mr. Nelson “eliminated” the second address. *Id.*

Mr. Nelsons did state that he felt they occupied the structure as a single family home. Mr. Nelson stated that they occupied the house for the full eighteen years they owned it, and that they were the only residents at the time they sold the home. *DR 00058*. However, Mr. Nelson did not state whether there they ever had any renters or family residing in the second duplex unit prior to 2009. *Id.* No other evidence in the record was submitted on this point.

Finally, Mr. Nelson’s declaration must be viewed consistently with the Nelsons’ permitting activity, all of which was expressly based on their assertion of an “existing nonconforming duplex.” *DR 00151-155*.

Mr. Nelson’s declaration does not provide substantial evidence that the nonconforming use was discontinued, particularly when considering the Nelson’s contemporaneous permitting activities, ongoing maintenance of the duplex in all overt ways during their ownership, and consistent occupancy.

2. Notes by the King County Assessor are not determinative of the type of unit, but reflect two units in the structure.

Rosema also argued that information from the King County Assessor notes evidenced a change in use. A June 18, 2001, note in the King County assessor's records reflected that property was used as single family dwelling and that there is an "ADU [accessory dwelling unit] in bsmt." *DR 00036*. This note reflects two units in the structure. While King County may call the second unit ADU, or accessory dwelling unit, King County's terminology and land use code do not have any legal effect on zoning and determination of nonconforming uses within the City of Seattle.

Even if King County deemed the structure to be only one dwelling unit (which it did not), King County has no authority to authorize, permit or otherwise establish or regulate a use within the City of Seattle. Instead, as the City explained in its Decision, the structure is a duplex and no ADU was ever established or could be legally permissible. *AR00015* (Paragraph 6).

Further, King County's note must be read consistently Mr. Nelson's declaration, submitted by Rosema. Mr. Nelson clearly stated that stated he removed the remaining triplex physical arrangements, but equally clearly refused to state that he removed the duplex physical

arrangements. *DR 00058* (handwritten corrections to Paragraph 4). To the contrary, Mr. Nelson clearly asserted he kept the duplex arrangements in place, including the separate entrance. *DR 00058* (handwritten Paragraph 6).

In sum, the Rosema's failed to provide substantial evidence regarding discontinuance even if they could side-step the City Code requirements in this regard.

G. The City's Parking Calculations Were Correct.

The applicable parking requirements are 1.5 spaces per unit where there are two or more bedrooms, plus .25 spaces per bedroom for dwelling units with 3 or more bedrooms. SMC 23.54.015, Chart B, subsection L. Fractions up to and including one and one-half are rounded down. SMC 23.86.002 (B). Any parking deficit concurrent to a legally established use is permitted to continue. SMC 23.54.015 (J).

The City found the property had two legally established parking spaces. *DR 00016; 00062*. Thus translates into is an established parking deficit of two spaces (which normally otherwise would require four spaces because there are six bedrooms). *Id.* Without the nonconformity, the proposed total nine bedrooms would require five onsite parking spaces. *DR 000062*. However, taking into account the existing two-

space deficit, the City correctly concluded that three spaces were required when the above rules were applied to the Property. *DR 00016*. Yu proposed four on-site parking spaces plus a tandem space. *DR 00047; 00084*.

In conclusion, the City corrected issued the Decision with respect to parking calculations.

CONCLUSION

Based on the foregoing analysis, Yu and Lee respectfully request that the City's Land Use Decision be affirmed.

Dated this 14th day of Sept., 2010.

JOHNS MONROE MITSUNAGA
KOLOUŠKOVÁ PLLC

By: 
Duana Koloušková, WSBA #27532
Attorneys for Appellants
AN YU, SHUI-XIAN FU, and
DAVID LEE

APPENDIX A
ASSIGNMENTS OF ERROR

1. Appellant assigns error to the following findings contained in Finding of Fact 2:

“The Nelsons removed internal partitions and an external entrance to make it more suitable for use as a single-family home.”

“They paid for two garbage containers because they were told by the City that they had to have a second container for the second kitchen.”

2. Appellant assigns error to the following findings contained in Finding of Fact 3:

“The Nelsons were the only residents from 1991 until 2009, and they used the subject property as their single-family home during that time.”

“A note in the County Assessor’s file dated June 18, 2001 states that the subject property was ‘returned to use as single family dwelling by current owner.’”

3. Appellant assigns error to the following findings contained in Finding of Fact 5:

“Prior owners established two parking spaces on the subject property. During the pendency of this appeal the current owners increased the number of bedrooms in the subject property from six to nine, which requires a minimum of five parking spaces.”

4. Appellant assigns error to the following findings contained in Finding of Fact 6:

“The plans submitted by the current owners and approved by the Department of Planning and Development (DPD) depict five outdoor parking spaces in the front and side yards of the subject property.”

5. Appellant assigns error to the following findings contained in Findings of Fact 8, 9, 10, and 11 as such are selective restatements of City Code, i.e. law, not findings.
6. Appellant also assigns error to the following findings contained in Finding of Fact 11: “SMC 23.44.016 D prohibits parking in required front and side yards.
7. Appellant assigns error to Conclusion of Law A.
8. Appellant assigns error to Conclusion of Law B.
9. Appellant assigns error to Conclusion of Law C.
10. Appellant assigns error to Conclusion of Law D.

11. Appellant assigns error to Order 1.
12. Appellant assigns error to Order 2.
13. Appellant assigns error to Order 3.
14. Appellant assigns error to Order 4.
15. Appellant assigns error to Order 5.
16. Appellant assigns error to Order 6.

No. **65607-4-I**
King County Superior Court No. 09-2-43983-4 SEA
IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

AN YU, SHUI-XIAN FU, and DAVID LEE,

Appellants,

vs.

CITY OF SEATTLE, and
KEITH ROSEMA and ANEE BRAR

Respondents.

AFFIDAVIT OF SERVICE

Atty: Duana T. Koloušková, WSBA #27532
JOHNS MONROE MITSUNAGA KOLOUŠKOVÁ PLLC
1601 – 114th Avenue S.E., Suite 110
Bellevue, WA 98004
T: 425-451-2812
F: 425-451-2818

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STATE OF WASHINGTON
2010 SEP 15 AM 10:38

STATE OF WASHINGTON)
)ss.
COUNTY OF KING)

The undersigned, being first duly sworn on oath, deposes and says:

I am a citizen of the United States of America; over the age of 18 years, am a legal assistant with the firm of Johns Monroe Mitsunaga PLLC, not a party to the above-entitled action and competent to be a witness therein. On this date, I caused to be served via Email and U.S. First Class Mail, true and correct copies of: APPELLANTS' CORRECTED OPENING BRIEF and this AFFIDAVIT OF SERVICE upon all counsel and parties of record at the address and in the manner listed below. Motion, Declaration and this Affidavit have been faxed for the purpose of filing with the Court.

Patrick Schneider, Esq.
FOSTER PEPPER PLLC
1111 3rd Ave Suite 3400
Seattle, WA 98101
Attorneys for Respondents
Rosema and Brar
schnp@foster.com

Elizabeth E. Anderson, Esq.
Assistant City Attorney
PETER S. HOLMES
Seattle City Attorney
600 – 4th Avenue, 4th Floor
Seattle, WA 98124-4769
Attorneys for Respondent
City of Seattle
Liza.Anderson@seattle.gov

Dated this 14th day of September, 2010.


EVANNA L. CHARLOT

STATE OF WASHINGTON)
)ss.
COUNTY OF KING)

SIGNED AND SWORN to (or affirmed) before me on
September 14, 2010 by Evanna L. Charlot.


Robert D. Johns
Residing at Seattle, Washington
My Appointment Expires: 4-19-14

