

68819-7

68819-7

No. 68819-7-1

**COURT OF APPEALS, DIVISION I,  
OF THE STATE OF WASHINGTON**

---

**TYKO JOHNSON, Appellant,**

**vs.**

**CITY OF SEATTLE, Respondent.**

---

**OPENING BRIEF OF APPELLANT**

---

Law Office of Charles R. Horner,  
PLLC

Charles R. Horner  
WSBA No. 27504  
Attorney for Appellant

1001 Fourth Avenue, Ste. 3200  
Seattle, Washington 98154  
206-381-8454  
crhornerpllc@qwestoffice.net

RECEIVED  
COURT OF APPEALS  
DIVISION I  
NOV 19 11:34 AM  
K

**ORIGINAL**

## TABLE OF CONTENTS

<b>I. ASSIGNMENTS OF ERROR.....</b>	<b>1</b>
<b>A. ASSIGNMENTS OF ERROR. ....</b>	<b>1</b>
Assignment of Error 1.....	1
Assignment of Error 2.....	1
Assignment of Error 3.....	1
Assignment of Error 4.....	1
Assignment of Error 5.....	1
Assignment of Error 6.....	2
Assignment of Error 7.....	2
Assignment of Error 8.....	2
Assignment of Error 9.....	2
Assignment of Error 10.....	2
Assignment of Error 11.....	2
Assignment of Error 12.....	3
Assignment of Error 13.....	3
Assignment of Error 14.....	3
Assignment of Error 15.....	3
Assignment of Error 16.....	4
Assignment of Error 17.....	4
Assignment of Error 18.....	4
Assignment of Error 19.....	4
Assignment of Error 20.....	4
Assignment of Error 21.....	4
Assignment of Error 22.....	4
Assignment of Error 23.....	5

B.	ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.....	5
	Issue Statement 1.....	5
	Issue Statement 2.....	5
	Issue Statement 3.....	5
	Issue Statement 4.....	5
	Issue Statement 5.....	6
	Issue Statement 6.....	6
	Issue Statement 7.....	6
	Issue Statement 8.....	6
	Issue Statement 9.....	7
	Issue Statement 10.....	7
	Issue Statement 11.....	7
	Issue Statement 12.....	8
	Issue Statement 13.....	8
	Issue Statement 14.....	9
	Issue Statement 15.....	9
<b>II.</b>	<b>STATEMENT OF THE CASE .....</b>	<b>9</b>
A.	PROCEDURAL HISTORY.....	9
	1. Proceedings before the Hearing Examiner.....	9
	2. Trial court proceedings.....	13
B.	FACTUAL BACKGROUND.....	20

**III. ARGUMENT..... 31**

A. THE HE AND TRIAL COURT ERRED IN AFFIRMING THE CITATIONS BECAUSE MR. JOHNSON COULD RECEIVE NO MEANINGFUL CONSIDERATION OF HIS DEFENSE THAT HIS USE WAS LEGAL..... 31

B. MR. JOHNSON’S USE WAS, BY DEFINITION, LEGAL AT ALL TIMES WHEN THE CITY CITED HIM ENGAGING IN IT..... 35

C. DISMISSAL OF THE 1983 CLAIM ASSOCIATED WITH CITATION 3 ON SUMMARY JUDGMENT WAS IMPROPER BECAUSE THERE WAS A LEGITIMATE DISPUTE OF MATERIAL FACT. .... 40

D. THE TRIAL COURT ERRED IN DISMISSING MR. JOHNSON’S 1983 CLAIMS STATED IN HIS FIRST TWO LUPA PETITIONS UNDER CR 12(b)(6)..... 44

E. THE TRIAL COURT ABUSED ITS DISCRETION BY FAILING TO CONTINUE THE HEARING OF THE CITY’S CR 12(b)(6) MOTION..... 45

F. THE TRIAL COURT ABUSED ITS DISCRETION BY FAILING TO RECONSIDER OR TO VACATE ITS CR 12(b)(6) DISMISSAL OF THE 1983 CLAIMS ..... 47

G. REQUEST FOR ATTORNEY’S FEES AND COSTS ON APPEAL AND IN THE TRIAL COURT..... 49

**IV. CONCLUSION ..... 50**

## TABLE OF AUTHORITIES

	Page
<b>I. Table of Cases</b>	
<i>Armstrong v. Manzo</i> , 380 U.S. 545, 552 (1965)	32
<i>Caoette v. Martinez</i> , 71 Wn.App. 69, 78-79, 856 P.2d 725 (1993)	48
<i>Devine v. Dept. of Licensing</i> , 126 Wn.App. 941, 110 P.3d 237 (2005)	33
<i>Elves, Inc., v. Eskenazi</i> , 635 F.2d 396 (5th Cir. 1981)	47, 48
<i>Hoffer v. State</i> , 110 Wn.2d 415, 420, 755 P.2d 781 (1988)	44
<i>In re Cross</i> , 99 Wn.2d 373, 382-383, 662 P.2d 828 (1983)	37
<i>In re Discipline of Sanai</i> , 167 Wn.2d 740, 225 P.3d 203 (2009)	46
<i>Jefferson County v. Lakeside Industries</i> , 106 Wn.App. 380, 23 P.3d 542 (2001)	36
<i>Mathews v. Eldridge</i> , 424 U.S. 319, 333 (1976)	32
<i>McCulloch v. Maryland</i> , 17 U.S. 316 (1819)	42
<i>McMilian v. King County</i> , 161 Wn.App. 581, 591, 255 P.3d 739 (2011)	36
<i>Monell v. New York City Dept. of Social Services</i> , 436 U.S. 658 (1978)	40
<i>Mullane v. Central Hanover Bank &amp; Trust Co.</i> , 339 U.S. 306, 314 (1950)	32

<i>Norton v. Town of Islip</i> , 239 F.Supp.2d 264, 296 (E.D.N.Y. 2003)	41, 42
<i>Post v. City of Tacoma</i> , 167 Wn.2d 300, 217 P.3d 1179 (2009)	32, 41, 43
<i>Rosema v. City of Seattle</i> , 166 Wn.App. 293, 297, 269 P.3d 393 (2012)	31, 36, 37, 38
<i>Sherman v. State</i> , 128 Wn.2d 164, 183, 905 P.2d 355 (1995)	40
<i>State v. Keller</i> , 32 Wn.App. 135, 140, 647 P.2d 35 (1982)	48
<i>State ex rel. Carroll v. Junker</i> , 79 Wn.2d 12, 26, 482 P.2d 775 (1971)	45-46
<i>Tex. State Teachers Ass'n v. Garland Indep. Sch. Dist.</i> , 489 U.S. 782, 792 (1989)	49
<b>II. Constitutional Provisions</b>	
U.S. Const. generally	32
U.S. Const., Amds. 5 and 14	34
Wash. Const., Art. I, §3	34
<b>III. Statutes</b>	
RCW 7.80.010	43
RCW 35.20.010(1)	43
RCW 35.20.030	43
Chapter 36.70C RCW (Land Use Petition Act) generally	13

RCW 36.70C.080	14
RCW 36.70C.130	34
RCW 36.70C.130(1)(a)	34
RCW 36.70C.130(1)(c)	34
RCW 36.70C.130(1)(e)	34
RCW 36.70C.130(1)(f)	19, 35
42 U.S.C. §1983	13, 16, 40, 45, 49
42 U.S.C. §1988(b)	16, 49
<b>IV. Ordinances</b>	
SMC 23.42.102	12, 21, 22, 23, 27, 37, 38, 39
SMC 23.42.104	23
SMC 23.84A.040	22, 37
SMC 23.44.016	10, 25
Chapter 23.90 SMC generally	25
SMC 23.90.002	24
Chapter 23.91 SMC generally	25, 26
SMC 23.91.006	10, 25
SMC 23.91.010	25
SMC 23.91.012	10, 25-26, 33, 42

---

**V. Other Authority**

Merriam-Webster Unabridged Dictionary

39

---

## II. ASSIGNMENTS OF ERROR

### A. Assignments of Error.

1. The City's Hearing Examiner ("HE") erred in concluding that appellant's use of his property was not legal nonconforming.

2. The HE erred in finding that appellant did not demonstrate at the first citation appeal hearing that his use was legal nonconforming.

3. The HE erred in concluding that appellant could not claim a legal nonconforming use because of the lack of "grandfather" language in the relevant ordinance, by failing to found her decision on substantial evidence, or by erroneously applying the law to the facts, No. 68819-7, CP 565-828, AR 29-32, CLs 3, 4, and 6.

4. The HE erred in concluding that appellant engaged in an illegal land use and in affirming the City's first citation of him for engaging in such use, AR 29-32, CL 6.

5. The HE erred in affirming and not dismissing Citation 2, AR 65-67.

6. The HE erred in affirming and not dismissing Citation 3, Sub. 23, AR 45-46.

7. The trial court's conclusion in its Findings, Conclusions, and Order dated March 13, 2012, that appellant "need only establish the existing use and obtain a permit" in order to continue a legal nonconforming land use, was error, No. 68819-7, CP 422-432, CL 4.

8. Trial court's CL 9, stating that "[t]he Citation 1 hearing examiner correctly concluded (CL3) that Mr. Johnson failed to establish a nonconforming use," was error.

9. The trial court erred CL 9 by not finding error in the HE's reliance on the absence of "grandfather" language to affirm Citation 1.

10. The trial court erred in its CL 9 in asserting that the HE concluded that "longevity of use or a preexisting use is insufficient to establish a legal nonconforming use . . ." or, if the HE, indeed stated any such thing, in affirming that such "longevity of use or a preexisting use is insufficient to establish a legal nonconforming use . . ."

11. The trial erred in CL 11, which stated, "[g]iven Mr. Johnson's failure at the Citation 1 hearing to establish a legal

nonconforming use, the hearing examiner's conclusion (CL5) that he as in violation of the excess vehicle storage provisions was correct and is affirmed."

12. That portion of the trial court's CL 18 asserting that "[d]eferral of the validity of Mr. Johnson's claim of a nonconforming use for a Departmental decision was unrelated to the determination of his violations of the Code" was error.

13. The trial court erred in concluding that the HE's giving collateral estoppel effect to her decision affirming the first citation (see CL 17) was "harmless error" where the City's policy precluded consideration of appellant's evidence of legal nonconforming use at the hearing of that citation (CLs 19, 21, and 30).

14. The trial court erred in sustaining the HE's affirmation of all three citations to the extent that it did so because appellant had not pursued the unrelated Departmental procedure to have his use "recognized" as legal nonconforming "for the record" (see CLs 4, 9, 11, 19, 21, 22, 30, and 32).

15. The trial court erred by affirming the first two citations and remanding the third citation for a mitigation hearing only where it failed to render a decision on whether the City violated appellant's procedural due process rights, see CL 28.

16. The trial court erred in affirming the first two citations against appellant and the related fines, Orders 34 and 35 and related CLs.

17. The trial court erred in its CL 30 and Order 36 in remanding the third citation for a "mitigation hearing" only.

18. The trial court erred in its order dated May 15, 2012, denying reconsideration of its Findings, Conclusions, and Order March 13, 2012.

19. The trial court erred in dismissing appellant's claim for damages, injunctive relief, and attorneys fees pursuant to 42 U.S.C. §§ 1983 and 1988(b) by order dated May 23, 2012.

20. The trial court's dismissal of appellant's 42 U.S.C. §1983 claim pursuant to CR 12(b)(6) by order dated March 14, 2011, was error.

21. The trial court erred in entering the entering its order dated March 14, 2011, denying appellant's motion of March 3, 2011, seeking a continuance of the hearing of respondent's motion to dismiss his damages claims pursuant to CR 12(b)(6).

22. The trial court's order of April 8, 2011, denying reconsideration of its decision dismissing appellant's Section 1983 claim was error.

23. The trial court's erred in refusing, by order dated April 6, 2012, to vacate its order of March 14, 2011, dismissing appellant's Section 1983 claim.

**B. Issues Pertaining to Assignments of Error.**

1. Did the HE err in concluding, and did the trial court err in affirming the HE's conclusion, that appellant could not claim a legal nonconforming use because of the lack of "grandfather" language in the relevant ordinance, by failing to found her decision on substantial evidence, or by erroneously applying the law to the facts (see RCW 36.70C.130) (Assignment of Error 3)?

2. Did the HE err by not dismissing the citations because the City's appeal process provided no means for appellant to receive consideration of his legal nonconforming use defense, (Assignments of Error 4, 5, and 6)?

3. Was the legality of appellant's nonconforming use predicated on his obtaining a City permit establishing such use "for the record" or was it legal at all relevant times, including before he obtained such permit (Assignment of Error 7)?

4. Did the trial court err in concluding that appellant "failed to establish a nonconforming use" despite his presentation of uncontested evidence of such where, as the court found

elsewhere, the HE was without authority to determine whether he had a legal nonconforming use (Assignment of Error 9 and 10)?

5. Where the only available citation appeal process precluded consideration of uncontested evidence that appellant's his use was at all times legal, did the Court err by not concluding that the City denied him procedural due process, thereby mandating reversal of the City's citations against appellant for an allegedly illegal land use (RCW 36.70C.180(1)(f)), and by affirming the HE's conclusion that appellant violated City Code by engaging in such use (Assignment of Error 11)?

6. Was the appellant's inability to receiving meaningful consideration of his defense of nonconforming use unrelated to the HE's determination of his violation of the three-vehicle ordinance (Assignment of Error 12)?

7. Did the HE commit actual and not harmless error in applying collateral estoppel to affirm the second and third citations for the alleged illegal use where under City's policy the only appeal process denied meaningful consideration of the uncontested evidence of legal nonconforming use (Assignment of Error 13)?

8. Did the HE and trial court err by averting to a Departmental procedure for recognizing a legal nonconforming use

“for the record” where that procedure was separate from the citation appeal process, the City never charged appellant with not resorting such procedure, and the City’s policy was that subsequent recognition of the use would not void its citations and fines for engaging in such use (Assignment of Error 14)?

9. Did the trial court err in affirming the first two citations for violating the three-vehicle limit and remanding the third citation for mitigation only even though the City Department of Planning and Development ultimately issued a “permit” recognizing the legal nonconforming use or does that amount to approval of punishment for engaging in legal activity (Assignments of Error 14-17)?

10. Did the trial court err in affirming the first two citations and remanding the third citation for a mitigation hearing only without considering appellant’s contention that the City violated his procedural due process rights, requiring reversal of the citations under RCW 36.70C.130(1)(f) (Assignments of Error 14-17)?

11. Did the trial court abuse its discretion in failing to reconsider its Findings of Fact and Conclusions of Law dated March 13, 2012, in light of (a) appellant’s contentions that it had failed to reach his procedural due process objection before upholding the citations under LUPA; (b) its conclusion that the HE

found no legal nonconforming use conflicted with its holding that the HE had no authority to power to make such a finding; (c) City ordinances generally recognizing a right to continue legally commenced nonconforming uses without requirement of “grandfather” language in specific zoning rules; and (d) the fact that legal nonconforming use are legal without need for a permit and remain so after adoption of contrary ordinance absent any amortization procedure or affirmative requirement to obtain a permit to continue the use (Assignment of Error 18)?

12. Was there a legitimate dispute of material fact precluding the trial court’s dismissal of appellant’s 42 U.S.C. §1983 and Section 1988(b) claims in Cause No. 11-2-15560-9 on summary judgment where, because of City policy, he could not “rebut the DPD evidence and establish that the cited violation(s) did not occur,” contrary to the appeal ordinance, and the trial court had not rendered a decision on his procedural due process objection pursuant to RCW 36.70C.130(1)(f) (Assignment of Error 19)?

13. Did there exist any possible set of facts under which appellant might recover from the City under his 42 U.S.C. §1983 claim such that dismissal of his claim under CR 12(b)(6) was an abuse of discretion (Assignment of Error 20)?

14. Did the trial judge abuse her discretion by not continuing the hearing of the City's CR 12(b)(6) motion dated February 9, 2011, when the ultimate hearing date was not consistent with the date of initial hearing to which the parties had stipulated and Mr. Johnson was unable to attend the hearing because of documented medical issues (Assignment of Error 21)?

15. Did the Court abuse its discretion by failing to reconsider its dismissal of appellant's 42 U.S.C. §1983 claim and in denying his motion to vacate such dismissal where he was unable to attend the hearing where such dismissal occurred because of a medical appointment and where he alleged facts in support of such claim in petitions and briefing (Assignments of Error 22 and 23)?

### **III. STATEMENT OF THE CASE**

#### **A. Procedural History.**

##### **1. Proceedings before the Hearing Examiner.**

This case arose from the three successive citations (hereinafter "Citation 1," "Citation 2," and "Citation 3") and associated fines that the City of Seattle (City) issued against Tyko Johnson for parking more than three motor vehicles outdoors at his

residence at 4146 -53<sup>rd</sup> Avenue Southwest. No. 68819-7, CP 565-828, AR 43-44 and AR 196-197; No. 68994-1, AR 64-65.<sup>1</sup>

The City also charged him with “junk storage” in one or two of the earlier citations, but the trial court dismissed those charges on appeal. No. 68819-7, CP 565-828, AR 196-197; CP 427 (CL 10). The City did not cross-appeal such dismissal and “junk storage” will not be an issue on appeal.

Mr. Johnson requested contested hearings before the City Hearing Examiner (hereafter “HE”) to appeal the citations, the only path the City provided for appealing. SMC 23.91.006. The Seattle Municipal Code (“Code”) provided that, at the hearing, “[t]he person cited may rebut the DPD [City Department of Planning and Development] evidence and establish that the cited violation(s) did not occur . . .” SMC 23.91.012(E)(2). At the hearings of the appeals of Citations 1 and 2, Mr. Johnson contended on the basis of never-rebutted testimony and evidence that he had continuously kept more than three vehicles on his property since decades before the City adopted its prohibitive ordinance, SMC 23.44.016(C)(2), in

---

<sup>1</sup> Owing to his late retention to prepare this brief, the undersigned was not able to determine the precise “CP” numbers for the entire record in time for filing this brief and, therefore, specifies certain documents with the “AR” numbers used in the record below. Upon request, a correct brief may be filed.

1999, thereby giving him a legal nonconforming use for which he could not cited. No. 68819-7, CP 565-828, AR 30, FF 8, AR 66, FF 7, AR 71-72; CP 427, CL 12 (“At the Citation 2 hearing, Mr. Johnson presented substantial evidence of the longevity of his use of his property for vehicle storage and repair”).

Despite Mr. Johnson’s uncontested evidence for a legal nonconforming use, the HE, in her decision Citation 1, simultaneously rejected the defense based on the lack of “grandfathering” language in the ordinance underlying the citation, but concluded that she could not consider it because she lacked jurisdiction to determine whether or not such use was legal nonconforming. No. 68819-7, CP 565-828, AR 31, CL 3-4. The HE affirmed the Citations 2 and 3 by giving collateral estoppel effect to her first decision even though, as the trial court later found in rejecting application of collateral estoppel, the HE lacked jurisdiction to consider the legal nonconforming use defense in the first instance. No. 68819-7, CP 565-828, AR 67; CP 428, CL 17; No. 688994-1, AR 45-46.

Citing SMC 23.42.102, the HE concluded that could not consider Mr. Johnson’s defense of legal nonconforming use because the Code assigned that role to the Director of the DPD

through a procedure unrelated to the citation appeal process. No. 68819-7, CP 565-828, AR 31, CL 4. The City's warnings and citations did not mention any such procedure nor did any City official allude to until the HE did so in her first decision. *Id.*; No. 68819-7, CP 565-828, AR 38-39, AR 42, AR 43-44, and AR 196-197; No. 68994-1, AR 64-65.

On March 16, 2011, nearly a month after the City issued Citation 3, DPD's Code Compliance Coordinator sent Mr. Johnson a letter stating "I learned that you may have been misinformed about whether you can obtain a permit for establishing the accessory use for parking more than four vehicles on your lot" and outlining a procedure "to establish an accessory parking use for the record" by making application to the DPD. No. 68994-1, AR 57 (emphasis added). Mr. Johnson made application to DPD on May 11, 2011, and, 112 days later, on August 31, 2011, DPD issued a "permit" recognizing his legal nonconforming use "for the record." No. 68994-1, CP 123.

## **2. Trial court proceedings.**

Tyko Johnson appealed Citations 1 and 2 in *pro se* petitions filed on December 27, 2010, and February 11, 2011, respectively. No. 68819-7, CP 151-191, CP 1-145. Referring to the Land Use

Petition Act, RCW 36.70C, he contended in each petition that the HE erred in sustaining the citations because she could not consider his defense and uncontested evidence that his use was legal at all relevant times and, therefore, that he had not received due notice and opportunity to be heard in his defense. No. 68819-7, CP 152, CP 154, CP 3 (“In short, defendant never had a full, fair opportunity to litigate the legal non-conforming issue to the use of this property”). Among the claims that Mr. Johnson joined with his LUPA appeal was a request for monetary damages pursuant to 42 U.S.C. § 1983 (hereinafter “1983 claim”). No. 68819-7, CP 155, CP 7. The City’s answers to each of the petitions alleged as an affirmative defense that “[p]etitioner has never been entitled to maintain the zoning violations during all time periods associated with the Petitioner’s claims in this matter” and demanded dismissal of the 1983 claims. No. 68819-7, CP 510-512, CP 547-549 (emphasis added).

On February 9, 2011, the City moved to dismiss all of Mr. Johnson’s 1983 and other non-LUPA claims under CR 12(b)(6). No. 68819-7, CP 513-527. It initially set its motion for February 18, 2012, the date of the initial hearing under the first LUPA case schedule. Mr. Johnson moved to consolidate the appeals of the

first two citations and he and the City then stipulated to an order providing that the actions would proceed on the later of the two case schedules so that the initial hearing under RCW 36.70C.080 would not occur until April 8, 2011. No. 68819-7, CP 146-148, CP 194-195. The Honorable Richard Eadie signed that stipulated order on February 18, 2011, on behalf of the assigned trial judge, Suzanne Barnett. CP 194-195. Mr. Johnson believed the hearing of the City's preliminary CR 12(b)(6) motion would be deferred to that date. No. 68819-7, CP 224. Without any notice to him, however, the City secured an order of consolidation signed by the Honorable Laura Inveen on February 22, 2011, that, through a handwritten alteration of the order, contradicted the earlier agreed order by stating that the consolidated cases would follow the earlier of the two case schedules. No. 68819-7, CP 149-150.

On March 1, 2011, the City renoted its CR 12(b)(6) motion for hearing on March 11. No. 68819-7, CP 198, CP 541-546. Mr. Johnson promptly objected by motion dated March 3, requesting a continuance of the motion to April 8 based on the case schedule to which the parties had agreed and because he had already scheduled an appointment with a geriatric cardiology specialist for March 11. No. 68819-7, CP 200-215. He reiterated his objection

to the timing of the hearing of the City's motion to dismiss in subsequent filings. No. 68819-7, CP 218-221.

The City claimed in its CR 12(b)(6) motion that Mr. Johnson had failed to state a 1983 claim "because Johnson cannot demonstrate that he has been damaged by the City's zoning enforcement efforts and because the City cannot be found liable for damages arising from enforcing ordinances enacted under the City's police power." No. 68819-7, CP 513-514. The City's argument referred only to Johnson's complaint about the nature of the land use action itself without addressing his objection to the HE's inability to consider his legal nonconforming defense. CP 518.

Mr. Johnson submitted a response to the City's motion stating in part, "I believe the evidence in the record, photographic and un-rebutted testimonial [*sic*] will clearly show an established Legal Non-Conforming use, and that my Due Process rights of Notice, and opportunity to Respond were violated." No. 68819-7, CP 217. Owing to his medical appointment, he was not able to attend the hearing of March 11, although the dismissal order erroneously stated that he did. CP 240-242.

The trial judge, Suzanne Barnett, denied Mr. Johnson's motion for continuance and dismissed his 1983 claim by orders dated March 14, 2011. No. 68819-7, CP 238-29. The judge later denied a motion for reconsideration of that dismissal under CR 59(a) and a motion in Spring 2012, to vacate that dismissal pursuant to CR 60(b)(11) ("Any other reason justifying relief from the operation of the judgment"). CP 245-260, CP 269-270, CP 448-459, CP 475-476.

Mr. Johnson filed a petition contesting Citation 3 with joined claims for damages and attorneys' fees under 42 U.S.C. §§1983 and 1988(b). No. 68894-1, CP 1-23. The petition complained of, among other errors, the HE's conclusion that collateral estoppel precluded relitigation of his legal nonconforming use defense where she had previously disclaimed the ability to rule on his defense. CP 5. He contended that such procedure was unlawful or failed to follow a prescribed process, resulted from an erroneous interpretation of the law, was not based on substantial evidence, was based on a clearly erroneous application of law to fact, was outside of the HE's jurisdiction, and violated his rights to due process under the United States and Washington constitutions and

Seattle ordinances respecting legal nonconforming uses. CP 5-6.  
Mr. Johnson also alleged a 1983 claim in the third petition. CP 6-7.

Judge Barnett conducted the consolidated trial of the LUPA appeals of Citations 1 and 2 on August 12, 2011, and the trial of the appeal of Citation 3 on November 4, 2011 (the Chief Civil Judge having previously denied a motion to consolidate all three appeals, but having assigned all three cases to Judge Barnett). Judge Barnett would not issue her 11-page Findings, Conclusions, and Order until March 14, 2012. See No. 68894-1, CP 140-140.

Even though the record as supplemented before the trials showed that DPD eventually issued a "permit" recognizing Mr. Johnson's legal nonconforming use "for the record" through its separate procedure, the trial judge, while dismissing the "junk storage" charges, affirmed all three citations and the fines associated with the first two. No. 68894-1, CP 140-140, CL 10, CL 31, Orders 34-36. The judge remanded only Citation 3 for a "mitigation hearing," at which Mr. Johnson would be deemed to have committed a violation he still denied, only the amount of the fine being at issue. See CP 431, 432, CL 33, Order 36.

Although the trial judge found that the HE had erred in ascribing collateral estoppel to her decision on Citation 1 in order to

affirm Citations 2 and 3, she deemed such error to be “harmless” because, as the City contended, the Code prohibited her from determining the existence of a legal nonconforming use as a defense to a citation. CP 428-429, CL 17-19. It appears that the judge decided Mr. Johnson should be held liable for the alleged violations because he had not procured a “permit” from DPD for recognizing his use “for the record” as of the date of each citation. See CP 2, FF 4, CP 431, CL 30. In Conclusion of Law 30, for instance, the judge referred to the HE’s affirming each citation “because Mr. Johnson had not sought “permission” to continue with what, but the time of the second hearing, appeared clearly to be a continuous nonconforming use (emphasis added).

The judge justified her remand of Citation 3 for mitigation only by alluding to DPD’s issuance of the “permit” on August 31, 2011, 112 days after Mr. Johnson submitted his application and 19 days after the LUPA trial of Citations 1 and 2, but before the trial of Citation 3. She did not explain why she did not make the same disposition for the first two citations. CP 431, CL 33. Crucially, the judge mentioned Mr. Johnson’s due process objection in passing only, but did render any decision concerning it. CP 430, CL 28.

Mr. Johnson timely moved for reconsideration of the Findings, Conclusion, and Order, on March 23, 2012, pointing out that the trial judge had not addressed his claim of denial of procedural due process under RCW 36.70C.130(1)(f) and objecting to conclusions that appeared to hold that a City permit was required in order to have a legal nonconforming use and that HE could have concluded that Mr. Johnson had no legal nonconforming use. No. 68819-7, CP 433-445. Judge Barnett did not issue her order denying reconsideration without comment and without requested briefing from the City, until May 15. CP 277.

On April 6, 2012, the City moved for summary judgment to dismiss the 1983 and 1988(b) claims in Cause No. 11-2-15560-9. No. 68994-1, CP 296-306. Mr. Johnson sought to present a legitimate issue of material fact as to his procedural due process claim in opposition by again pointing to City policy precluding consideration of his evidence legal nonconforming use defense presented in the only forum for appeal the City provided. CP 211-236.

By the time of the hearing of the City's summary judgment motion, on May 4, 2012, Judge Barnett had still not ruled on Mr. Johnson's motion for reconsideration. She was apparently in the

process of leaving the Superior Court and the Honorable Palmer Robinson was tasked to hear argument on the City's motion on May 4, 2012. Judge Barnett issued her order denying the motion for reconsideration on May 15, 2012. Judge Robinson granted the City's motion for summary judgment on May 24, 2012, and final judgment in all three cases was achieved (Mr. Johnson declined to participate in the mitigation hearing for Citation 3 because such would constitute an admission of liability, CP 175). No. 68994-1, CP 278-279. Mr. Johnson timely appealed the Citation 1 and 2 cases and Citation 3 case on May 18 and June 22, 2012, respectively.

**B. Factual Background.**

Tyko Johnson, has always been a "car guy, having worked on cars and later RV.'s for 75 years." No. 68819-7, CP 565-828, AR 71. Since January 1957, Mr. Johnson has continually kept a combination of four or five cars, boats, trailers, and motor homes on his property. *Id.*, AR 72. He built his home there in 1958, and has continuously resided there since then. *Id.*, AR 71.

The City never contested Mr. Johnson's evidence, encompassing testimony, documentary evidence, and aerial photogrammetric analysis, that he continually kept more than three

vehicle on his property, including that it did not contest either the HE's or trial judge's findings that he had done so. See No. 68819-7, CP 565-828, AR 30, FF 8, and AR 66, FF 7; CP 431, CL 30; No. 68994-1, AR 7-32. Indeed, the DPD ultimately recognized his legal nonconforming use "for the record" through the permit procedure set forth in SMC 23.42.102. CP 123.

The City never claimed there was any restriction of the number of vehicles on the Johnson property at any time during the first four decades of his ownership. See No. 68819-7, CP 565-828, AR 230, lines 5-7. At the start of the fifth decade of his residency, the City Council adopted Ordinance 119618, Section 3, effective September 26, 1999, which provided that "[n]o more than three (3) vehicles may be parked outdoors on any lot." At the time of the citations, the ordinance read, "[f]or lots developed with one single family dwelling, no more than three vehicles may be parked outdoors."

The City never notified Mr. Johnson that it had any restriction against more than three vehicles on a residential property until July 2010, over ten years after enacting the ordinance and in the sixth decade of his ownership. No. 68819-7, CP 565-828, AR 39. It at no time notified him of any requirement to obtain

a permit in order to lawfully continue his longstanding use of his property since 1957. *Id.*, AR 73.

The City Code addresses legal nonconforming uses in the following relevant provisions:

SMC 23.84A.040 Definitions -- "U.

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

SMC 23.42.102 Establishing nonconforming status.

A. Any use that does not conform to current zoning regulations, but conformed to applicable zoning regulations at any time and has not been discontinued as set forth in Section 23.42.104 is recognized as a nonconforming use or development. Any residential development in a residential, commercial or downtown zone that would not be permitted under current Land Use Code regulations, but which existed prior to July 24, 1957, and has not been discontinued as set forth by Section 23.42.104, is recognized as a nonconforming use or development. A recognized nonconforming use shall be established according to the provisions of subsections B through D of this section.

\* \* \*

C. A use or development which did not obtain a permit may be established if the Director reviews and approves an application to establish the nonconforming use or development for the record.

\* \* \*

SMC 23.42.104 Nonconforming uses.

A. Any nonconforming use may be continued, subject to the provisions of this section. [The ensuing provisions are not relevant to this case]

(boldface and underlining added).

Mr. Johnson has not found nor has the City pointed to any City ordinance providing that the right to continue a use begun before adoption of an ordinance prohibiting it depends on obtaining any kind of permit, such as a provision that a nonconforming use shall be automatically amortized upon failure to secure such a permit. Guidance from the DPD, Client Assistance Memo (“CAM”) 217, although titled “How to Legalize a Use Not Established by Permit,” does not refer to any code provision amortizing or otherwise outlawing uses for the reason that they were not established “for the record” under SMC 23.42.102(C) before the City begins an enforcement action. No. 68994-1, CP 125-130. It simply explains how “a nonconforming can become recognized as legal through the DPD permit process.” CP 225. CAM 217 states that “[t]here are several situations in which you might wish to demonstrate that a use of property not established by permit is a legal land use” including where an owner wishes to change a use from an existing use that was not commenced by permit, to clarify the use status of a property prior to a private sale,

or to clear-up title, tax, or other issues. CP 226 (emphasis added).

While CAM 217 indicates that an owner who pursues a permit to establish a use for the record, but then fails to demonstrate that such use can be deemed legal nonconforming could become subject to enforcement action, it does not state that an owner can be punished for failing to obtain a “permit” for a use that would meet the requirements for Department recognition as legal nonconforming. See CP 228.

Nor did the City of Seattle ever pursue Mr. Johnson based on his not obtaining a permit recognizing the legality of the continuous presence of four or more vehicles on his property starting in January 1957, such as pursuant to SMC 23.90.002(A) (“It is a violation of Title 23 for any person to initiate or maintain or cause to be initiated or maintained the use of any structure, land or property within The City of Seattle without first obtaining the permits or authorizations required for the use by Title 23”) nor did it pursue the Notice and Order enforcement procedures set forth in Chapter 23.90 SMC.

Citation 1, issued pursuant to the citation procedure set forth in Chapter 23.91 SMC, charged him simply with keeping “more than the allowed 3 vehicles parked on a single family lot,” *i.e.*,

violating the land use regulation stated in SMC 23.44.016, quoted above. No. 68819-7, CP 565-828, AR 43-44. Citation 1 imposed a fine of \$150 and represented “a determination that a violation has been committed by the person named in the citation and this determination will become final unless you contest it by checking the 3<sup>rd</sup> box below,” being the box stating, “I request a hearing to contest the violation. I believe the violation did not occur . . .” *Id.* While the citation also permitted an election of a mitigation hearing in lieu of denying liability, that path would have required an admission that the violation had occurred and confirmation that the violation had been corrected before the mitigation hearing. *Id.*; SMC 23.91.010. Mr. Johnson has never admitted any such thing.

A contested hearing and a mitigation hearing pursuant to Chapter 23.91 SMC were the only options for appealing the citations. SMC 23.91.006. The citation appeal procedures, Chapter 23.91 SMC, provide that “The person cited may rebut the DPD evidence and establish that the cited violation(s) did not occur . . .” SMC 23.91.012(E)(2) (emphasis added). Importantly, there was no option of appealing the Citation directly to the Department with a request that it recognize a claim of legal nonconforming use by way of defense or, alternatively, to a court,

such as the Municipal Court, with jurisdiction, unlike the Examiner, to consider constitutional and legal nonconforming use defenses. The only path of appeal was to the HE. See Chapter 23.91 SMC.

At the hearing on Citation 1 held on October 27, 2011, Mr. Johnson, in light of City testimony regarding the effective date of Ordinance 119618, presented evidence of a legal nonconformity, *i.e.*, that the use for which he was cited did not violate the Code. No. 68819-7, CP 565-828, AR 228-229; see SMC 23.91.012(E)(2). His son and witness, Terry Johnson, presented un rebutted testimony establishing that he had since decades before the City's prohibition kept more than three vehicle out-of-doors on the property. CP 565-828, AR 223.

The City did not object to, impeach on cross examination, or seek to rebut this testimony or to present any evidence or argument that Mr. Johnson did not have a legal nonconforming use. No. 68819-7, CP 565-828, AR 233, lines 16-20 and AR 241-242, lines 13-25 and 1-9. At the hearing of Citation 1, neither the City nor HE hinted at the existence of a procedure to request the Department to recognize such use for the purpose of the City's record or the possibility that the HE could not consider Mr.

Johnson's claim of a legal non-conforming use. See CP 565-828, AR 216-247.

The HE's decision on Citation 1 referred to the testimony that the Johnson "family has stored at least 4 to 5 cars outdoors on the property since the 1970s," noted that the land use regulation barring such use was not in effect until 1999, and acknowledged Mr. Johnson's contention that such use was legal nonconforming. No. 68819-7, CP 565-828, AR 30, FF 8 and 11. In her Conclusions, the HE purported to have jurisdiction of the appeal, yet went on to declare, citing SMC 23.42.102, that the determination of "whether a use of property is legally nonconforming to present Land Use Code requirements" is made by the Department, not the HE, which Mr. Johnson was not then before in any capacity and to which he could not appeal. *Id.*, AR 31, CLs 1 and 4. Relying on SMC 23.42.102, the HE disregarded the unrebutted testimony that Mr. Johnson had been continuously keeping more than three vehicles on his property from decades before the adoption of Ordinance 119618, did not permit him to establish that a violation had not occurred for that reason, and affirmed the citation.

Notwithstanding her disclaimer of jurisdiction to consider Johnson's evidence of legal nonconforming use, the HE also concluded that the contention for a legal nonconforming use was incorrect because of the absence of "grandfathering" language in the relevant ordinance. No. 68819-7, CP 565-828, AR 31, CL 3. She did address the relationship of such conclusion with the general Code provisions recognizing the right to continue legal nonconforming uses or the common law related to such uses.

The City again cited Mr. Johnson for violating the three-vehicle limit on December 15, 2010, and yet again February 22, 2011. No. 68819-7, CP 565-828, AR 196-197; No. 68994-1, AR 64-65. Mr. Johnson denied liability and requested contested hearings as to those citations, as well.

At the hearing on Citation 2, Mr. Johnson, again without objection from the City, presented extensive additional testimony, evidence, and argument to support his contention that he had a legal nonconforming use. See No. 68819-7, CP 565-828, AR 164, lines 12-26, and AR 71-77.

At the hearing of Citation 2, in the following colloquy with the HE, Vicki Baucom, the City's Code Compliance Analyst and representative at the hearings described the City's policy as being

that the alleged violation was deemed committed as when the citation was written, that the HE could consider only a pre-existing “permit” establishing the use “ in defense of a citation, and that applying to the DPD for a permit to recognize such use after receiving a citation would not affect the validity of the citation, rescission of such being a matter of mere grace on the City’s part:

EXAMINER: Okay. So, Ms. Baucom, let me ask you – so the department is saying that unless when a citation is issued and someone comes in and says, “I have a legal, non-conforming use,” that the only way that could be a viable defense is if they had already submitted an application for a non-conforming use through the department.

MS. BAUCOM: If that use is not established, the violation exists at the time the citation was written. If they came – if after receiving the citation they came to us and said, “We understand there is a process, we have applied for the process,” we would consider rescinding that citation at that time and do a motion in order to do that.

\* \* \*

EXAMINER: . . . So under no circumstances come in and prove - you are saying, the department’s position is under no circumstances could somebody come into a hearing like this and prove that they had a non-conforming use that the examiner could consider as a defense to the citation?

MS. BAUCOM: That is correct under subsection 102 – the establishing of nonconforming use.

No. 68819-7, CP 565-828, AR 174 (emphasis added).

Ms. Baucom's duties included to "use independent judgment and exercise discretion to determine the applicability of codes, precedents, policies and judicial procedures to the facts of a given case and determine the appropriate department response in instances of non-compliance." Her job includes "identif[ying] and recommend[ing] solutions for conflicts between code interpretation and department policies and procedures" and "maintain[ing] expertise in City codes relating to department's work and provid[ing] training and expert advice to department staff on code compliance related subjects." No. 68994-1, CP245-246. The City has echoed Ms. Baucom's above-quoted description of City policy throughout this litigation. See, e.g., No. 68994-1, CP 290.

The HE denied the appeals of Citations 2 and 3 by, as the trial judge found, improperly giving collateral estoppel effect to the first decision. No. 68994-1, CP 431, CL 29. The HE did so because Mr. Johnson did not have a "permit" recognizing his legal nonconforming use "for the record" when the citations were written.

Although Mr. Johnson ultimately applied for the "permit" for his legal nonconforming use solely to put an end to the City's serial citations and not because he believed that his use was not legal until he did so, the City took 112 days, until after the LUPA trial on

Citations 1 and 2, to finish reviewing his application. The City continuously defended and continues to defend the validity of the citations regardless of DPD's eventual acknowledgment of the legality of the use for which he was cited.

## V. ARGUMENT

### A. The HE and Trial Court Erred in Affirming the Citations Because Mr. Johnson Could Receive No Meaningful Consideration of His Defense That His Use Was Legal.

The Court of Appeals reviews “the City's actions on the administrative record, without reference to the superior court decision.” *Rosema v. City of Seattle*, 166 Wn.App. 293, 297, 269 P.3d 393 (2012). The Court reviews alleged errors of law *de novo* after giving due deference to the local jurisdiction's interpretation of its codes and standards where there is ambiguity or conflict, reviews a challenge to the sufficiency of the evidence under the substantial evidence standard viewing the evidence and reasonable inferences in the light most favorable to the prevailing party in the highest forum that exercised fact-finding authority, and reviews application of the law to the facts under the clearly erroneous standard. *Id.*

“An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably

calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950) (emphasis added). While judicially imposed requirements for the formality of a hearing can vary with circumstances, depriving a citizen of a property interest or other right without an opportunity for a meaningful hearing violates procedural due process under the United States Constitution. *Matthews v. Eldridge*, 424 U.S. 319, 333 (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)) ("The fundamental requirement of due process is the opportunity to be heard "at a meaningful time and in a meaningful manner") (emphasis added); *Post v. City of Tacoma*, 167 Wn.2d 300, 217 P.3d 1179 (2009) (citing and quoting *Matthews v. Eldridge*). These basic principles of due process undergird Mr. Johnson's LUPA appeals of the citations and his associated 1983 claims.

Although the formality of procedures adequate confer due process can vary by context, an process that entirely precludes consideration of evidence that would establish a defense to a government charge must be viewed as tantamount to a denial of a hearing because what is the value of a hearing in which policy bars

consideration of such defense? The trial court here did find the HE's application of collateral estoppel to be error, but nevertheless improperly affirmed her decisions because the HE, in accordance City policy, could not consider Mr. Johnson's uncontested evidence that his use was not illegal so as to violate the three-vehicle restriction.

The proper remedy where a government agency would otherwise inflict a deprivation without a hearing that comports with due process requirements is to voiding of the government action, a step that neither the HE nor the trial court took in this case. See *Devine v. Dept. of Licensing*, 126 Wn.App. 941, 110 P.3d 237 (2005) (in writ of review proceeding examining agency action, deprivation of driver's license as a result of failure to timely confer required hearing mandated voiding of the revocation). Similar to *Devine*, Mr. Johnson did not receive the appeal process promised by SMC 23.91.012(E)(2), the ability "rebut the DPD evidence and establish that the cited violation(s) did not occur" (emphasis added). He is likewise entitled to an order of dismissal of all three citations because City policy precluded consideration of his defense on appeal.

In terms of the standards of RCW 36.70C.130, the HE lacked jurisdiction to consider Tyko Johnson's claim of a legal nonconforming use and, therefore, to determine whether or not he had violated the City's ordinance. RCW 36.70C.130(1)(a). On the same reasoning, the decision under review was not within the HE's jurisdiction. RCW 36.70C.130(1)(e). The He's decision was also not supported by substantial evidence given that she claimed her decision on Citation 1 precluded a legal nonconforming use since that she had announced in that decision that she had no authority to decide one way or the other. RCW 36.70C.130(1)(c).

While the foregoing presents ample grounds to reverse the HE and trial court and to dismiss the citations, they are also predicates to Mr. Johnson's principal objection to the HE's and trial court's approach. That object is that the HE deprived him of procedural due process under the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Section 3 of the Washington Constitution ("No person shall be deprived of life, liberty, or property, without due process of law") by affirming the citations despite her lack if authority to meaningful consider his contention that his use was legal at all relevant times. RCW 36.70C.130(1)(f).

The HE's decisions were also apparently based on an erroneous interpretation of the law in the appeal of Citation 1. That erroneous interpretation, to the effect that the lack of an explicit "grandfather" language in the prohibition at issue entitles the tribunal to disregard the City's general ordinances permitting continuation of legal nonconforming uses, is simply wrong in view of the law and the City's own subsequent decision to recognize the legality of the use. The trial court erred in appearing to endorse this conclusion in her Findings, Conclusions, and Order. CL 9. Considering the uncontested evidence of a nonconforming use, the trial court also certainly erred to the extent that it concluded that the HE had determined that Mr. Johnson failed to establish a nonconforming use. CL 9.

**B. Mr. Johnson's Use Was, By Definition, Legal At All Times When the City Cited Him Engaging In It.**

The City has sought to argue that Mr. Johnson was subject to punishment for engaging in a use without regard to its legality. This analysis defies the long and well established law related to legal nonconforming uses in Washington, which is embodied in both decisional law and the plain meaning of the City's own ordinances. That body of law prescribes that the right to continue

uses in existence as of the adoption of a zoning restriction is in the nature of a vested right and entitled to due process protections when the following elements exist:

- (1) the use existed before the City enacted the contrary zoning ordinance;
- (2) the use was lawful at the time; and
- (3) the applicant did not abandon or discontinue the use for over a year before the relevant change in the zoning code.

See *McMilian v. King County*, 161 Wn.App. 581, 591, 255 P.3d 739 (2011); *Rosema*, 166 Wn.App. 299 (“[a] legal nonconforming use is a vested right”).

Such uses are legal by virtue of satisfying the common law requirements for showing their existence and, by their very nature, require no “permit” in order to be legally commenced or continued. In *Jefferson County v. Lakeside Industries*, the county demanded that the Lakeside obtain a conditional use permit for a then prohibited use, but Lakeside contended the use was legal nonconforming. 106 Wn.App. 380, 23 P.3d 542 (2001). The court held that the use was deemed to exist legally so the owner had the right to continue it without any requirement of a permit. 106 Wn.App. at 385.

City's ordinances on the subject closely track the common law. See SMC 23.42.102(A)<sup>2</sup> and SMC 23.84A.040.<sup>3</sup> On these ordinances, legal nonconforming use exists either under the common law or because it was recognized by the Department. Judge Schindler's concurrence in *Rosema* noted that "[t]he City of Seattle adopted regulations that favor permitting a nonconforming use and are designed to avoid inadvertently discontinuing a legally established nonconforming use." 166 Wn.App. at 302.

This Court must strive to construe City ordinances in accordance with common sense and so as preserve their constitutionality and not in a manner that would render them absurd or result in the destruction of vested rights. *In re Cross*, 99 Wn.2d 373, 382-383, 662 P.2d 828 (1983). In addition to the irrelevancy of the presence or absence of a grandfather clause in the three-vehicle ordinance, given the general ordinances favoring the continuance of nonconforming uses, it would be absurd and

---

<sup>2</sup>"Any use that does not conform to current zoning regulations, but conformed to applicable zoning regulations at any time and has not been discontinued as set forth in Section 23.42.104 is recognized as a nonconforming use or development."

<sup>3</sup>"Use, nonconforming' means a use of land or a structure that was lawful when established and that does not now conform to the use regulations of the zone in which it is located, or that has otherwise been established as nonconforming according to section 23.42.102"

inimical to vested rights to construe the Code as providing that the right to maintain an already legal use does not come into existence until City deigns to confer a “permit” recognizing such use. Under such construction, there could be no such thing as a legal nonconforming use in Seattle since, by definition, one cannot legally commence a use after it has been outlawed. Indeed, compliance with the procedure under SMC 23.42.102 appeared in no way integral to the determination in *Rosema* that a Seattle property owner enjoyed a continuing legally nonconforming use. See 166 Wn.App. at 297 (formal DPD “interpretation” was requested by neighbors; no reference to any “permit”).

The only proper and constitutional reading of the Code sections addressing nonconforming uses is that they recognize legal nonconforming uses based on the same criteria as the common law and merely provide an optional mechanism for recording their existence in the City’s books for purposes such as those cited in CAM 217. In order to preserve the ordinance’s constitutionality and to avoid an absurd result, the term “establish,” used in SMC 23.42.102 in connection with making a record with the City of the legal nonconforming uses, must be construed in its

sense of “to prove,” rather than “to bring into existence.”<sup>4</sup>

SMC 23.42.102(C) refers to “an application to establish the nonconforming use or development for the record” (emphasis added), an optional procedure by its own terms that plainly uses “establish” in the sense of “prove” or “show.” In sum, the City Code plainly recognizes legal nonconforming uses, consistent with state law, and simply lays out a procedure for making a record of the use with the City if the property owner desires. See No. 68994-1, CP 125-130 (CAM 217) (noting voluntary nature of process). Any contention by the City to the contrary would plainly fall afoul of vested rights and lead to absurd results under the City’s own Code and is not entitled to deference from this Court.

Of course, that procedure had no role in the City’s appeal procedure in this case. That fact deprived Mr. Johnson of any real opportunity to defend on the ground that he had a legal nonconforming use and his presentation of un rebutted evidence to support that defense was rendered futile as a result of City policy.

---

<sup>4</sup> establish. 2013. In unabridged.merriam-webster.com. Retrieved October 17, 2013, from <http://unabridged.merriam-webster.com/unabridged/establish>.

**C. Dismissal of the 1983 Claim Associated with Citation 3 on Summary Judgment Was Improper Because There Was a Legitimate Dispute of Material Fact.**

In reviewing an order on summary judgment, the Court of Appeals engages in the same inquiry as the trial court, reviewing all facts and reasonable inferences from them in the light most favorable to the nonmoving party and reviewing all questions of law *de novo*. . *Sherman v. State*, 128 Wn.2d 164, 183, 905 P.2d 355 (1995).

A citizen states a claim pursuant to 42 U.S.C. § 1983 against a municipal corporation for a deprivation of federal constitutional rights, including a deprivation of property without procedural due process, under color of law, as a result of a formal policy or pursuant to custom or usage.<sup>5</sup> *Monell v. New York City Dept. of Social Services*, 436 U.S. 658 (1978).

Mr. Johnson based his 1983 claim on the ground that the City denied him the same procedural due process for the reasons

---

<sup>5</sup> "[A]ny person who, under color of any law, statute, ordinance, regulation, custom, or usage of any State, shall subject, or cause to be subjected, any person . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution of the United States, shall, any such law, statute, ordinance, regulation, custom, or usage of the State to the contrary notwithstanding, be liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress . . . ."

set forth in Section A, above. He submits that there is an ample dispute of material fact that precluded its dismissal.

A citizen makes out a claim of violation of procedural due process by showing that “(1) he possessed a protected property interest as defined by state law; (2) he was deprived of that interest under color of law; and (3) this deprivation was without due process of law.” *Norton v. Town of Islip*, 239 F.Supp.2d 264, 296 (E.D.N.Y. 2003).

A citizen’s interest in not being forced to pay fines is unquestionably a property interest that is entitled to procedural due process protection. *Post*, 217 P.3d at 1186 ( “The private interest *Post* seeks to vindicate is the right against the assessment of erroneous or excessive monetary penalties”). In this case, the City’s policy also forced Mr. Johnson to pay for a permit application and related expenses just to stop the City from punishing for a legal use.

The City imposed fines upon Mr. Johnson without consideration of his offered complete defense to its charge of unlawful land use. The power to punish the exercise of a right is tantamount to the power to destroy it. *Cf. McCulloch v. Maryland*,

17 U.S. 316 (1819) (“the power to tax involves the power to destroy”).

Next, the City has deprived Mr. Johnson of his right to be free from an unjustified fine that in effect punishes a land use that he has contended (without dispute) was lawful at all times under color of law, by virtue of policy, custom or usage. That policy, announced by the City’s Code Compliance Analyst and repeatedly announced by the City in this litigation, is the product of the severe limitation on the HE’s jurisdiction.

It is never harmless error to deny procedural due process. The due process clause “creates an independent right to notice and hearing in the context of state deprivations of property without respect to the underlying merits of a case.” *Norton*, 239 F.Supp.2d at 271-272 (citing numerous federal decisions).

As a result of the City’s policy and the restriction on the Examiner’s jurisdiction, Mr. Johnson quite simply was not accorded the right, as purportedly conferred by SMC 23.91.012, to “rebut the DPD evidence and establish that the cited violation(s) did not occur.” This failure occurred in the context of a system for “hearing and determining civil infractions” that Seattle established by ordinance. See RCW 7.80.010(5). Thus, the establishment of the

Examiner appeal process, with its attendant highly restrictive jurisdiction, deprived Mr. Johnson of the scope of process he would have received in an appeal to Municipal Court or District Court, which would have been the default procedure in the absence of the examiner appeal. RCW 7.80.010(1); *Post*, 217 P.3d at 1185; see RCW 35.20.010(1); RCW 35.20.030 (“The municipal court shall have jurisdiction to try violations of all city ordinances . . . It is empowered . . . to hear and determine all causes, civil or criminal, arising under such ordinances, and to pronounce judgment in accordance therewith”). The City’s appeal process for these citations gave Mr. Johnson constitutionally deficient due process relative to what he would have received under the default system established by RCW 7.80.010(1). This presents another facet of the City’s denial of due process under color of City policy.

The City provided no effective alternative process to Mr. Johnson. The DPD’s “permit” process is not connected with the citation/appeal procedure insofar as applying for such a permit was not a substitute for constitutionally required procedural due process. The City’s Code Compliance Analyst made this clear when she advised the Examiner that the violation is established simply by citing it and the City, purely as a matter of grace, might,

but is not required to bring a motion to dismiss the citation after the fact. No. 68819-7, CP 565-828, AR 174. On the other side of the coin, the sole path to appeal the citation and fine was to the HE and not also, or in the alternative to, DPD. Mr. Johnson was denied a forum that could act.

**D. The Trial Court Erred in Dismissing Mr. Johnson's 1983 Claims stated in His First Two LUPA Petitions Under CR 12(b)(6).**

A court of appeal reviews the granting of a motion under CR 12(b)(6) *de novo*. *Hoffer v. State*, 110 Wn.2d 415, 420, 755 P.2d 781 (1988). The City's CR 12(b)(6) motion to dismiss the 1983 claim entirely neglected address its steep burden in a motion to dismissal for failure to state claims upon which relief may be granted. The burden is very difficult to meet, as explained in *Hoffer v. State*, 110 Wn.2d at 420-421<sup>6</sup> The trial judge's dismissal plainly did not comply with this steep burden. She may have dismissed the 1983 claims effectively by default because Mr. Johnson could not attend the hearing.

---

<sup>6</sup> Courts should dismiss a claim under CR 12(b)(6) only if it appears beyond doubt that the plaintiff can prove no set of facts, consistent with the complaint, which would entitle the plaintiff to relief. . . . a plaintiff's allegations are presumed to be true . . . [A] court may consider hypothetical facts . . . [A] complaint survives a CR 12(b)(6) motion if any set of facts could exist that would justify recovery. . . . CR 12(b)(6) motions should be granted sparingly and with care. (internal quotes and citations omitted) (emphasis added)

Mr. Johnson incorporated his due process objections to the City's appeal process in each of his first two petitions. Case No. 68819-7, CPs 2, 3, 4, 5, and 6 and CPs 152, 153, and 154. He also incorporated Section 1983 claims in each petition. Regardless of his absence at the hearing, granting the City's CR 12(b)(6) motion was plain error since it could not be said that there no hypothetical facts existed consistent with the petitions would entitle him to recover. The City asked the trial judge to dismiss the 1983 claims based on argumentative assertions about facts and, still worse, did not even address the procedural due process aspect of the claims. The above-discussion of his 1983 claim as to Citation 3 discloses the legal basis of a claim of denial of procedural due process in an appeal of a citation and fine. The Court should reverse the CR 12(b)(6) dismissals of the 1983 claims.

**E. The Trial Court Abused its Discretion by Failing to Continue the Hearing of the City's CR 12(b)(6) Motion.**

Request for continuances are subject to review for an abuse of discretion occurs where the exercise thereof is "manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

While the trial judge did not explain why she denied the motion for a continuance, Mr. Johnson contends that she abused her discretion on each basis mentioned in *Junker*. He stipulated to a consolidation that would place the initial hearing after March 11, 2011, the date on which he scheduled his important medical appointment. Yet the actions were ultimately consolidated under a schedule that was contrary to his stipulation. No. 68819-7, CP 224.

The trial court then proceeded with the hearing despite its awareness of his medical situation, which precluded his attendance. The Washington Supreme Court in *In re Discipline of Sanai*, 167 Wn.2d 740, 225 P.3d 203 (2009), noting the preeminent constitution right to an opportunity to be heard, held that the hearing officer had abused his discretion in denying the respondent a right to be heard by refusing a continuance for medical reasons. The trial court's approach effectively forced a choice between his health and an opportunity to heard and denied him the right to be heard at the hearing. For these reasons, the trial court abused its discretion by not continuing the hearing.

F. **The Trial Court Abused its Discretion by Failing to Reconsider or to Vacate Its CR 12(b)(6) Dismissal of the 1983 Claims.**

Motions for reconsideration under CR 59(a) and to vacate under CR 60(b) are both subject to review for abuse of discretion. The Court abused its discretion by not reconsidering in light of the surprise to Mr. Johnson in the timing of the City's motion after the City had apparently agreed to a later case schedule, the irregularity of proceeding even though he was at an important medical appointment under circumstances fully explained to the Court, and, in any event, his 1983 claims were clearly not amenable to dismissal under CR 12(b)(6). CR 59 (1), (3), and (7)-(9). The Court also abused its discretion by not vacating the dismissal under CR 60(b)(11). The policy of Rule 60, whether state or federal, is that finality of judgments should, under certain circumstances, yield to the policy favoring the trial of cases on their merits. See *Seven Elves, Inc., v. Eskenazi*, 635 F.2d 396 (5th Cir. 1981). The trial court's discretion must be exercised in light of the balance to be struck between finality and the desirability of reaching decisions on the merits. *Id.*, at 402.

The trial judge also abused her discretion by not vacating the dismissal under CR 60(b)(11), "[a]ny other reason justifying

relief from the operation of the judgment,” considering that it appears Mr. Johnson essentially lost by virtue of not being able to attend the hearing and the City’s motion failed to address procedural due process . See *Caoette v. Martinez*, 71 Wn.App. 69, 78-79, 856 P.2d 725 (1993) (Civil Rule 60(b)(11) specially favors vacation of a judgment entered by default where it is “based upon incomplete, incorrect or conclusory factual information”); see also *Eskenazi*, 635 F.2d at 403 (where appearing defendants essentially lost the original proceeding by default for failure to appear at trial, holding that “[t]runcated proceedings of this sort are not favored, and Rule 60(b) will be liberally construed in favor of trial on the full merits of the case,” and reversing trial court’s denial of motion to vacate) (emphasis added). Notably, the City did not even request dismissal the 1983 claim in the Cause No. 11-2-15560-9SEA, further indicating the lack of basis for dismissal of fundamentally similar claims in the earlier actions. The need for correction of an irregularity in proceedings is the guiding purpose of CR 60(b)(11). See *State v. Keller*, 32 Wn.App. 135, 140, 647 P.2d 35 (1982).

**G. Request for Attorney’s Fees and Costs on Appeal and in the Trial Court.**

Mr. Johnson contends that, in the event that this Court reverse any or all of the trial court’s dismissals of his 1983 claims, he shall be entitled to an award of the reasonable fees of his attorney for this appeal and the proceedings in the trial court concerning or dependent or interrelated with his 1983 claim. 42 U.S.C. §1988(b) (“In any action or proceeding to enforce a provision of section[] 1983 . . . , the court, in its discretion, may allow the prevailing party . . . a reasonable attorney’s fee as part of the costs . . .”); *Tex. State Teachers Ass’n v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 792 (1989) (holding that a plaintiff who has prevailed on “any significant issue” and achieved “some of the benefit” sought is entitled to attorney’s fees). He believes that he should receive such an award in the event of a reversal of the trial court’s dismissals of the 1983 claims in whole or in part.

In the event he prevails, Mr. Johnson will also submit an affidavit of fees and expenses under RAP 18.1(d). Mr. Johnson also contends that, upon substantially prevailing in this appeal, his is entitled to an award of his costs on appeal pursuant to RAP 14.2 and 14.3.

## VI. CONCLUSION

Mr. Johnson requests that the Court grant him the following relief:

- (1) Dismissal of Citations 1, 2, and 3 and reversal of the trial court's Findings, Conclusions, and Order affirming them;
- (2) Reversal of each of trial court's dismissals of his 42 U.S.C. §1983 claims and a remand to the trial court for trial of those claims;
- (3) An award of his reasonable attorneys' fees for this appeal and the proceedings in the trial court concerning or dependent or interrelated with his 1983 claims or a remand to the trial court for a determination of fees awardable under 42 U.S.C. §1988(b) for proceedings in that court related to his claims; and
- (4) An award of his costs of appeal.

RESPECTFULLY SUBMITTED this 18<sup>th</sup> day of October, 2013.

  
Charles R. Horner, WSBA No. 27504  
Attorney for Appellant

**A-1**

**SMC 23.42.100 – SMC 23.42.104**



## Seattle Municipal Code

Information retrieved October 20, 2013 8:44 PM

Title 23 - LAND USE CODE  
 Subtitle III - Land Use Regulations  
 Division 2 - Authorized Uses and Development Standards  
 Chapter 23.42 - GENERAL USE PROVISIONS

### 23.42.100 Nonconformity—Applicability and intent.

- A. The nonconformity provisions of this chapter apply to uses and sites in all zones, except for the shoreline overlay district (see Chapter 23.60).
- B. 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.

( Ord. [120293](#) § 1 (part), 2001.)

### ***New legislation may amend this section!***

***The above represents the most recent SMC update, which includes ordinances codified through Ordinance 124220 except 124105 with effective dates prior to July 24<sup>th</sup>, 2013.***

Recently approved legislation may not yet be reflected in Seattle Municipal Code. See the legislative history at the bottom of each section to determine if new legislation has been incorporated.

Search for recently approved legislation referencing this section. (Searches for legislation approved within the past six months, which may not yet be incorporated into the SMC. See the legislative history for each section to confirm whether an ordinance is reflected.)

Search for proposed legislation that refers to this section. (Searches for Council Bills introduced since 01/2012 and not yet passed.)

*Note: The above searches are provided to assist in research, but they are not guaranteed to capture all relevant legislation. Search directly on the [Council Bills and Ordinances Index](#) for the most comprehensive results.*

For research assistance, contact the Seattle City Clerk's Office at (206) 684-8344, or by e-mail, [clerk@seattle.gov](mailto:clerk@seattle.gov).

For interpretation or explanation of a particular SMC section, please contact the relevant City department.





## Seattle Municipal Code

Information retrieved October 20, 2013 8:44 PM

---

Title 23 - LAND USE CODE

Subtitle III - Land Use Regulations

Division 2 - Authorized Uses and Development Standards

Chapter 23.42 - GENERAL USE PROVISIONS

### **23.42.102 Establishing nonconforming status.**

- A. Any use that does not conform to current zoning regulations, but conformed to applicable zoning regulations at any time and has not been discontinued as set forth in Section [23.42.104](#) is recognized as a nonconforming use or development. Any residential development in a residential, commercial or downtown zone that would not be permitted under current Land Use Code regulations, but which existed prior to July 24, 1957, and has not been discontinued as set forth by Section [23.42.104](#), is recognized as a nonconforming use or development. A recognized nonconforming use shall be established according to the provisions of subsections B through D of this section.
- B. Any use or development for which a permit was obtained is considered to be established.
- C. A use or development which did not obtain a permit may be established if the Director reviews and approves an application to establish the nonconforming use or development for the record.
- D. For a use or development to be established pursuant to subsection C above, the applicant must demonstrate that the use or development would have been permitted under the regulations in effect at the time the use began, or, for a residential use or development, that the use or development existed prior to July 24, 1957 and has remained in continuous existence since that date. Residential development shall be subject to inspection for compliance with minimum standards of the Housing and Building Maintenance Code. (Chapters 22.200 through 22.208). Minimum standards of the Housing and Building Maintenance Code must be met prior to approval of any permit to establish the use and/or development for the record.
- E. Nonconforming uses commenced after July 24, 1957 and not discontinued (Section [23.42.104](#)) are also subject to approval through the process of establishing use for the record, if not established by permit. Residential nonconforming uses are subject to inspection under the Housing and Building Maintenance Code if in existence before January 1, 1976. Conformance to the Seattle Building Code in effect at the time a use first began is required if the use first existed after January 1, 1976.

( Ord. [120293](#) § 1 (part), 2001.)

---

### ***New legislation may amend this section!***

***The above represents the most recent SMC update, which includes ordinances codified through Ordinance 124220 except 124105 with effective dates prior to July 24<sup>th</sup>, 2013.***

Recently approved legislation may not yet be reflected in Seattle Municipal Code. See the legislative history at the bottom of each section to determine if new legislation has been incorporated.

[Search for recently approved legislation referencing this section.](#) (Searches for legislation approved within the past six months, which may not yet be incorporated into the SMC. See the legislative history for each section to confirm whether an ordinance is reflected.)

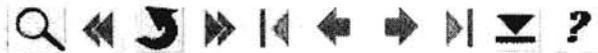
Search for *proposed* legislation that refers to this section. (Searches for Council Bills introduced since 01/2012 and not yet passed.)

*Note: The above searches are provided to assist in research, but they are not guaranteed to capture all relevant legislation. Search directly on the Council Bills and Ordinances Index for the most comprehensive results.*

For research assistance, contact the Seattle City Clerk's Office at (206) 684-8344, or by e-mail, [clerk@seattle.gov](mailto:clerk@seattle.gov).

For interpretation or explanation of a particular SMC section, please contact the relevant City department.





## Seattle Municipal Code

Information retrieved October 20, 2013 8:44 PM

Title 23 - LAND USE CODE  
Subtitle III - Land Use Regulations  
Division 2 - Authorized Uses and Development Standards  
Chapter 23.42 - GENERAL USE PROVISIONS

### **23.42.104 Nonconforming uses.**

- 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.

( Ord. [122816](#) , § 3, 2008; Ord. [120293](#) § 1 (part), 2001.)

***New legislation may amend this section!***

***The above represents the most recent SMC update, which includes ordinances codified through Ordinance 124220 except 124105 with effective dates prior to July 24<sup>th</sup>, 2013.***

Recently approved legislation may not yet be reflected in Seattle Municipal Code. See the legislative history at the bottom of each section to determine if new legislation has been incorporated.

Search for recently approved legislation referencing this section. (Searches for legislation approved within the past six months, which may not yet be incorporated into the SMC. See the legislative history for each section to confirm whether an ordinance is reflected.)

Search for proposed legislation that refers to this section. (Searches for Council Bills introduced since 01/2012 and not yet passed.)

*Note: The above searches are provided to assist in research, but they are not guaranteed to capture all relevant legislation. Search directly on the Council Bills and Ordinances Index for the most comprehensive results.*

For research assistance, contact the Seattle City Clerk's Office at (206) 684-8344, or by e-mail, [clerk@seattle.gov](mailto:clerk@seattle.gov).

For interpretation or explanation of a particular SMC section, please contact the relevant City department.



**A-2**

**SMC 23.84A.040**



## Seattle Municipal Code

Information retrieved October 20, 2013 8:41 PM

Title 23 - LAND USE CODE  
Subtitle IV - Administration  
Division 2 - General Terms  
Chapter 23.84A - DEFINITIONS

### 23.84A.040 "U"

"Underground" means entirely below the surface of the earth, measured from existing or finished grade, whichever is lower, excluding access.

"University." See "Institution."

"Urban plaza." See "Plaza, urban."

"Urban center" means an area designated as an urban center in Seattle's Comprehensive Plan.

"Urban center village" means a portion of a larger urban center designated in Seattle's Comprehensive Plan as an urban center village.

"Urban village" means an area designated in Seattle's Comprehensive Plan as an urban center, hub urban village or residential urban village.

"Urban village, hub" means an area designated in Seattle's Comprehensive Plan as a hub urban village.

"Urban village, residential" means an area designated in Seattle's Comprehensive Plan as a residential urban village.

"Usable open space." See "Open space, usable."

"Use" means the purpose for which land or a structure is designed, built, arranged, intended, occupied, maintained, let or leased.

"Use, accessory" means a use that is incidental to a principal use.

"Use, conditional" means a use or other feature of development that may be permitted when authorized by the Director of the Department of Planning and Development ("administrative conditional use"), or by the Council ("Council conditional use"), pursuant to specified criteria.

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

"Use, principal" means a use that is not incidental to another use.

"Utility" means a use in which power, water or other similar items are provided or transmitted; or sewage is treated, or solid waste is stored, transferred, recycled or incinerated. High-impact uses and utility lines are not considered utilities. Subject to the foregoing exclusions, utilities include but are not limited to the following uses:

1. "Communication utilities, major." See "communication devices and utilities."
2. "Communication utilities, minor." See "communication devices and utilities."
3. "District energy supply facility" means a utility use in which hot water, steam, or electricity is produced for local distribution to structures on two or more lots. Examples include sewer heat

**A-3**

**Chapter 23.90 SMC**



## Seattle Municipal Code

Information retrieved October 20, 2013 8:40 PM

### Chapter 23.90 - ENFORCEMENT OF THE LAND USE CODE

---

#### Sections:

- 23.90.002 Violations.
- 23.90.004 Duty to enforce.
- 23.90.006 Investigation and notice of violation.
- 23.90.008 Time to comply.
- 23.90.010 Stop Work Order.
- 23.90.012 Emergency Order.
- 23.90.014 Review by the Director.
- 23.90.015 Order of the Director.
- 23.90.016 Extension of compliance date.
- 23.90.018 Civil Enforcement Proceedings and Penalties
- 23.90.019 Civil Penalty for Unauthorized Dwelling Units in Single-Family Zones
- 23.90.020 Alternative criminal penalty
- 23.90.025 Appeal to Superior Court.

#### SMC 23.90.002

##### Violations.

- A. It is a violation of Title 23 for any person to initiate or maintain or cause to be initiated or maintained the use of any structure, land or property within The City of Seattle without first obtaining the permits or authorizations required for the use by Title 23
- B. It is a violation of Title 23 for any person to use, construct, locate, demolish or cause to be used, constructed, located, or demolished any structure, land or property within The City of Seattle in any manner that is not permitted by the terms of any permit or authorization issued pursuant to Title 23 or previous codes, provided that the terms or conditions are explicitly stated on the permit or the approved plans.
- C. It is a violation of Title 23 to remove or deface any sign, notice, complaint or order required by or posted in accordance with Title 23
- D. It is a violation of Title 23 to misrepresent any material fact in any application, plans or other information submitted to obtain any land use authorization.
- E. It is a violation of Title 23 for anyone to fail to comply with the requirements of Title 23  
( Ord. 122050 § 17, 2006; Ord. 117570 § 28, 1995; Ord. 113978 § 5(part), 1988; Ord. 110381 § 1(part), 1982.)

#### SMC 23.90.004

##### Duty to enforce.

- A. It shall be the duty of the Director to enforce Title 23. The Director may call upon the police, fire, health or other appropriate City departments to assist in enforcement. It shall be the duty of the Director of Transportation to enforce Section 23.55.004, Signs projecting over public rights-of-way.
- B. Upon presentation of proper credentials, the Director or duly authorized representative of the Director may, with the consent of the owner or occupier of a building or premises, or pursuant to a lawfully issued inspection warrant, enter at reasonable times any building or premises subject to the consent or warrant to perform the duties imposed by the Land Use Code.
- C. The Land Use Code shall be enforced for the benefit of the health, safety and welfare of the

general public, and not for the benefit of any particular person or class of persons.

- D. It is the intent of this Land Use Code to place the obligation of complying with its requirements upon the owner, occupier or other person responsible for the condition of the land and buildings within the scope of this Code.
  - E. No provision of or term used in this Code is intended to impose any duty upon the City or any of its officers or employees which would subject them to damages in a civil action.
- ( Ord. 118409 § 216, 1996; Ord. 113978 § 5(part), 1988; Ord. 110381 § 1(part), 1982.)

SMC 23.90.006

Investigation and notice of violation.

- A. The Director is authorized to investigate any structure or use the Director reasonably believes does not comply with the standards and requirements of this Land Use Code.
- B. If after investigation the Director determines that the standards or requirements have been violated, the Director may issue a notice of violation to the owner, tenant or other person responsible for the condition. The notice of violation shall state separately each standard or requirement violated, shall state what corrective action, if any, is necessary to comply with the standards or requirements, and shall set a reasonable time for compliance. In the event of violations of the standards or requirements of the Seattle Shoreline Master Program, Chapter 23.60, the required corrective action shall include, if appropriate, but shall not be limited to, mitigating measures such as restoration of the area.
- C. The notice shall be served upon the owner, tenant or other person responsible for the condition by personal service, or by first class mail to the person's last known address. If the address of the responsible person is unknown and cannot be found after a reasonable search, the notice may be served by posting a copy of the notice at a conspicuous place on the property. If a notice of violation is directed to a tenant or other person responsible for the violation who is not the owner, a copy of the notice shall be sent to the owner of the property.
- D. A copy of the notice of violation may be filed with the King County Department of Records and Elections when the responsible party fails to correct the violation or the Director requests the City Attorney take appropriate enforcement action.
- E. Nothing in this section shall be deemed to limit or preclude any action or proceeding to enforce this chapter nor does anything in this section obligate the Director to issue a notice of violation prior to initiation of a civil or criminal enforcement action except as otherwise provided in Director's rules adopted pursuant to SMC chapter 23.88

( Ord. 122407 , § 1, 2007; Ord. 121196 § 31, 2003; Ord. 118472 § 9, 1997; Ord. 118414 § 64, 1996; Ord. 117263 § 73; Ord. 117203 § 9, 1994; Ord. 113978 § 5(part), 1988; Ord. 110381 § 1(part), 1982.)

SMC 23.90.008

Time to comply.

When calculating a reasonable time for compliance as required by Section 23.90.006, the Director shall consider the following criteria:

1. The type and degree of violation cited in the notice;
2. The stated intent, if any, of a responsible party to take steps to comply;
3. The procedural requirements for obtaining a permit to carry out corrective action;
4. The complexity of the corrective action, including seasonal considerations, construction requirements and the legal prerogatives of landlords and tenants; and
5. Any other circumstances beyond the control of the responsible party.

( Ord. 122407 , § 2, 2007; Ord. 117263 § 74, 1994; Ord. 113978 § 5(part), 1988; Ord. 110381 § 1(part), 1982.)

## SMC 23.90.010

## Stop Work Order.

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

( Ord. 113978 § 5(part), 1988.)

## SMC 23.90.012

## Emergency Order.

Whenever any use or activity in violation of this Code threatens the health and safety of the occupants of the premises or any member of the public, the Director may issue an Emergency Order directing that the use or activity be discontinued and the condition causing the threat to the public health and safety be corrected. The Emergency Order shall specify the time for compliance and shall be posted in a conspicuous place on the property, if posting is physically possible. A failure to comply with an Emergency Order shall constitute a violation of this Land Use Code. Any condition described in the Emergency Order which is not corrected within the time specified is hereby declared to be a public nuisance and the Director is authorized to abate such nuisance summarily by such means as may be available. The cost of such abatement shall be recovered from the owner or person responsible or both in the manner provided by law.

( Ord. 113978 § 5(part), 1988.)

## SMC 23.90.014

## Review by the Director.

- A. Any person significantly affected by or interested in a notice of violation issued by the Director pursuant to Section 23.90.006 may obtain a review of the notice by requesting such review within ten (10) days after service of the notice. When the last day of the period so computed is a Saturday, Sunday or federal or City holiday, the period shall run until five (5:00) p.m. on the next business day. The request shall be in writing, and upon receipt of the request, the Director shall notify any persons served the notice of violation and the complainant, if any, of the request for review and the deadline for submitting additional information for the review. Additional information shall be submitted to the Director no later than fifteen (15) days after the notice of a request for a review is mailed, unless otherwise agreed by all persons served with the notice of violation. Before the deadline for submission of additional information, any person significantly affected by or interested in the notice of violation (including any persons served the notice of violation and the complainant) may submit any additional information in the form of written material or oral comments to the Director for consideration as part of the review.
- B. The review will be made by a representative of the Director who is familiar with the case and the applicable ordinances. The Director's representative will review all additional information received by the deadline for submission of additional information. The reviewer may also request clarification of information received and a site visit. After review of the additional information, the Director may:
  1. Sustain the notice of violation;
  2. Withdraw the notice of violation;
  3. Continue the review to a date certain for receipt of additional information; or
  4. Modify the notice of violation, which may include an extension of the compliance date.

( Ord. 122407 , § 3, 2007; Ord. 119702 § 1, 1999; Ord. 113978 § 5(part), 1988.)

## SMC 23.90.015

## Order of the Director.

- A. Where review by the Director has been conducted pursuant to Section 23.90.014, the Director shall issue an order of the Director containing the decision within fifteen (15) days of the date that the review is completed and shall cause the same to be mailed by regular first class mail to the person or persons named on the notice of violation and, if possible, mailed to the complainant.
- B. Unless a request for review before the Director is made pursuant to Section 23.90.014, the notice of violation shall become the order of the Director.
- C. Because civil actions to enforce Title 23 SMC are brought in Seattle Municipal Court pursuant to Section 23.90.018, orders of the Director issued under this chapter are not subject to judicial review pursuant to chapter 36.70C RCW.

( Ord. [122407](#) , § 4, 2007.)

## SMC 23.90.016

## Extension of compliance date.

The Director may grant an extension of time for compliance with any notice or Order, whether pending or final, upon the Director's finding that substantial progress toward compliance has been made and that the public will not be adversely affected by the extension.

An extension of time may be revoked by the Director if it is shown that the conditions at the time the extension was granted have changed, the Director determines that a party is not performing corrective actions as agreed, or if the extension creates an adverse effect on the public. The date of revocation shall then be considered as the compliance date. The procedures for revocation, notification of parties, and appeal of the revocation shall be established by Rule.

( Ord. 113978 § 5(part), 1988; Ord. 110381 § 1(part), 1982.)

## SMC 23.90.018

## Civil Enforcement Proceedings and Penalties

- 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.
- B. Specific violations.
  1. Violations of Section 23.71.018 are subject to penalty in the amount specified in subsection 23.71.018.H.
  2. Violations of the requirements of subsection 23.44.041.C are subject to a civil penalty of \$5,000, which shall be in addition to any penalty imposed under subsection 23.90.018.A.
  3. Violations of Section 23.49.011, 23.49.015, 23.49.023, or 23.50.051 with respect to failure to demonstrate compliance with commitments to earn LEED Silver ratings under applicable sections are subject to penalty in amounts determined under Section 23.49.020, and not to any other penalty, but final determination and enforcement of penalties under that Section

23.49.020 are subject to subsection 23.90.018.C.

4. Violations of Sections 23.45.510 and 23.45.526 with respect to failure to demonstrate compliance with commitments to earn a LEED Silver rating or a 4-Star rating awarded by the Master Builders Association of King and Snohomish Counties or other eligible green building ratings systems under applicable sections are subject to penalty in amounts determined under subsection 23.90.018.E, and not to any other penalty.
  5. Violation of subsection 23.40.007.B with respect to failure to demonstrate compliance with a waste diversion plan for a structure permitted to be demolished under subsection 23.40.006.C is subject to a penalty in an amount determined as follows:
 
$$P = SF \times .02 \times RDR,$$
 where:
    - P is the penalty;
    - SF is the total square footage of the structure for which the demolition permit was issued; and
    - RDR is the refuse disposal rate, which is the per ton rate established in SMC Chapter 21.40, and in effect on the date the penalty accrues, for the deposit of refuse at City recycling and disposal stations by the largest class of vehicles.
  6. Violations of subsection 23.40.060.E.2 by failing to submit the report required by subsection 23.40.060.E.2 by the date required is subject to a penalty of \$500 per day from the date the report was due to the date it is submitted.
  7. Violation of subsection 23.40.060.E.1 by failing to demonstrate full compliance with the standards contained in subsection 23.40.060.E.1 is subject to a maximum penalty of 5 percent of the construction value set forth in the building permit for the structure and a minimum penalty of 1 percent of construction value, based on the extent of compliance with standards contained in subsection 23.40.060.E.1.
- C. Civil actions to enforce Title 23 shall be brought exclusively in Seattle Municipal Court except as otherwise required by law or court rule. The Director shall request in writing that the City Attorney take enforcement action. The City Attorney shall, with the assistance of the Director, take appropriate action to enforce Title 23. In any civil action filed pursuant to this chapter, the City has the burden of proving by a preponderance of the evidence that a violation exists or existed. The issuance of the notice of violation or of an order following a review by the Director is not itself evidence that a violation exists.
- D. Except in cases of violations of Section 23.45.510, 23.45.526, 23.49.011, 23.49.015, 23.49.023, or 23.50.051 with respect to failure to demonstrate compliance with commitments to earn LEED Silver, Built Green 4-Star, or ESDS ratings or satisfy alternative standards, the violator may show as full or partial mitigation of liability:
1. That the violation giving rise to the action was caused by the willful act, or neglect, or abuse of another; or
  2. That correction of the violation was commenced promptly upon receipt of the notice thereof, but that full compliance within the time specified was prevented by inability to obtain necessary materials or labor, inability to gain access to the subject structure, or other condition or circumstance beyond the control of the defendant.
- E. Demonstration of green building certification pursuant to LEED Silver or Built Green 4-Star or ESDS ratings for certain development in multifamily zones.
1. Applicability. This section applies whenever a commitment to earn a LEED Silver rating, or a Built Green 4-Star or ESDS rating, or a substantially equivalent standard, as approved by the Director, is a condition of a permit in a multifamily zone.
  2. Demonstration of Compliance; Penalties.

- a. The applicant shall demonstrate to the Director the extent to which the applicant has complied with the commitment to meet the green building performance requirements no later than 90 days after issuance of final Certificate of Occupancy for the new structure, or such later date as may be allowed by the Director for good cause. Performance is demonstrated through an independent report from a third party.
  - 1) For projects committed to achieve a LEED Silver rating, the report will be produced by the U.S. Green Building Council or another independent entity approved by the Director and submitted by the applicant to the Director.
  - 2) For projects using the Built Green Multi-family Program the report will be produced by the Master Builders Association of King and Snohomish Counties or another independent entity approved by the Director and submitted by the applicant to the Director.
  - 3) For projects using the ESDS, the report will be produced according to the process managed by the Housing Trust Fund Contract Manager for the State of Washington.
  - 4) For purposes of this subsection 23.90.018.E, if the Director approves a commitment to achieve a substantially equivalent standard, the terms "LEED Silver rating", "Built Green 4-Star" or "ESDS" shall mean such other standard.
- b. Failure to submit a timely report regarding the green building performance rating from an approved independent entity by the date required is a violation of the Land Use Code. The penalty for such violation shall be \$500 per day from the date when the report was due to the date it is submitted, without any requirement of notice to the applicant.
- c. Failure to demonstrate, through an independent report as provided in this subsection, full compliance with the applicant's commitment to meet a green building performance requirement, is a violation of the Land Use Code. Each day of noncompliance is a separate violation. The penalty for each violation is determined as follows:

$$P = CV \times 0.01,$$

where:

P is the penalty;

CV is the Construction Value as set forth on the building permit for the new structure.

- d. Failure to comply with the applicant's commitment to meet green building performance requirements is a violation of the Land Use Code independent of the failure to demonstrate compliance; however, such violation shall not affect the right to occupy any chargeable floor area, and if a penalty is paid in the amount determined under subsection 23.90.018.E.2, no additional penalty shall be imposed for the failure to comply with the commitment.
- e. If the Director determines that the report submitted provides satisfactory evidence that the applicant's commitment is satisfied, the Director shall issue a certificate to the applicant so stating. If the Director determines that the applicant did not demonstrate compliance with its commitment to meet green building performance requirements in accordance with this Section 23.90.018, the Director may give notice of such determination, and of the calculation of the penalty due, to the applicant.
- f. If, within 90 days, or such longer period as the Director may allow for good cause, after initial notice from the Director of a penalty due under this subsection, the applicant shall demonstrate, through a supplemental report from the independent entity that provided the initial report, that it has made sufficient alterations or improvements to earn the required green building performance rating, then the penalty owing shall be eliminated. If the applicant does not submit a supplemental report in accordance with this subsection by the date required under this subsection, or if the Director determines that the supplemental

report does not demonstrate compliance, then the amount of the penalty as set forth in the Director's original notice shall be final, subject to subsection 23.90.018.C.

- g. Any owner, other than the applicant, of any lot on which the bonus development or extra floor area was obtained or any part thereof, shall be jointly and severally responsible for compliance and liable for any penalty due under this subsection 23.90.018.E.

F. Use of Penalties. A subfund shall be established in the City's General Fund to receive revenue from penalties under subsections 23.90.018.B.3, 23.90.018.B.5 and 23.90.018.E. Revenue from penalties under that subsection shall be allocated to activities or incentives to encourage and promote the development of sustainable buildings. The Director shall recommend to the Mayor and City Council how these funds should be allocated.

( Ord. 123589 , § 104, 2011; Ord. 123495 , § 103, 2011; Ord. No. 123209 , § 68, 2009; Ord. 123206 , § 8, 2009; Ord. 123141 , § 7, 2009; Ord. 122901 , § 3, 2009; Ord. 122855 , § 23, 2009; Ord. 122611 , § 15, 2007; Ord. 122407 , § 4, 2007; Ord. 122190 , § 13, 2006; Ord. 122054 § 97, 2006; Ord. 120156 § 1, 2000; Ord. 116795 § 17, 1993; Ord. 113978 § 5(part), 1988; Ord. 113079 §§ 2(part), 6, 1986; Ord. 110381 § 1(part), 1982.)

SMC 23.90.019

#### Civil Penalty for Unauthorized Dwelling Units in Single-Family Zones

In addition to any other sanction or remedial procedure that may be available, the following penalties apply to unauthorized dwelling units in single-family zones in violation of Section 23.44.006. An owner of a single-family zoned lot that has more than one single-family dwelling unit and who is issued a notice of violation for an unauthorized dwelling unit, is subject to a civil penalty of \$5,000 for each additional dwelling unit, unless the additional unit is an authorized dwelling unit in compliance with Section 23.44.041, is a legal non-conforming use, or is approved as part of an administrative conditional use permit pursuant to Section 25.09.260. Penalties for violation of Sections 23.44.006 and 23.44.041 shall be reduced from \$5,000 to \$500 if, prior to the compliance date stated on the notice of violation for an unauthorized dwelling unit, the dwelling unit is removed or authorized in compliance with Section 23.44.041, is a legal non-conforming use, or is approved as part of an administrative conditional use permit pursuant to Section 25.09.260. Falsely certifying to the terms of the covenant required by subsection 23.44.041.C.3 or failure to comply with the terms of the covenant is subject to a penalty of \$5,000, in addition to any criminal penalties. Penalties for violation of Sections 23.44.006 and 23.44.041 for an unauthorized detached accessory dwelling unit existing on January 1, 2009 will be waived if the owner occupancy requirement of Section 23.44.041.C has been met since January 1, 2010, an application for a building permit authorizing the detached accessory dwelling unit is filed with the Department of Planning and Development by June 30, 2010, and final inspection approval for the permit authorizing the detached accessory dwelling unit is obtained by December 31, 2010.

( Ord. 123649 , § 67, 2011; Ord. 123141 , § 8, 2009; Ord. 122407 , § 6, 2007; Ord. 122190 , § 14, 2006; Ord. 119617 § 4, 1999; Ord. 118472 § 10, 1997; Ord. 117789 § 13, 1995; Ord. 117203 § 10, 1994.)

SMC 23.90.020

#### Alternative criminal penalty

- A. Any person who violates or fails to comply with any of the provisions of this Title 23 and who has had an Order of Judgment entered against them by a court of competent jurisdiction for violating Titles 22 or 23 within the past seven (7) years from the date the criminal charge is filed shall upon conviction be guilty of a gross misdemeanor subject to the provisions of Chapter 12A.02 and 12A.04, except that absolute liability shall be imposed for such a violation or failure to comply and none of the mental states described in Section 12A.04.030 need be proved. The Director may request that the City Attorney prosecute such violations criminally as an alternative to the civil procedure outlined in this chapter. Each day of noncompliance with any of the provisions of this Land Use Code shall constitute a separate offense.
- B. A criminal penalty, not to exceed \$5,000 per occurrence, may be imposed:

1. For violations of subsection 23.90.002.D;
2. For any other violation of this Code for which corrective action is not possible, other than violations with respect to commitments to earn LEED Silver ratings, Built Green 4-Star ratings, or ESDS ratings or satisfy alternative standards; and
3. For any willful, intentional, or bad faith failure or refusal to comply with the standards or requirements of this Code.

( Ord. [123589](#) , § 105, 2011; Ord. No. [123209](#) , § 69, 2009; Ord. [122611](#) , § 16, 2007; Ord. [122407](#) , § 7, 2007; Ord. [122054](#) § 98, 2006; Ord. [118414](#) § 65, 1996; Ord. [113978](#) § 5(part), 1988: Ord. [110381](#) § 1(part), 1982.)

SMC 23.90.025

Appeal to Superior Court.

Final decisions of the Seattle Municipal Court on enforcement actions authorized by this chapter may be appealed pursuant to the Rules for Appeal of Decisions of Courts of Limited Jurisdiction.

( Ord. [122407](#) , § 8, 2007.)



**A-4**

**Chapter 23.91 SMC**



## Seattle Municipal Code

Information retrieved October 20, 2013 8:37 PM

### Chapter 23.91 - CITATION—HEARINGS—PENALTIES

---

#### Sections:

23.91.002 Scope of Chapter 23.91  
 23.91.004 Citation  
 23.91.006 Response to citations  
 23.91.008 Failure to respond.  
 23.91.010 Mitigation hearings  
 23.91.012 Contested hearing.  
 23.91.014 Failure to appear for hearing.  
 23.91.016 Penalties.  
 23.91.018 Alternative criminal penalty.  
 23.91.020 Abatement.  
 23.91.022 Collection of penalties.  
 23.91.024 Each day a separate violation.  
 23.91.026 Additional relief.

#### SMC 23.91.002

#### Scope of Chapter 23.91

A. Violations of the following provisions of Seattle Municipal Code Title 23 shall be enforced under the citation or criminal provisions set forth in this Chapter 23.91

1. Junk storage in residential zones (Sections 23.44.006 and 23.44.040, and Chapter 23.45), unless the lot contains a vacant structure subject to the vacant building maintenance standards contained in subsection 22.206.200.A;
2. Construction or maintenance of structures in required yards or setbacks in residential zones (Sections 23.44.014 and 23.44.040, and Chapter 23.45);
3. Parking of vehicles in a single-family zone (Section 23.44.016), unless the lot contains a vacant structure subject to the vacant building maintenance standards contained in subsection 22.206.200.A; and
4. Keeping of animals (Section 23.42.050).

B. Any enforcement action or proceeding pursuant to this Chapter 23.91 shall not affect, limit or preclude any previous, pending or subsequent enforcement action or proceeding taken pursuant to Chapter 23.90.

( Ord. [123939](#) , § 20, 2012; Ord. [123546](#) , § 6, 2011; Ord. [123209](#) , § 70, 2009; Ord. [122311](#) , § 102, 2006; Ord. [119837](#) § 4, 2000; Ord. [119473](#) § 3, 1999.)

#### SMC 23.91.004

#### Citation

A. Citation. If after investigation the Director determines that the standards or requirements of provisions referenced in Section 23.91.002 have been violated, the Director may issue a citation to the owner and/or other person or entity responsible for the violation. The citation shall include the following information:

1. the name and address of the person to whom the citation is issued;
2. a reasonable description of the location of the property on which the violation occurred;

3. a separate statement of each standard or requirement violated;
  4. the date of the violation;
  5. a statement that the person cited must respond to the citation within 15 days after service;
  6. a space for entry of the applicable penalty;
  7. a statement that a response must be sent to the Hearing Examiner and received not later than 5:00 p.m. on the day the response is due;
  8. the name, address and phone number of the Hearing Examiner where the citation is to be filed;
  9. a statement that the citation represents a determination that a violation has been committed by the person named in the citation and that the determination shall be final unless contested as provided in this chapter; and
  10. a certified statement of the inspector issuing the citation, authorized by RCW 9A72.085, setting forth facts supporting issuance of the citation.
- B. Service. The citation may be served by personal service in the manner set forth in RCW 4.28.080 for service of a summons or sent by first class mail, addressed to the last known address of such person(s). Service shall be complete at the time of personal service, or if mailed, on the date of mailing. If a citation sent by first class mail is returned as undeliverable, service may be made by posting the citation at a conspicuous place on the property.

( Ord. [123649](#) , § 68, 2011; Ord. [119896](#) § 5, 2000; Ord. [119473](#) § 4, 1999.)

SMC 23.91.006

Response to citations

- A. A person must respond to a citation in one of the following ways:
1. Paying the amount of the monetary penalty specified in the citation, in which case the record shall show a finding that the person cited committed the violation; or
  2. Requesting in writing a mitigation hearing to explain the circumstances surrounding the commission of the violation and providing an address to which notice of such hearing may be sent; or
  3. Requesting a contested hearing in writing specifying the reason why the cited violation did not occur or why the person cited is not responsible for the violation, and providing an address to which notice of such hearing may be sent.
- B. A response to a citation must be received by the Office of the Hearing Examiner no later than fifteen (15) days after the date the citation is served. When the last day of the appeal period so computed is a Saturday, Sunday, or federal or City holiday, the period shall run until five (5:00) p.m. on the next business day.

( Ord. [123899](#) , § 25, 2012; Ord. [122407](#) , § 9, 2007; Ord. [119896](#) § 6, 2000; Ord. [119473](#) § 5, 1999.)

SMC 23.91.008

Failure to respond.

If a person fails to respond to a citation within fifteen (15) days of service, an order shall be entered by the Hearing Examiner finding that the person cited committed the violation stated in the citation, and assessing the penalty specified in the citation. ( Ord. [119473](#) § 6, 1999.)

SMC 23.91.010

Mitigation hearings

- A. Date and Notice. If a person requests a mitigation hearing, the mitigation hearing shall be held within 30 days after written response to the citation requesting such hearing is received by the Hearing Examiner. Notice of the time, place, and date of the hearing shall be sent to the address

specified in the request for hearing not less than ten days prior to the date of the hearing.

- B. Procedure at Hearing. The Hearing Examiner shall hold an informal hearing which shall not be governed by the Rules of Evidence. The person cited may present witnesses, but witnesses may not be compelled to attend. A representative from DPD may also be present and may present additional information, but attendance by a representative from DPD is not required.
- C. Disposition. The Hearing Examiner shall determine whether the person's explanation justifies reduction of the monetary penalty; however, the monetary penalty may not be reduced unless DPD affirms or certifies that the violation has been corrected prior to the mitigation hearing. Factors that may be considered in whether to reduce the penalty include whether the violation was caused by the act, neglect, or abuse of another; or whether correction of the violation was commenced promptly prior to citation but that full compliance was prevented by a condition or circumstance beyond the control of the person cited.

( Ord. [123899](#) , § 26, 2012; Ord. [121477](#) § 66, 2004; Ord. [119896](#) § 7, 2000; Ord. [119473](#) § 7, 1999.)

SMC 23.91.012

Contested hearing.

- A. Date and Notice. If a person requests a contested hearing, the hearing shall be held within sixty (60) days after the written response to the citation requesting such hearing is received.
- B. Hearing. Contested hearings shall be conducted pursuant to the procedures for hearing contested cases contained in Section 3.02.090 and the rules adopted by the Hearing Examiner for hearing contested cases, except as modified by this section. The issues heard at the hearing shall be limited to those that are raised in writing in the response to the citation and that are within the jurisdiction of the Hearing Examiner. The Hearing Examiner may issue subpoenas for the attendance of witnesses and the production of documents.
- C. Sufficiency. No citation shall be deemed insufficient for failure to contain a detailed statement of the facts constituting the specific violation which the person cited is alleged to have committed or by reason of defects or imperfections, provided such lack of detail, or defects or imperfections do not prejudice substantial rights of the person cited.
- D. Amendment of Citation. A citation may be amended prior to the conclusion of the hearing to conform to the evidence presented if substantial rights of the person cited are not thereby prejudiced.
- E. Evidence at Hearing.
  - 1. The certified statement or declaration authorized by RCW 9A.72.085 submitted by an inspector shall be prima facie evidence that a violation occurred and that the person cited is responsible. The certified statement or declaration of the inspector authorized under RCW 9A.72.085 and any other evidence accompanying the report shall be admissible without further evidentiary foundation.
  - 2. Any certifications or declarations authorized under RCW 9A.72.085 shall also be admissible without further evidentiary foundation. The person cited may rebut the DPD evidence and establish that the cited violation(s) did not occur or that the person contesting the citation is not responsible for the violation.
- F. Disposition. If the citation is sustained at the hearing, the Hearing Examiner shall enter an order finding that the person cited committed the violation. If the violation remains uncorrected, the Hearing Examiner shall impose the applicable penalty. The Hearing Examiner may reduce the monetary penalty in accordance with the mitigation provisions in Section 23.91.010 if the violation has been corrected. If the Hearing Examiner determines that the violation did not occur, the Hearing Examiner shall enter an order dismissing the citation.
- G. Appeal. The Hearing Examiner's decision is the final decision of the City. Any judicial review must be commenced within twenty-one (21) days of issuance of the Hearing Examiner's decision

in accordance with RCW 36.70C.040.

( Ord. 122407 , § 10, 2007; Ord. 121477 § 67, 2004; Ord. 119896 § 8, 2000: Ord. 119473 § 8, 1999.)

SMC 23.91.014

Failure to appear for hearing.

Failure to appear for a requested hearing will result in an order being entered finding that the person cited committed the violation stated in the citation and assessing the penalty specified in the citation. For good cause shown and upon terms the Hearing Examiner deems just, the Hearing Examiner may set aside an order entered upon a failure to appear. ( Ord. 119473 § 9, 1999.)

SMC 23.91.016

Penalties.

- A. First Violation. The first time that a person or entity is found to have violated one of the provisions referenced in Section 23.91.002. after the effective date of the ordinance codified in this chapter, the person or entity shall be subject to a penalty of One Hundred Fifty Dollars (\$150).
- B. Second and Subsequent Violations Any subsequent time that a person or entity is found to have violated one of the provisions referenced in Section 23.91.002 within a five (5) year period after the first violation, the person or entity shall be subject to a penalty of Five Hundred Dollars (\$500) for each such violation.
- C. In addition to the penalties imposed under paragraphs A or B of this section, 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.

( Ord. 122855 , § 24, 2009; Ord. 119473 § 10, 1999.) Chapter 23.91, is effective on July 16, 1999.

SMC 23.91.018

Alternative criminal penalty.

Any person who violates or fails to comply with any of the provisions referenced in Section 23.91.002 shall be guilty of a misdemeanor subject to the provisions of Chapters 12A.02 and 12A.04, except that absolute liability shall be imposed for such a violation or failure to comply and none of the mental states described in Section 12A.04.030 need be proved. The Director may request the City Attorney to prosecute such violations criminally as an alternative to the citation procedure outlined in this chapter. ( Ord. 119473 § 11, 1999.)

SMC 23.91.020

Abatement.

Any property on which there continues to be a violation of any of the provisions referenced in Section 23.91.002 after enforcement action taken pursuant to this chapter is hereby declared a nuisance and subject to abatement by the City in the manner authorized by law.

( Ord. 119473 § 12, 1999.)

SMC 23.91.022

Collection of penalties.

If the person cited fails to pay a penalty imposed pursuant to this chapter, the penalty may be referred to a collection agency. The cost to the city for the collection services will be assessed as costs, at the rate agreed to between the City and the collection agency, and added to the penalty. Alternatively, the City may pursue collection in any other manner allowed by law.

( Ord. 119473 § 13, 1999.)

SMC 23.91.024

Each day a separate violation.

Each day a person or entity violates or fails to comply with a provision referenced in Section 23.91.002 may be considered a separate violation for which a citation may be issued. ( Ord. 119473 § 14, 1999.)

SMC 23.91.026

Additional relief.

The Director may seek legal or equitable relief at any time to enjoin any acts or practices that violate the provisions referenced in Section 23.91.002 or abate any condition that constitutes a nuisance.

(Ord. [119473](#) § 15, 1999.)

Including Changes Made by Ordinances Through Ordinance 124187, adopted by the City Council on June 3, 2013. Most ordinances become effective 30 days after the Mayor's approval. Some have later effective dates. Information regarding effective dates of specific ordinances may be obtained from the City Clerk's Office.

Also Including Shoreline District Boundaries, Landmark and Historic Districts, Environmentally Sensitive Areas,<sup>1</sup> the Airport Height Overlay District Maps<sup>1</sup> and Pedestrian-Oriented Streets.

1. Maps showing airport height overlays and areas designated environmentally sensitive are available at the Master Use Permit Information Center.

### KEY TO DISTRICT DESIGNATIONS

Letters and numbers indicating zoning district designations are shown on the maps which follow. These designations and the corresponding descriptions of the districts are set out on this page.

Zones	Abbreviated
Residential, Single-family 9,600	SF 9600
Residential, Single-family 7,200	SF 7200
Residential, Single-family 5,000	SF 5000
Residential Small Lot	RSL
Residential, Multifamily, Lowrise 1	LR1
Residential, Multifamily, Lowrise 2	LR2
Residential, Multifamily, Lowrise 3	LR3
Residential, Multifamily, Midrise	MR
Residential, Multifamily, Highrise	HR
Residential-Commercial	RC
Neighborhood Commercial 1	NC1
Neighborhood Commercial 2	NC2
Neighborhood Commercial 3	NC3
Master Planned Community - Yesler Terrace	MPC-YT
Seattle Mixed	SM
Commercial 1	C1
Commercial 2	C2
Downtown Office Core 1	DOC1
Downtown Office Core 2	DOC2
Downtown Retail Core	DRC
Downtown Mixed Commercial	DMC
Downtown Mixed Residential	DMR
Pioneer Square Mixed	PSM
International District Mixed	IDM
International District Residential	IDR
Downtown Harborfront 1	DH1
Downtown Harborfront 2	DH2

**A-5**

**Client Assistance Memo 217**

# Seattle Permits

— part of a multi-departmental City of Seattle series on getting a permit

## How to Legalize a Use Not Established by Permit

Updated November 18, 2010

Seattle's Land Use Code specifies the type of development or "use" allowed on property in different zones in the city. Examples of different types of uses are single family homes, multifamily residences, office buildings, and warehouses. The Land Use Code requires that all uses of land be established by permit.

This Tip explains how to legalize a use not previously established by a permit issued by the Seattle Department of Planning and Development (DPD) or its predecessor, the Building Department. In many cases, a use not previously established by permit will be considered a "nonconforming" use. This Tip further explains what a nonconforming use is, and when a nonconforming use can become recognized as legal through the DPD permit process.

### Establishing Nonconforming Uses

An existing use is called a "nonconforming use" if it would not be permitted in its location by current land use laws, but it has been in continuous operation since a time when it was permitted by applicable laws. If a use not allowed under the current zoning commenced under permit, or a permit for the use has been granted and has not expired, or substantial progress has been made toward construction of a structure to be occupied by the use, then DPD recognizes the use as "established" in our records, and therefore legally nonconforming.

Sometimes, a use has been ongoing for a certain period of time but has never been legally established by permit. If that use is permitted outright under current zoning, and meets all current Seattle Municipal Code (SMC) standards, the owner may apply for and obtain a use permit by the same procedures that apply to new uses. If the use is not permitted outright under

current zoning or does not meet some other SMC regulation, the use may still be "established" as a "legally nonconforming" use if it commenced at a time when it met applicable zoning and other regulations, and has continued to the present time, even if it does not meet all present regulations.

### Establishing a Use for the Record

DPD calls the procedure detailed in the previous paragraph "establishing a use for the record," and this Tip is primarily concerned with applications to establish this type of use and the criteria for issuing permits that recognize such uses.

A typical example of the need to establish a use for the record is a situation in which property is zoned for single family residences only, but a triplex structure is located on it. The triplex is nonconforming because the present zoning is limited to single family residences. The structure also may not meet the present Seattle Building Code (SBC) because, for example, it lacks a sprinkler system or one-hour fire wall required for new multifamily structures.

If a permit exists for this triplex in DPD records, and the use has not been discontinued, then it is recognized as a legally established nonconforming use. However, if there is no permit, or the available permits describe the structure as a single family residence, then DPD cannot recognize the triplex use as legal unless the owner first demonstrates that the triplex was put on the lot when zoning and other regulations such as the SBC would have allowed it, and that the structure has been used continuously as a triplex since that time. If DPD accepts this demonstration, then a permit can be issued recognizing the triplex as an established use.

### Recent Residential Code Changes

In 2001, the Seattle City Council adopted changes to the conformity regulations that now allow a nonconforming residential use, such as a triplex in a single family zone, to be established for the record if the use predates July 24, 1957, even if the use was not per-

[www.seattle.gov/dpd](http://www.seattle.gov/dpd)



mitted under Seattle's original zoning code of 1923. This new provision applies only to residential uses. Nonresidential uses, such as a commercial office in a single family zone, that predate 1957 must still meet the requirements of the 1923 code or predate zoning regulations. Also, this new code provision does not apply within the Shoreline Overlay District or within any of the Industrial zones.

**NOTE:** An alternative to establishing a use not established by permit may be to apply for an accessory dwelling unit (ADU) permit instead, if you are the owner and occupant of a single family residence and you wish to legalize one additional dwelling unit.

### Why Apply for a Permit to Establish a Use?

There are several situations in which you might wish to demonstrate that a use of property not established by permit is a legal land use:

- You may have applied for a permit to change or expand the use, and a routine check of DPD records shows that the use claimed for the structure does not have a permit. (**NOTE:** There are limits on changes to or expansions of nonconforming uses.)
- You may wish to sell a building as a duplex or triplex, but the most recent permit shows a single family residence.
- You may find that the use is permitted under present zoning, but it is advantageous to show that it commenced prior to the beginning of modern SBC requirements on Jan. 1, 1976, or prior to the effective date of other codes affecting land use, such as the Shoreline Master Program or the State Environmental Policy Act (SEPA).
- You may simply have discovered that there are no City records for the triplex use you always thought you had, and you want to clear up any title, tax assessment, or other problems that may result from maintaining a use not established by permit.

### Criteria for Establishing Use

A permit to establish a use from a certain date in the past can only be issued if the criteria and documentation discussed below are met and proper site plan and structural drawings are provided. If the use to be established is a dwelling unit, then the DPD inspection process must verify that applicable standards of the Housing and Building Maintenance Code (HBMC) and/or SBC are met (if the use commenced after Jan 1, 1976).

The fact that a use has existed for a long time does not necessarily mean that it can now be established by permit. The use must either be something that can be approved under present City codes or something that could have been authorized at its present location in the past and has existed since that time.

Unless a use can be established under the present Land Use Code and other present codes, an applicant must demonstrate the following before a permit can be issued:

- That the use was commenced at or prior to a time when it could have been lawfully established either by construction or conversion under the Zoning Ordinance or Land Use Code then in effect. For example, density, parking, and open space must meet standards of the Zoning Ordinance or Land Use Code provisions in force at the time establishment of the use can be proved.

If discretionary approval—such as a conditional use, variance, or environmental review—would have been required for establishment of the use at the time its establishment can be proved, then proof that such approval was given must be submitted. In addition to official documents from the authorizing agency, extraneous documentation that the official document was obtained will be accepted. For example, minutes of a Board of Public Works meeting in which the use was discussed and approved or a notation on a City property record card indicating approval will be accepted in lieu of the permit document itself.

If the nonconforming use is residential and predates July 24, 1957, and is not located in the Shoreline Overlay District or any of the Industrial zones, then the use may be legalized for the record based on documentation showing that it was in existence prior to July 24, 1957, and has remained in continuous use since that time. Legalization of residential uses prior to July 24, 1957, is also subject to the inspection process described below. The documentation presented is subject to the standards discussed in the subsection on documentation of existence of use, beginning on page 3 of this Tip, just as are uses postdating July 24, 1957.

- That the use has been in existence continuously, with no interruption that would constitute abandonment or discontinuance of a nonconforming use under the provisions of either former or current land use regulations.

- In the case of dwelling units, that the minimum standards for habitable dwellings in the HBMC in effect at the time of application are met. If the dwelling unit was created prior to Jan. 1, 1976— or if it was created after Jan. 1, 1976, and a zoning Notice of Violation (NOV) has been issued regarding it—then site inspection is required by DPD inspectors to determine if minimum HBMC standards are met. If inspection shows that minimum standards are not met, then repairs must be made before a permit will be issued establishing the use. If electrical work is needed to satisfy HBMC standards, an electrical permit can be issued prior to issuance of the use permit if zoning approval is granted.
- For all structures, that minimum applicable SBC standards for fire and life safety are met as set forth in Section 104. If the use to be established was created within a structure after Jan. 1, 1976, all SBC standards must be met for the year in which the use first legally commenced. Review by a building plans examiner, and inspection by a building inspector, are required for all uses to be established to a date after Jan. 1, 1976.

### Example of the Significance of Dates for Establishing Uses

To understand the importance of dates when establishing a use, consider this example of trying to establish for the record a nonconforming duplex on a lot now zoned for single family residences. To do this, you will need to show that the duplex use has existed since a time when the property was zoned to allow duplexes, or that the duplex use predates July 24, 1957.

Because there have been a number of different zoning ordinances in effect since Seattle was originally zoned in 1923, the year from which you must prove the duplex existed will vary. The most significant dates are 1923, 1947, 1957 and 1982, because substantial rezones and significant code changes affecting most of the city occurred in those years. Another significant date is 1988, when density standards for the multifamily zones removed in 1982 were reimposed. As noted previously, Jan. 1, 1976, is significant as the date after which complete SBC review is required.

Finally, if the use you are trying to prove commenced in your structure before the property was annexed into the city of Seattle, the date of annexation may be the critical date to which you must prove your use. Significant annexations occurred in north Seattle, in particular, between 1942 and 1954. For many residential nonconforming uses, the critical date is now July

24, 1957, as this date now applies to all residential uses commenced prior to that date and not located in the Shoreline Overlay District or in any of the Industrial zones.

For example, if the duplex use is shown to have started in 1950, then a permit can be issued once the structure is certified by inspection to be in compliance with minimum HBMC standards. If the use began in 1960, but could not have been permitted under the zoning for the property until 1982, then a permit cannot be issued until a full review under 1982 SBC standards and inspection by a building inspector has been completed. A HBMC inspection would not be required unless necessary to clear a zoning Notice of Violation (NOV) issued on the property.

### Documenting Existence of a Use

To prove that your use was established at a time when it would have been legal, you must submit documentation that the use was in existence prior to whatever the critical date for the property is. For example, if your use could only have been legally established prior to 1947, tax assessment records from 1975 will not provide sufficient proof. The standard of proof required by DPD is a preponderance of evidence. In other words, your documentation must show that it is more probable than not that the use in question existed prior to the critical date.

The first step in gathering information about establishing a use is to determine what zoning was in effect at the time your building was constructed or the use began, and when zoning changes later occurred.

If establishing your use for the record appears to be required, the land use planner will refer you to the Public Resource Center (PRC), located directly across from the ASC on the 20th floor of Seattle Municipal Tower. PRC staff will help you to review maps showing past zoning and annexation information, if applicable. If you decide to apply for a permit, you will also need to review the available permit history for your structure in the DPD Microfilm Library (part of the PRC).

For general information, call the ASC at (206) 684-8850 or the PRC at (206) 684-8467.

Examples of records that DPD will accept as documentation of the existence of a use are:

- **Occupancy listings** from the Polk Directory or Reverse Telephone Directories. The Seattle Public Library, Central Branch, located at 1000 Fourth Ave., has copies of the Polk reverse directories dating from 1939. Qwest, the telephone company,

also has a reverse directory. To submit reverse directory information as proof of use, make copies of the pages showing the occupants of your property at several-year intervals beginning at the time you wish to establish the occupancy.

- **Business and/or licensing records.** Obtain licensing records from the Washington State Department of Licensing and Consumer Affairs, (206) 684-8484; they can document a business use.
- **County records** showing the previous permitted use if the property was formerly not part of the City of Seattle. Very few of these records are actually now available, but the information number for King County zoning is (206) 296-6655.
- **Tax assessment records.** Records from 1972 to the present can be obtained from the King County Assessor, King County Administration Building, 500 Fourth Ave., (206) 296-7300. Tax records prior to 1972 must be obtained from the Washington State Archives Puget Sound Branch, located in Bellevue, (425) 564-3940. To obtain tax records you will need the tax account number and the legal description of the property. These records often date back as far as 1937, and they can provide detailed history—such as dates of construction of buildings—to even earlier dates.
- **Sewer hookups.** Dates of hookups are important. Sewer records can be obtained from the Seattle Department of Transportation's Street Use Section, (206) 684-5253.
- **Signed written statements** from persons having no financial interest in the property and who are not relatives of the applicant or property owner. Notarization is not required.
- **Other evidence** that DPD's Director deems useful and reliable, based on the circumstances of the individual case. Examples include, but are not limited to: photographs; U.S. Census reports; and signed written statements of experts such as engineers, architects, or building professionals, testifying to the age of a structure or its fixtures, such as kitchen equipment. In some cases, a DPD inspection may be necessary to make a final determination of the age of a structure. An inspection of this type is generally made by a Building Inspector.

**It is your responsibility to furnish at least two different types of documentation from the sources listed above.** DPD, in its discretion, may require further documentation, if the documentation you have submitted does not demonstrate the existence of the use

from a time when it was permitted outright, or fails to show continuous, uninterrupted maintenance of the use. DPD may, in some cases, accept only one type of documentation from the sources listed above if that documentation is particularly persuasive. Any number of signed written statements, however, are not sufficient by themselves to document the existence of a use.

Please also note that if you or a prior owner have ever applied for and been granted permits for work inconsistent with the use you are now seeking to establish, DPD may deny your application. For example, if you have applied to establish a legally nonconforming duplex for the record in a single-family zone, we will deny the application if prior permits which identified the building as a single-family residence have been issued for additions to the structure in question.

If you disagree with our analysis of the documentation presented, or our analysis of the applicable Zoning Ordinance or Land Use Code, you may choose to request a formal interpretation of the Land Use Code under Seattle Municipal Code (SMC) Section 23.88.020. If, for any reason, your application cannot be granted, further maintenance of the use not established by permit may subject you to enforcement action according to standard DPD procedures.

### Applying for a Permit

To apply for a permit, please visit the DPD Applicant Services Center (ASC), located on the 20th floor of Seattle Municipal Tower at 700 Fifth Ave. You may also contact the Applicant Services Center at (206) 684-8850. (Note: an appointment may be necessary and a fee may be required to speak with a land use planner.)

In order to schedule an application intake appointment, you will need to fill out a Preliminary Application, available on DPD's website at [www.seattle.gov/dpd/toolsresources/](http://www.seattle.gov/dpd/toolsresources/) or by calling (206) 684-8850.

Before you come for your intake appointment, you will be expected to complete the Use For the Record Information Worksheet attached to this Tip. This worksheet contains space for providing basic information about your property, including address and legal description, the presently permitted use, why you are applying for a permit to establish a use not previously established by permit, and basic zoning history.

At your intake appointment, you will be asked to submit the Use For the Record Information Worksheet, a copy of the white property record card for the property, a copy of the most recent permit establishing a use, and a copy of the zoning Notice of Violation (NOV), if one has been

issued on your property. The property record card and permit can be obtained from the DPD Microfilm Library (located on the 20th floor of Seattle Municipal Tower at 700 Fifth Ave.). Please check with microfilm staff to be sure the most recent permit actually establishes a use and has been given final approval by DPD.

You will also need to submit the supporting documentation you have gathered to prove existence of the use at a time when it was legal under zoning, and two or three sets of plans as follows:

- For uses that commenced **prior** to Jan. 1, 1976, two sets of plans meeting plan quality standards as set forth in Tip 106, including:
  1. Appropriate cover sheet.
  2. Plot plan showing configuration of on-site parking and, for all structures, measurements showing location of the structure on the site.
  3. For structures, floor plans showing all rooms, doors, windows, stairs, common areas, and kitchen and bathroom facilities.
  4. Highlighting of dwelling unit(s) to be established.
- For uses that commenced **after** January 1, 1976, three sets of plans meeting plan quality standards as set forth in Tip #106, including:
  1. Appropriate cover sheet.
  2. Plot plan showing configuration of on-site parking and, for all structures, measurements showing location of the structure on the site.
  3. For structures, floor plans showing all rooms, doors, windows, stairs, common areas, and kitchen and bathroom facilities.
  4. For structures, a copy of the original building floor plans (if available from DPD microfilm library), as reference document.
  5. Highlighting of dwelling unit(s) to be established, on original plans and on application plans.

If you have questions about the application process, visit the ASC and ask to speak to a land use planner.

Questions about plan preparation can best be answered by a permit specialist, available in the ASC or by calling (206) 684-8850.

If you have questions about development standards, the zoning history of your property, or about what documentation will be useful to support your application, contact Public Resource Center (PRC) staff on the same floor as the ASC or call them at (206) 684-8467.

## Inspection Procedures

### 1. Housing and Building Maintenance Code (HBMC) Inspection

If you are establishing a dwelling unit or units for the record, a DPD inspector will conduct a site inspection to determine compliance with minimum standards of the HBMC under the following circumstances:

- use commenced **prior** to Jan. 1, 1976 (regardless of whether the compliance service center has an active zoning notice of violation on the property)
- use commenced **after** Jan. 1, 1976, and the compliance service center has an active zoning notice of violation on the property

In this situation, your plans must also conform to the SBC in effect at the time the use is both in existence and first could have been legally established.

It is your responsibility to arrange for the required inspection. If your use can be approved under applicable zoning, the land use planner who analyzes the zoning issue will refer your application for the HBMC inspection or SBC review, as needed. Where an HBMC inspection is required as described above, a permit establishing a dwelling unit for the record will not be issued by DPD until after the inspector has determined that the subject structure is in compliance with the HBMC.

If violations of the HBMC are noted, they must be corrected prior to issuance of a permit except. However, if correction of violations requires a building permit or electrical permit, we will issue the use permit after application is made for the appropriate building permit or electrical permit.

In cases where you are establishing some use other than a dwelling unit, a site inspection may be required as part of the determination of compliance with the appropriate Zoning Ordinance or Land Use Code, to determine conformity of the site to plans submitted and to the HBMC if applicable. You will receive a letter explaining why such an inspection is required. Any violations noted must be corrected before a use permit will be issued.

For uses commenced prior to Jan. 1, 1976, final approval of the use permit will be given by the land use planner who reviewed your application for compliance with the appropriate Zoning Ordinance or Land Use Code.

### 2. Building Code Review and Inspection

If you are establishing for the record a use that is located within a structure (this applies to most uses

other than parking lots and outdoor storage), a building plans examiner will review your plans to determine compliance with the SBC effective on the date the use first could have been legally established, and a site inspection will be conducted by a building inspector under any of these circumstances:

- the use commenced **after** Jan. 1, 1976, and the compliance service center has **no active zoning NOV** related to the use issue.
- the use commenced **after** Jan. 1, 1976, and the compliance service center **has an active zoning NOV** on the property. In this situation, an HBMC inspection is also required prior to completion of the "establish use for the record" approval.
- the use commenced **prior** to Jan. 1, 1976, **is not a dwelling unit**, and the land use planner determining compliance with the appropriate Zoning Ordinance or Land Use Code concludes that there is **insufficient information** on the plans submitted to determine that minimum standards under Section 104 of the SBC have been met.

Where a SBC review is required, a permit establishing a use for the record will not be issued by DPD until after the building plans examiner has determined, based on the plans submitted, that your structure is in compliance with the SBC.

If no corrections to the plans are required, the use permit will be issued after plan approval, subject to final approval on a site inspection by a building inspector. If corrections to the plans are required, these corrections must be made prior to issuance of a permit. Once the plans have been approved, the permit may issue as a combination use and building permit, if alterations to your structure are required to bring it into compliance with the SBC. Final approval will be made on a site inspection by a building inspector.

For non-residential uses, the land use planner or building plans examiner may, as part of the determination of compliance with the appropriate Zoning Ordinance or Land Use Code, request site inspection of the property by a DPD inspector to determine conformity of the site to plans submitted and to the HBMC if applicable. Any violations noted must be corrected before a use permit will be issued.

## Fees

The application fee for a permit establishing a use for the record is a standard charge for 1½ hours of work by a land use planner. This fee is subject to possible change every January when a new Fee Ordinance is adopted by the City Council. Fees for additional research, plan checking, or other services performed by DPD may also be assessed as set forth in the Fee Ordinance, as required for each individual project. The HBMC inspection is incorporated into the standard fee, but additional charges will be made for SBC review and any building permit that needs to be issued to bring a structure into compliance with the SBC.

For an up-to-date fee listing visit DPD's website at [www.seattle.gov/dpd/codesrules/codes/fees/](http://www.seattle.gov/dpd/codesrules/codes/fees/) or contact the Public Resource Center, located on the 20th floor of Seattle Municipal Tower at 700 Fifth Ave., (206) 684-8467.

## Access to Information

Links to electronic versions of **DPD Tips**, **Director's Rules**, and the **Seattle Municipal Code** are available on the "Tools & Resources" page of our website at [www.seattle.gov/dpd](http://www.seattle.gov/dpd). Paper copies of these documents are available from our Public Resource Center, located on the 20th floor of Seattle Municipal Tower at 700 Fifth Ave. in downtown Seattle, (206) 684-8467.

**A-6**

**establish. 2013. In unabridged.merriam-  
webster.com**

## Merriam-Webster Unabridged Dictionary

**es·tab·lish** *verb* \əˈstablish, eˈ-, -lēsh, chiefly in present participle -lēsh\

*inflected form(s): -ed/-ing/-es*

*transitive verb*

**1 a** : to make firm or stable : fix to prevent or check unsteadiness, wavering, turmoil, or agitation

<establish the gun firmly on its base>

**b** : to place, install, or set up in a permanent or relatively enduring position especially as regards living quarters, business, social life, or possession

<the family established itself in a large house>

<established himself in the community as a grain dealer>

<stayed with the team long enough to see it established as a member of a major league>

<the first day of 1930 saw me established in London with a good job on an evening paper — Harold Nicolson>

**c** : to found or base securely (as a theory)

<established the moral unity of all people upon the idea of God>

<examine critically the foundations of his creed and establish his theology upon philosophy — V.L.Parrington>

**d** : to assist, support, or nurture so that stability and continuance are assured

<stayed as principal of the new school until it was well established>

**e** : to fix or implant (itself) in gaining a firm hold

<think of the possibilities if this scourge becomes widely established among our eastern oaks — W.H.Camp>

<a vice continued until it established itself beyond escape>

**2 a** : to settle or fix after consideration or by enactment or agreement

<a congressional bill establishing duties on a wide range of imports>

<an act establishing quota limits on immigration>

**b** : APPOINT, ORDAIN, ENTITLE

<established several European correspondents for the newspaper>

<established a new vice-president for the firm>

**3** *obsolete* : to settle (as an **estate**) upon someone : secure (as rights) to a group

**4** **a** : to bring into existence, create, make, start, originate, found, or build usually as permanent or with permanence in view

<establish a factory on the banks of the river>

<established a cranberry bog — *American Guide Series: Oregon*>

<the five studies in this volume have the common purpose of *establishing* a background for an understanding of 18th century English literature — *University of Minnesota Press Catalog*>

<establish a school for the deaf>

<the Italians voted to *establish* a republic — *Current Biography*>

<Noah Webster, with his dictionary ... had *established* American usage in the matter of words — Van Wyck Brooks>

**b** : to bring about : EFFECT

<Mrs. Hale *established* social relations with her, and together they went about — Theodore Dreiser>

**c** (1) : PROVIDE : set up

<it *established* a fund of \$700,000 to open regional offices — *Current Biography*>

(2) : to provide for : ENDOW

<establish a chair of Asian studies at the university>

**5** *obsolete* : to bring (as anger) to a state of calm : QUIET

**6** **a** *archaic* : CONFIRM, VALIDATE

**b** : to prove or make acceptable beyond a reasonable doubt

<the point the speaker was trying to *establish* was the imminence of economic collapse>

<the impossibility of spontaneous generation was finally *established* as a valuable working principle — J.B. Conant>

<*establish* the fact that he was not there when the murder occurred>

**c** : to provide strong evidence for : bring unavoidably to the attention

<something was said that *established* him as being in the contracting business — Hamilton Basso>

**d** : to calculate or determine exactly and with certainty the terms, limits, or identity of

<the evidence *established* the motive for the crime>

<*establish* the weight of the planet>

**e** : to provide the mind or comprehension with appropriate information about

<the opening shot of the movie *establishes* the scene>

**7** : to make a national or state institution of (a church)

**8 a** : to provide with a secure reputation especially as valuable, useful, or certain

<screen productions based on *established* novels>

<*established* as the world's tobacco capital — *American Guide Series: North Carolina*>

**b** : to place in a position of being accepted, respected, or feared

<the British authority had been pretty securely *established* — B.K.Sandwell>

<clearly *established* my standing as a man of good character — B.F.Fairless>

<upset the *established* order in southeast Asia>

**c** : to make a norm, a custom, a convention, or a habit

<the *established* way of addressing a clergyman>

<*established* art styles>

<it was his *established* practice to eat an early supper>

<an *established* conditioned reflex>

**9 a** : to set (as a record) as an achievement

**b** : to arrive at (as a result)

**10** : to define and record (as a species) by effective publication in systematic biology

**11** : to make such plays in a card game as will permit (a specified card or all remaining cards of a specified suit) to win tricks

*intransitive verb*

: to become naturalized : enter and persist without care or cultivation — used chiefly of plants

<various xerophytes readily *establish* on and stabilize coastal dunes>

## Origin of ESTABLISH

Middle English *establissen*, from Middle French *establiss-*, stem of *establiir*, from Latin *stabilire*, from *stabilis* firm, stable — more at stable

First Known Use: 14th century (transitive sense 2a)

### **Related to ESTABLISH**

**Synonyms:** demonstrate, prove, show, substantiate

**Antonyms:** disprove

**Related Words:** attest, authenticate, bear out, document, evidence, support, sustain, uphold; confirm, corroborate, justify, validate, verify

**Near Antonyms:** confute, discredit, invalidate, rebut, refute

See Synonym Discussion at found, set

Pronunciation Symbols

**Merriam-Webster Unabridged**

© 2013 Merriam-Webster, Incorporated

2018 OCT 21 PM 09:50

**IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON,  
DIVISION I**

TYKO JOHNSON,  
  
Appellant,

vs.

CITY OF SEATTLE,  
  
Respondent.

NO. 68819-7

PROOF OF SERVICE OF  
APPELLANT'S OPENING  
BRIEF

I, Charles R. Horner, declare the following matters to be true and correct under penalty of perjury under the laws of the state of Washington:

1. On October 18, 2013, I served respondent City of Seattle with Appellant's Opening Brief by personally delivering a copy of it to the Office of the Seattle City Attorney, 600 Fourth Avenue, 4<sup>th</sup> Floor, Seattle.

2. I also emailed a copy of Appellant's Opening Brief to the City's attorney, Patrick Downs, at [Patrick.Downs@seattle.gov](mailto:Patrick.Downs@seattle.gov) at 2:27 p.m. on October 18, 2013, before taking a hard copy to his office, as described above.

SIGNED this 20<sup>th</sup> day of October 2018, at Tacoma, Washington.



Charles R. Horner, WSBA No. 27504