

No. 72719-2-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

WASHINGTON STATE DEPARTMENT OF TRANSPORTATION,

Respondent,

vs.

CITY OF SEATTLE,

Appellant.

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COURT OF APPEALS
STATE OF WASHINGTON
THOMAS S. BURT

CITY OF SEATTLE'S REPLY BRIEF

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I. INTRODUCTION AND SUMMARY OF THE ARGUMENT

The basic statutory rule is clear: state agencies must comply with local development regulations that do not preclude the siting of essential public facilities. Here, without hampering—let alone precluding—the siting of SR 520, the City applied its Grading Code to WSDOT work outside a highway right-of-way. WSDOT cannot carry its burden of avoiding the basic statutory rule or proving that the City misread its own Code. Because WSDOT fails to carry its burden, the City respectfully asks this Court to reverse the trial court.

II. ARGUMENT

A. State agencies must comply with local development regulations that do not preclude the siting of essential public facilities.

1. The GMA’s basic rule is clear.

The Growth Management Act (“GMA”) establishes a two-part rule. The default is found in Section 103: “State agencies shall comply with the local comprehensive plans and development regulations and amendments thereto...”¹ The limitation on that rule is found in Section 200: “No local comprehensive plan or development regulation may preclude the siting of essential public facilities.”²

¹ RCW 36.70A.103.

² RCW 36.70A.200(5).

WSDOT does not undercut the rule’s plain language.³ Instead, WSDOT makes unsupported assertions about the history of Section 103’s exceptions for the state facility on McNeil Island. Even if that history were accurate, WSDOT misses the point: the only reason for those exceptions is Section 103’s clear default rule requiring state agencies to comply with local development regulations.

While essentially turning its head away from Section 103, WSDOT helps itself to the protections for the siting of essential public facilities in Section 200.⁴ WSDOT cannot have it both ways. These two sections are intrinsically linked—it makes no sense to have a rule that local development regulations cannot preclude the siting of essential public facilities if those regulations did not apply in the first place. WSDOT may not avail itself of the part it likes without conceding the part it dislikes.

2. WSDOT-specific statutes adopted after the GMA are consistent with the basic rule.

Amendments to the GMA and Chapter 47.01 RCW are consistent with the basic rule and the premise that WSDOT is subject to that rule. First, RCW 36.70A.430 requires that counties establish a “collaborative process to review and coordinate state and *local permits* for all

³ WSDOT merely dismisses Section 103 as “a broad, general statute.” Response at 40.

⁴ Response at 44, n. 11.

transportation projects that cross more than one city or county boundary.”⁵ WSDOT does not even discuss Section 430. It remains stark evidence that the legislature intended the basic rule to apply specifically to WSDOT.

Second, in RCW 36.70A.420, the legislature recognized “there are major transportation projects that affect multiple jurisdictions as to...land use implications,”⁶ and said “present environmental planning and permitting authority may result in multiple *local permits*” for the project.⁷ WSDOT contends Section 420 addresses only “environmental permitting.”⁸ WSDOT misreads the law. In the phrase “environmental planning and permitting,” “permitting” stands by itself and “environmental planning” refers to the environmental review required by the State Environmental Policy Act (“SEPA”).⁹ This is evident from the language of the GMA, where the only other reference to “environmental planning” is in the title of RCW 36.70A.385, which authorizes pilot projects to simplify environmental review under SEPA of proposed GMA comprehensive plans and development regulations. Likewise, the GMA establishes a “growth management planning and environmental review

⁵ RCW 36.70A.430 (emphasis added).

⁶ RCW 36.70A.420.

⁷ *Id.* (emphasis added).

⁸ Response at 31-32.

⁹ Local adoption of comprehensive plans and development regulations require SEPA review. *See, e.g.*, RCW 36.70A.040; RCW 43.21C.030(c); WAC 197-11-704(2)(b).

fund” focused on improving the interaction of environmental review under SEPA and project permitting consistent with the GMA.¹⁰ Local jurisdictions qualify for funding if they “[i]mprove[] the process for *project permit review* while maintaining environmental quality,” “[d]emonstrate that procedures for *review of development permit applications* will be based on the integrated plans and environmental analysis,” and “improve the efficiency and effectiveness of *the permitting process* by greater reliance on integrated plans and prospective environmental analysis.”¹¹ Because “environmental planning” in Section 420 refers to environmental review under SEPA, the rest of that section addresses the application to WSDOT of local development regulations through local permitting—consistent with the general rule and the WSDOT-specific Section 430, neither of which mentions the “environmental permitting” WSDOT now tries to read into the GMA.

Third, and also consistent with those other provisions, the pilot project established by former Chapter 47.06C RCW dealt with consolidating local permit processing. Cities electing to participate in the pilot project would “enter into an agreement with the department to define

¹⁰ RCW 36.70A.490 and .500.

¹¹ RCW 36.70A.500(2)(a), (3)(c), (4)(e) (emphasis added).

the *local permit* requirements that must be met.”¹² And as part of the process, local agencies would identify “[a]ll permits and other approvals it might require for the project.”¹³ Even where a local jurisdiction elected not to participate in a pilot project, the legislature said WSDOT “shall comply with all provisions of city, town, and county ordinances....”¹⁴ Again, WSDOT asserts incorrectly that this language is limited to some sort of local “environmental permit,” the only example of which WSDOT offers is a shoreline permit.¹⁵ Local governments do not issue “environmental permits.” Shoreline permits (which ultimately are state permits¹⁶) are land use and not “environmental permits”—they are issued pursuant to regulations in a county’s or city’s shoreline master program, which “shall be considered a part of the county or city's development regulations.”¹⁷

Finally, consistent with the basic rule, RCW 47.01.300 directs WSDOT to cooperate with “environmental regulatory authorities” to identify and initiate timely review of permits required for highway

¹² Former RCW 47.06C.060(2)(b) (emphasis added).

¹³ Former RCW 47.06C.070(3)(ii) (emphasis added).

¹⁴ Former RCW 47.06C.060(3).

¹⁵ Response at 30-32.

¹⁶ *Citizens for Rational Shoreline Planning v. Whatcom County*, 172 Wn.2d 384, 393, 258 P.3d 36, 41 (2011) (Shoreline Master Program is not a product of local government action).

¹⁷ RCW 36.70A.480(1). *Accord* Seattle Municipal Code (“SMC”) 23.02.010 (“This title [23] shall be known as the Land Use Code of The City of Seattle.”); SMC 23.60.002.A (“This chapter shall be known as the “Seattle Shoreline Master Program.”).

projects.¹⁸ Although WSDOT correctly notes “environmental regulatory authorities” is not a defined term,¹⁹ WSDOT incorrectly infers that term excludes cities or counties. The legislature adopted that language in the same bill adopting Section 430 of the GMA, which orders the establishment of “a mechanism among affected cities and counties to designate a permit coordinating agency to facilitate multijurisdictional review and approval of such transportation projects.”²⁰ It would be odd for the legislature to force local governments to coordinate local permit review of highway projects among themselves, but to simultaneously direct WSDOT to coordinate with all permitting authorities *other than* counties or cities for the same projects. More crucially, RCW 47.01.300 commands WSDOT to submit mitigation plans to “environmental regulatory authorities,”²¹ where those plans are necessarily for highway infrastructure development that must be “consistent with an approved land use planning process” under the GMA.²² The only way to ensure such consistency is through application of local development regulations and

¹⁸ RCW 47.01.300.

¹⁹ Response at 32.

²⁰ Laws of 1994, ch. 258, § 2 (adopting RCW 36.70A.430). *See, id.* § 4 (adopting RCW 47.01.300).

²¹ RCW 47.01.300(5).

²² RCW 90.74.010(4) (defining “infrastructure development”). RCW 47.01.300(5) refers to mitigation measures under RCW 90.74.040, which is itself part of a chapter requiring “mitigation plans” for “infrastructure development.” RCW 90.74.010(4) and (6).

local land use permitting. And the way to require permits of WSDOT is through application of the basic rule: WSDOT must comply with local development regulations that do not preclude the siting of an essential public facility.

3. WSDOT misreads other statutes as trumping the GMA's basic rule and preempting the City Grading Code.

Unable to find a hole in the GMA's clear basic rule or the statutes premised on that rule, WSDOT offers external reasons for ignoring the rule and preempting the City's Grading Code. These reasons do not withstand scrutiny.

WSDOT starts from the false premise that the City puts itself in the position of determining the design for the SR 520 project.²³ By being subject to local permits, WSDOT is in no different position than any other party developing a project: the developer may have to alter its design or construction methods to comply with local law, but that does not turn the City into the project designer.²⁴ The case WSDOT cites for support,

²³ Response at 10; Response at 34.

²⁴The City analogized WSDOT to a private developer and said WSDOT is not acting in a regulatory capacity when implementing RCW 47.01.260(1). City of Seattle's Opening Brief ("Opening Brief") at 17. WSDOT's response that it is acting in a governmental—not a proprietary—capacity when building highways misses the point. Response at 29-30. The City is arguing that, although RCW 47.01.260(1) grants WSDOT the authority to locate, design, and construct highways as the proprietor of the asset (even if that is considered a governmental function), it is in the same position as a private developer to the extent local regulations do not preclude the siting of an essential public facility.

Seattle Building and Construction Trades Council,²⁵ does not hold that the City cannot impose development conditions authorized by statute and code.²⁶

Claiming RCW 47.01.260(1) trumps the GMA's basic rule, WSDOT argues it has jurisdiction over state highways unless the power to regulate state highways was granted by the legislature.²⁷ But the legislature did just that when it declared "[s]tate agencies shall comply with local development regulations."²⁸ The cases WSDOT cite do not support its argument.²⁹ *Deaconess* did not address the GMA; it held only that a private hospital could not enjoin the construction of an interstate highway by filing a nuisance action.³⁰ *Seattle Building and Construction Trades Council* likewise did not address the GMA, holding merely that a local initiative could not determine whether a highway could be

WSDOT also cites RAP 2.5 in its objection to the City's analogy. The RAP provides that the Court "may refuse to review any claim of error which was not raised in the trial court." The City's argument does not raise a new claim of error.

²⁵ Response at 35.

²⁶ *Seattle Bldg. and Constr. Trades Council v. City of Seattle*, 94 Wn.2d 740, 747-48, 620 P.2d 82 (1980) (local initiative could not preclude the expansion of Interstate 90 when state law determined where highways would be built).

²⁷ Response at 38.

²⁸ RCW 36.70A.103.

²⁹ Response at 39-43, citing *Deaconess Hosp. v. Washington State Highway Comm'n*, 66 Wn.2d 378, 393, 403 P.2d 54 (1965); *Seattle Bldg. and Constr. Trades Council v. City of Seattle*, 94 Wn.2d 740, 747, 620 P.2d 82 (1980); *Residents Opposed to Kittitas Turbines v. State Energy Facility Site Evaluation Council (EFSEC)*, 165 Wn.2d 275, 308, 197 P.3d 1153 (2008).

³⁰ *Deaconess Hosp.*, 66 Wn.2d at 408.

expanded.³¹ And *Residents Opposed* addressed a different statute containing express language enabling one statute to supersede another—language absent from the statutory authority WSDOT musters.³²

WSDOT casts aside the rule that a statutory conflict should be resolved in favor of the more recent enactment.³³ So even though the legislature adopted the GMA’s basic rule and the slew of statutes premised on it well after consolidating highway jurisdiction in WSDOT, WSDOT contends RCW 47.01.260(1) prevails because it is more specific to state highways.³⁴ This formalistic reasoning makes no sense. Each body of law is specific to its own objective—RCW 47.01.260(1) is specific about what agency exercises dominion over state highways, and the GMA and related statutes are specific about what agencies exercise land use regulatory authority over state agencies generally, and state highways in particular.

WSDOT’s argument that RCW 47.01.260(1) trumps the GMA’s basic rule cannot be squared with WSDOT’s acknowledgement that it obtains “environmental permits.”³⁵ If WSDOT has full power over highways under RCW 47.01.260(1), that power must extend to all statutes requiring permits

³¹ *Seattle Bldg. and Constr. Trades Council*, 94 Wn.2d at 747.

³² *Residents Opposed to Kittitas Turbines*, 165 Wn.2d at 308; RCW 80.50.110(2).

³³ Response at 43-44. See, *Connick v. City of Chehalis*, 53 Wn.2d 288, 290, 333 P.2d 647 (1958) (law of statutory construction).

³⁴ Response at 41-44.

³⁵ Response at 44.

for highway projects, not just the GMA. For example, the Shoreline Management Act (“SMA”) says it “shall be applicable to all agencies of state government,”³⁶ just like the GMA provides “state agencies shall comply with the local comprehensive plans and development regulations.”³⁷ WSDOT cannot explain why it complies with the SMA and other statutes,³⁸ but not the GMA.

WSDOT tacitly acknowledges the unreasonableness of its argument when it states it will obtain a building permit for an office building.³⁹ If WSDOT’s interpretation of RCW 47.01.260(1) is correct, WSDOT would be free even of building permits. That law provides WSDOT “shall exercise all the powers...convenient, or incidental to the planning...and maintaining state highways...”⁴⁰ A WSDOT office tower to house engineers would certainly be “convenient, or incidental to the planning...and maintaining state highways” within the meaning of that law. If WSDOT reads that law correctly—if that law trumps the basic rule

³⁶ RCW 90.58.280.

³⁷ RCW 36.70A.103.

³⁸ See, <http://www.wsdot.wa.gov/Environment/Permitting/State.htm>. In a similar vein, WSDOT notes it complies with the Highway Runoff Manual and WAC Chapter 173-200, which implement Chapter 90.48 RCW, the Coastal Waters Protection Act. Response at 8-9. As with the SMA, WSDOT does not explain why it is subject to this statute but not the GMA’s basic rule.

³⁹ Response at 46. The state is subject to local building code regulation under Chapter 19.27 RCW.

⁴⁰ RCW 47.01.260(1); *Webster’s Third New Int’l Dictionary* at 497 (unabridged ed. 1993) (Convenient means “suited to the needs or the circumstances of a particular situation.”).

in the GMA—why would WSDOT need any local permit for an office tower? Why could WSDOT not erect an office tower for highway engineers in the middle of a single-family zone contrary to local development regulations? The answer is that WSDOT’s interpretation of the law proves too much—more even than WSDOT deems reasonable, as demonstrated by its selective application of that law in the context of building permits.

Chapter 47.52 RCW, which WSDOT cites but never analyzes, likewise does not trump the GMA’s basic rule. That chapter establishes the rights of WSDOT and abutting property owners regarding a “limited-access facility.”⁴¹ Like RCW 47.01.260(1), Chapter 47.52 is silent about applying local development regulations to highway projects. And the case WSDOT cites, *Seattle Building and Construction Trades Council*, arose before the GMA and its core ruling—that the state may determine where a limited access facility may be built—remains consistent with the GMA’s basic rule against local regulations being used to preclude the siting of essential public facilities.⁴²

⁴¹ RCW 47.52.010 (“For the purposes of this chapter, a “limited access facility” is defined as a highway or street especially designed or designated for through traffic, and over, from or to which owners of occupants of abutting land, or other persons, have no right or easement....”).

⁴² Response at 41, citing *Seattle Bldg. and Constr. Trades Council v. City of Seattle*, 94 Wn.2d 740, 747, 620 P.2d 82 (1980). Compare RCW 36.70A.200(5).

WSDOT also claims RCW 47.01.260(1) preempts the City's Grading Code. The test for preemption is "whether the ordinance permits or licenses that which the statute forbids and prohibits, and vice versa."⁴³ Courts harmonize statutes unless a conflict exists.⁴⁴ RCW 47.01.260(1) does not prohibit local regulation of highway projects, and the Grading Code can be harmonized because RCW 47.01.260(1) is silent on whether highway projects are subject to local development regulations.⁴⁵ This is like the situation in *Edmonds School District*, which held a school district was subject to a city's building code because the legislature had not directed that building permits be waived when constructing schools.⁴⁶

The case law WSDOT invokes does not support preemption of the Grading Code.⁴⁷ All are readily distinguishable. *State v. Mason* held preemption existed when the same criminal conduct could be punished as a felony under state law and a misdemeanor under city code.⁴⁸ *Snohomish County v. State* held a county zoning code was preempted where the code

⁴³ *Snohomish Cnty. v. State*, 97 Wn.2d 646, 649, 648 P.2d 430 (1982).

⁴⁴ *In re Estate of Kerr*, 134 Wn.2d 328, 343, 949 P.2d 810 (1998).

⁴⁵ RCW 47.01.260(1) (WSDOT has powers to design and build highways).

⁴⁶ *Edmonds School Dist. v. Mountlake Terrace*, 77 Wn.2d 609, 614, 465 P.2d 177(1970).

Accord City of Everett v. Snohomish Cnty., 112 Wn.2d 433, 442, 772 P.2d 992 (1989).

⁴⁷ Response at 36-38, citing *State v. Mason*, 34 Wn. App. 514, 520, 663 P.2d 137 (1983), *Snohomish Cnty. v. State*, 97 Wn.2d 646, 648, 650, 648 P.2d 430 (1982), *State v. Seattle*, 94 Wn.2d 162, 166, 615 P.2d 461 (1980), and *City of Union Gap v. Carey*, 64 Wn.2d 43, 390 P.2d 674 (1964).

⁴⁸ *State v. Mason*, 34 Wn. App. at 521.

precluded a prison that a statute directed be built at the Monroe facility.⁴⁹ *State v. Seattle* arose before the adoption of the GMA and the basic rule that state agencies must comply with local development regulations.⁵⁰ And *City of Union Gap v. Carey* held that local criminal traffic regulations were preempted by a state statute that required locally-adopted traffic controls be “approved by the State Highway Commission.”⁵¹ None of those decisions is germane to case WSDOT presents now.

In the end, WSDOT is left complaining that, as a matter of policy, it should not be subject to local regulation. WSDOT argues that subjecting it to local development regulations would make contract compliance more difficult.⁵² WSDOT cannot ground that complaint in the record of this case. The City did not impose additional standards when it required WSDOT to apply its own vibration standards to the easement areas,⁵³ and did not impose construction standards on the work bridges.⁵⁴ This case presents no opportunity to undercut the wisdom of the legislature’s decision that state agencies generally—and WDOT in particular—are subject to local development regulations that do not preclude the siting of

⁴⁹ *Snohomish Cnty. v. State*, 97 Wn.2d at 650.

⁵⁰ *State v. Seattle*, 94 Wn.2d at 166.

⁵¹ *City of Union Gap v. Carey*, 64 Wn.2d at 46.

⁵² Response at 33; Response at 46.

⁵³ CP 120-185; CP 106-107 (WSDOT vibration standards).

⁵⁴ Response at 32.

essential public facilities. Even if this case presented an example of the regulatory overreach WSDOT fears, WSDOT must direct its concerns to the legislature. WSDOT should not ask the courts to redraft clear law.

B. The Code regulates work in the temporary construction easements because they are outside a “highway right-of-way.”

The City Council exercised its authority under the GMA to subject WSDOT highway work to the City Grading Code, but only work outside a “highway right-of-way.”⁵⁵ The temporary construction easements are outside the SR 520 “highway right-of-way.” WSDOT attempts to redefine City law and cast the easements, despite evidence to the contrary, as part of the SR 520 “highway right-of-way.” These attempts are unsuccessful.

1. “Highway right-of-way” is a strip of land, any portion of which is open as a matter of right to public vehicular travel.

Within the meaning of City law and common parlance, “highway right-of-way” is a strip of land allowing one to pass over the land of another (a “right-of-way”⁵⁶) when a portion of that strip is open as a

⁵⁵ SMC 22.170.060.B.14. Reproduced at CP 252-254.

⁵⁶ SMC 23.84A.032 (““Right-of-way” means a strip of land platted, dedicated, condemned, established by prescription or otherwise legally established for the use of pedestrians, vehicles or utilities.”); *See, Kalinowski v. Jacobowski*, 52 Wn. 359, 362, 100 P. 852 (1909) (right-of-way is “a common expression occurring so frequently that it may be said that its meaning is well understood by intelligent persons generally, and that it is understood to be the right of a person to travel over a particular tract of land without interference”); *See also, Ryan Mercantile Co. v. Great Northern Ry. Co.*, 294 F.2d 629, 638 (9th Cir. 1961) (“The term ‘right of way’ is defined as meaning a right of passage over another person’s land, and it has been said that this definition has been so

matter of right to public vehicular travel.⁵⁷ Review of this definition is *de novo*;⁵⁸ and under LUPA, the reviewing court may grant relief only if the petitioner proves “[t]he land use decision is an erroneous interpretation of the law, after allowing for such deference as is due the construction of a law by a local jurisdiction with expertise.”⁵⁹

The City is entitled to deference. Contrary to WSDOT’s claim,⁶⁰ the City has consistently argued in this action that “highway right-of-way” means a strip of land when a part of it is open as a matter of right to public vehicular travel.⁶¹ WSDOT also claims the City is arguing that SR 520 is a single linear parcel of land.⁶² The City never argued this and agrees the strip of land constituting a highway right-of-way may contain separate parcels. What unites the parcels is they create the strip of land over some portion of which the public has a right to pass in vehicles.

universally incorporated into innumerable decisions that it may be said to be generally accepted.”).

⁵⁷ SMC 11.14.245 (“‘Highway’ means the entire width between the boundary lines of every way publicly maintained when any part thereof is open to the use of the public for purposes of vehicular travel.”). *Accord* RCW 46.04.197 (same definition); RCW 47.04.010(11) (“Every way, lane, road, street, boulevard, and every way or place in the state of Washington open as a matter of right to public vehicular travel...”).

⁵⁸ *Wells v. Whatcom Cnty. Water Dist. No. 10*, 105 Wn. App. 143, 150, 19 P.3d 453 (2001) (this Court sits in the same position as the Superior Court reviewing the case *de novo*). WSDOT argues the City did not challenge the trial court’s conclusion that WSDOT has statutory authority to determine what constitutes state highway right-of-way. Response at 10. WSDOT cites no authority that this Court does not have *de novo* review. And besides, the City took issue with that conclusion in its opening brief.

⁵⁹ RCW 36.70C.130(1)(b).

⁶⁰ Response at 11-12.

⁶¹ CP 235-237; City of Seattle’s Opening Brief at 24-25.

⁶² Response at 14.

WSDOT then argues it makes no sense for the City to require a grading permit for the temporary work bridges *outside* the highway right-of-way, but not to also require permits for the temporary support structures directly beneath the highway bridges that are *within* the highway right-of-way.⁶³ That is a policy argument best directed to the City Council. The GMA requires WSDOT to comply with local development regulations,⁶⁴ and the City acted within the GMA’s authority when it adopted regulations exempting WSDOT grading within the highway right-of-way.

2. The temporary construction easements are outside “highway right-of-way.”

WSDOT’s own plans show the temporary construction easements outside the SR 520 highway right-of-way boundary.⁶⁵ One of the plan sheets is included as Appendix A.⁶⁶ Even though temporary construction easements could be deemed “right-of-way” because they are strips of land allowing WSDOT access over another’s property; the easements are not “highway right-of-way” because no portion of those strips is open as a matter of right to public vehicular travel. The easement documents

⁶³ Response at 28.

⁶⁴ RCW 36.70A.103.

⁶⁵ CP at 99-104 (SR 520 limited-access boundary designated “limited access WSDOT right of way”); CP at 43-49, 51 (SR 520 limited-access boundary designated “limited access” and “existing RW [right of way]”).

⁶⁶ CP 43. For legibility purposes, the line showing the “limited access” (also labeled “existing RW [right-of-way]”) boundary has been darkened and the temporary construction easement cross-hatched.

confirm that only WSDOT, not the public, has a right of access over the easements.⁶⁷ WSDOT's claim that the temporary construction easements are part of the highway right-of-way⁶⁸ is not supported by the record.

3. WSDOT's interpretation of the City Code is entitled to no deference, especially because WSDOT misinterprets "highway right-of-way" to mean any "right-of-way."

While acknowledging that LUPA requires courts to give deference to a local jurisdiction's interpretation of its own law,⁶⁹ WSDOT nevertheless claims it has authority to define "state highway right-of-way" within the meaning of the City Grading Code.⁷⁰ WSDOT's justifications for this claim lack merit.

First, WSDOT asserts the term is defined nowhere in the City Code. WSDOT overlooks City definitions of "highway"⁷¹ and "right-of-way."⁷² Even if "state highway right-of-way" could not be readily inferred from those definitions, a court must give effect to a statutory term's plain

⁶⁷ The easement documents allow only grading-related construction work to occur within the easements; they grant WSDOT no right to allow others to pass over the property. CP 53, 60, 72.

⁶⁸ Response at 34.

⁶⁹ See, RCW 36.70C.130(1)(b); *City of Federal Way v. Town & Country Real Estate, LLC*, 161 Wn. App. 17, 37-38, 252 P.3d 382, 392-393 (2011).

⁷⁰ Response at 20-21.

⁷¹ SMC 11.14.245 ("Highway" means the entire width between the boundary lines of every way publicly maintained when any part thereof is open to the use of the public for purposes of vehicular travel.")

⁷² SMC 23.84A.032 ("Right-of-way" means a strip of land platted, dedicated, condemned, established by prescription or otherwise legally established for the use of pedestrians, vehicles or utilities.")

meaning as an expression of legislative intent,⁷³ and may turn to dictionary definitions to determine that meaning.⁷⁴ The City has already demonstrated how dictionary definitions are consistent with the City's interpretation of "state highway right-of-way."⁷⁵ No rule of construction allows the state as a party to a dispute, as WSDOT does here, to declare itself the arbiter of local law simply because the word "state" appears in the term.

Even if WSDOT could determine the definition of "state highway-right-of-way" under City law, there is no state definition of "state highway right-of-way," as WSDOT claims.⁷⁶ RCW 47.01.260(1) does not give WSDOT authority to define "highway right-of-way."⁷⁷ The statute gives WSDOT the authority to plan, construct, and maintain state highways.⁷⁸ Under RCW 47.01.260(1), WSDOT may determine what property and interests it will acquire, but that does not give WSDOT the authority to define City law. And although *Deaconess* and *Washington Toll Bridge Authority* support the argument that WSDOT may determine what

⁷³ *Gorre v. City of Tacoma*, 180 Wn. App. 729, 732, 324 P.3d 716 (2014).

⁷⁴ *Shoreline Community College v. Employment Sec.*, 120 Wn.2d 394, 403, 842 P.2d 938 (1992).

⁷⁵ CP 235-237.

⁷⁶ Response at 21 ("the Court should defer to WSDOT's definition of "state highway right of way" since it is defined in RCW Title 47"); Response at 48.

⁷⁷ Response at 16-18.

⁷⁸ RCW 47.01.260(1).

property interests it may acquire, the cases do not convey to WSDOT the authority to define City code.⁷⁹

WSDOT's statutory "right-of-way" citations do not undercut the City's definition of "highway right-of-way" either. RCW 47.14.020(1) applies only to Chapter 47.14, which deals with donating private property for a highway purpose, be it right-of-way or highway right-of-way.⁸⁰ The only other definition in RCW 47.14.020, "airspace," is the space "within approved right-of-way lines."⁸¹ The air above a temporary construction easement is not "airspace" just as a temporary construction easement is not highway right-of-way; neither is within the approved highway right-of-way lines. WSDOT also twists RCW 47.14.020(1) to mean "*any* land *needed* for transportation purposes."⁸² The statute actually speaks of "*the area* of land *designated* for transportation purposes."⁸³ Temporary construction easements comprise land needed for transportation purposes even though no portion of them is open as a matter of right to public vehicular traffic, but the easements are not among the areas designated for transportation purposes as highway right-of-way.

⁷⁹ Response at 16-17, citing *Deaconess Hosp. v. Washington State Highway Comm'n*, 66 Wn.2d 378, 393, 403 P.2d 54 (1965); *State ex rel. Washington Toll Bridge Authority v. Yelle*, 197 Wash. 110, 115, 84 P.2d 688 (1938).

⁸⁰ RCW 47.14.010.

⁸¹ RCW 47.14.020(2).

⁸² Response at 26 (emphasis added).

⁸³ RCW 47.14.020(1) (emphasis added).

RCW 47.04.040 addresses transfer of “designated” highways “including the roadway and ditches and existing drainage facilities, together with all appurtenances” to the state.⁸⁴ WSDOT argues ditches and drainage facilities are not typically open to the public or allowed to be driven on, and that this statute treats them as part of the highway right-of-way.⁸⁵ The City agrees that publicly-inaccessible ditches or drainage facilities may be within a “designated” highway right-of-way—only a *portion* of a right-of-way needs to be open as a matter of right to public vehicular travel for the right-of-way to be considered highway right-of-way. That does not mean the temporary construction easements are within SR 520’s “designated” highway right-of-way.

RCW 47.24.020(6) provides that, when necessary for public safety, the state will assume maintenance “within the right-of-way to protect the roadway.”⁸⁶ Based on this, WSDOT states the “roadway” and the “right-of-way” are not the same.⁸⁷ The City agrees: roadways are typically within and part of a right-of-way, just like vehicles that travel along the SR 520 roadway are within the larger highway right-of-way. But that does

⁸⁴ RCW 47.04.040.

⁸⁵ Response at 23-24; Response at 47, citing RCW 46.61.160 (WSDOT may restrict pedestrian and bicycle use of limited-access highway; RCW 46.61.150 (cannot drive on medians).

⁸⁶ Response at 24, citing RCW 47.24.020(6); RCW 47.04.010(32) (A “roadway” is “[t]he paved, improved, or proper driving portion of a highway designed, or ordinarily used for vehicular travel.”).

⁸⁷ Response at 24.

nothing to prove temporary construction easements located outside of a highway right-of-way are part of that highway right-of-way.

WSDOT cites RCW 47.24.020(15), which allows unused portions of certain street rights-of-way to be sold. From this WSDOT concludes that portions of a right-of-way unused for transportation purposes can still be considered part of the right-of-way.⁸⁸ Again, the City agrees that a right-of-way (highway or otherwise) may include land that is not used for transportation or any other active purpose. But again, that does nothing to prove that the SR 520 highway right-of-way includes the temporary construction easements at issue in this case .

Next, WSDOT turns to RCW 47.28.020, which requires the right-of-way for state highways be 100-feet-wide, and argues the statute does not require that all of the right-of-way be paved or accessible to the public.⁸⁹ The City agrees that not all of a highway right-of-way need be paved and open to the public. Indeed, portions of state highway right-of-way remain closed to public access, but the right-of-way remains a “highway right-of-way” because some portion of the strip remains open as a matter of right to public vehicular traffic. That does not mean the temporary construction easements here are part of the SR 520 highway

⁸⁸ Response at 24-25.

⁸⁹ Response at 25.

right-of-way. To the contrary, a companion statute, RCW 47.28.025, provides that after WSDOT establishes a limited-access facility, the “description, plan, and resolution shall then be recorded in the office of the county auditor.”⁹⁰ The WSDOT-prepared plan for SR 520 shows the temporary construction easements outside the highway right-of-way.⁹¹

Although WSDOT invokes “right-of-way” citations to support its argument that the temporary construction easements are highway right-of-way, WSDOT never examines “highway.” This is crucial: WSDOT’s argument that the temporary construction easements are highway right-of-way fails when “highway” is included in the phrase. Because no portion of the easements is open as a matter of right to public vehicular traffic, those easements do not constitute *highway* right-of-way.

Finally, WSDOT misreads RCW 47.12.010 as supporting its argument that all right-of-way is highway right-of-way.⁹² That statute authorizes WSDOT to acquire three categories of property: right-of-way for highways; various sites; and right-of-way to reach the first two categories. If “highway right-of-way” meant every interest in land WSDOT could acquire, there would be no need for the legislature to distinguish those three categories of property. In fact, there would be no

⁹⁰ RCW 47.28.025.

⁹¹ CP 43-49, 51, 99-104.

⁹² Response at 12-13.

need for RCW 47.12.160 or 47.12.250, which authorize WSDOT to acquire interests of land outside the highway right-of-way.⁹³ The legislature understands what WSDOT refuses to accept: not all land or right-of-way WSDOT acquires to advance its laudable transportation purposes constitutes highway right-of-way.

St. Louis v. Wabash also provides no support for WSDOT's argument that all rights-of-way are highway right-of-way.⁹⁴ *St. Louis* did not address whether a property interest outside a right-of-way is part of the right-of-way, and did not question that all the facilities were within the right-of-way.⁹⁵ WSDOT cites RCW 47.12.026 and *State v. Pink*, and argues that WSDOT may acquire highway right-of-way through a permanent easement.⁹⁶ WSDOT's ability under the statute to acquire an

⁹³ WSDOT quibbles with the City's characterization of the temporary easements as "sites" for constructing structures for the highway right-of-way. WSDOT complains the City omitted the phrase "for exclusive use by an urban transportation system" in its citation of RCW 47.12.010. Response at 15. WSDOT may parse the statutory run-on sentence differently, but under the statute WSDOT may acquire any site for "the construction and maintenance of structures and facilities...for exclusive...use by an urban public transportation system, or for any other highway purpose...." RCW 47.12.010 (emphasis added).

⁹⁴ Response at 13.

⁹⁵ All the railroad facilities disputed by the railroad companies were *within* the railroad right-of-way. See, *St. Louis*, 217 U.S. at 252 (railroad consisted of fee ownership and "an easement for the passage of its trains and engines"); *St. Louis, K.C. & C.R. Co. v. Wabash R. Co. et al.*, 152 F.849 (1907) (railroad consisted of fee ownership and "an easement for the passage of its trains and engines" and "was operating a main track, side tracks, switches, and terminal facilities upon this property").

⁹⁶ Response at 14, citing *State v. Pink*, 144 Wn. App. 945, 953, 185 P.3d 634 (2008).

easement for highway right-of-way,⁹⁷ or dispose of an easement for highway right-of-way, or acquire highway right-of-way by permanent easement under *State v. Pink*, does not turn temporary construction easements into highway right-of-way.

III. CONCLUSION

WSDOT has failed to demonstrate that it is not subject to the City's Grading Code or that the temporary construction easements are exempt "highway right-of-way." The City respectfully requests that the Court reverse the trial court and deny WSDOT's petition.

DATED this 25th day of June, 2015.

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Assistant City Attorneys
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Seattle*

⁹⁷ RCW 47.12.026(1) (WSDOT may acquire an easement for *highway* or toll facilities *right-of-way*).

APPENDIX B: CITED SEATTLE MUNICIPAL CODE SECTIONS

- SMC 22.170.060.B.14
- SMC 23.02.010
- SMC 23.60.002.A
- SMC 11.14.245
- SMC 23.84A.032

22.170.055 Applicability of city laws

A grading permit application shall be considered under the applicable city law in effect on the date a complete permit application is submitted that complies with all the requirements of subsection 22.170.070.B.1 through 22.170.070.B.5 and 22.170.070.C.1.

(Ord. 124617, § 1, 2014.)

Note—Applicable city law includes but is not limited to Title 23, Seattle Land Use Code; Chapter 25.09, Environmentally Critical Areas regulations; Chapter 25.09, Tree Protection regulations; and the Seattle Building, Residential, Mechanical, Fuel Gas, Energy, Stormwater, Grading and Side Sewer codes.

22.170.060 Grading Permit Required

A. Grading Permit Required. Except as otherwise specifically provided in this code, a grading permit shall be obtained from the Director before commencing any activity for which a permit is required as specified in subsection 22.170.060.A. The required grading permit may be a component of a building permit, and, in this case, a separate grading permit is not required. The provisions of this chapter apply to a grading permit that is a component of a building permit except as expressly otherwise stated. Actions exempt from the requirement for a grading permit are specified in subsection 22.170.060.B.

1. General. A grading permit is required prior to any of the actions in subsection 22.170.060.A.1, whether or not the site is subject to any other provision of subsection 22.170.060.A:

a. Changing existing grade at any location more than 4 feet measured vertically, if the combined volume of excavation, filling, and other movement of earth material on a site is more than 50 cubic yards;

b. Changing the existing grade at any location more than 4 feet measured vertically, if the grading will result in a permanent slope steeper than 3 horizontal to 1 vertical;

c. Changing the existing grade at any location more than 4 feet measured vertically, if there will be a temporary slope steeper than 1 horizontal to 1 vertical;

d. Any grading if the combined volume of excavation, filling, and other movement of earth material exceeds 500 cubic yards;

e. One acre or more of land disturbing activity on a site;

f. Two thousand square feet or more of new plus replaced impervious surface.

2. Shoreline District. In the Shoreline District as established in Section 23.60.010 a grading permit is required:

a. If there will be any grading of lands covered by water;

b. If there will be any land disturbing activity within 100 feet of the ordinary high water mark; or

c. If the combined volume of excavation, filling, and other movement of earth material is more than 25 cubic yards in the area between 100 and 200 feet of the ordinary high water mark.

3. Environmentally Critical Areas and Buffers. A grading permit is required for:

a. Any land disturbing activity in riparian corridors, wetlands, wetland buffers, and shoreline buffers;

b. Land disturbing activity in liquefaction-prone areas, abandoned landfills, seismic hazards areas, peat settlement-prone areas, and volcanic hazard areas, if any threshold in subsection 22.170.060.A.1 is met or exceeded;

c. Land disturbing activity in any Environmentally Critical Area not listed in subsections 22.170.060.A.3.a and 22.170.060.A.3.b, if the combined volume of excavation, filling, and other movement of earth material is more than 25 cubic yards or grading reaches any threshold in subsection 22.170.060.A.1.

4. Potentially Hazardous Locations. A grading permit is required for any volume of excavation, filling, or other movement of earth material in potentially hazardous locations as defined in Section 22.170.050.

5. In-Place Ground Modification. A grading permit is required for any in-place ground modification. The Director may waive the requirement for a grading permit if the Director determines the in-place ground modification will be insignificant in amount or type.

6. Temporary Stockpiles. A grading permit is required for temporary stockpiles that meet or exceed any applicable threshold of subsection 22.170.060.A.1 through 22.170.060.A.5 and that are not located on sites for which a valid grading permit has been issued.

7. Grading Near Public Places. A grading permit is required to excavate or fill in excess of 3 feet, measured vertically, on private property within any area between the vertical prolongation of the margin of a public place, and a 100 percent slope line (45 degrees from a horizontal line) from the existing elevation of the margin of a public place to the proposed elevation of the private property. See Sections 15.44.020 and 15.44.030.

22.170.060 BUILDING AND CONSTRUCTION CODES

B. Exemptions. A grading permit is not required for the activities listed in subsection 22.170.060.B.

1. Activity conducted in the public right of way by a City agency, or under a street use permit that specifically authorizes the activity;

2. Excavation and filling of cemetery graves;

3. Exploratory excavations that comply with the requirements of subsection 22.170.190.N;

4. Operation of sewage treatment plant sludge settling ponds;

5. Operation of surface mines for the extraction of mineral and earth materials subject to the regulations and under a permit of the State of Washington;

6. Stockpiling and handling of earth material when the earth material is consumed or produced in a process that is the principal use of the site and that complies with the requirements of subsection 22.170.190.M;

7. Maintenance or reconstruction of active tracks and yards of a railroad in interstate commerce within its existing right-of-way;

8. Maintenance or reconstruction of the facilities of parks and playgrounds including work required for the protection, repair, replacement or reconstruction of any existing paths, trails, sidewalks, public improvement or public or private utility, and the stockpiling of material for these maintenance and reconstruction activities;

9. Excavation and filling of post holes;

10. Trenching and backfilling for the installation, reconstruction or repair of utilities on property other than a public right-of-way;

11. Grading done as part of a City public works project (see also Section 22.800.070);

12. Public works and other publicly funded activities on property owned by public entities, when all of the following conditions are satisfied:

a. Stormwater discharges from the property do not enter the public drainage control system or the public combined sewer system;

b. The project will not undercut or otherwise endanger adjacent property; and

c. The Director has waived grading permit requirements by interagency agreement.

13. Underground storage tank removal and replacement that is subject to regulation by a state or federal agency, unless any grading is done on a potentially hazardous location. See subsection 22.170.060.A.

14. Development undertaken by the Washington State Department of Transportation in state highway right-of-way that complies with

standards established pursuant to Chapter 173-270 Washington Administrative Code, the Puget Sound Highway Runoff Program;

15. On-site work required for construction, repair, repaving, replacement or reconstruction of an existing road, street or utility installation in a public right-of-way.

C. Compliance Required. All grading and other land disturbing activity, whether or not it requires a grading permit, shall comply with the provisions of this code, the Stormwater Code, and all other applicable laws.

(Ord. 123107, § 1, 2009.)

22.170.070 Application Requirements for Grading Permits

A. General. To obtain a grading permit, the owner shall first file an application with the Director. All applications shall contain the information required in Section 22.170.070, and all additional information required by or pursuant to the Stormwater Code.

B. Plans and Information Required.

1. Projects Requiring Plans. The information listed in subsection 22.170.070.B shall be provided on plans submitted with each application for a grading permit.

Exceptions:

a. When the only grading included in an application is for an approved drainage control plan the information required in subsection 22.170.070.B is not required.

b. When the only grading included in an application for a building permit is excavation and replacement of earth material within an area 4 feet or less from the footing lines of a building or structure, plans are not required, except that the applicant shall show the location of temporary stockpiles and the slope of temporary cuts.

2. Requirements for Plans. The following information shall be submitted with applications for grading permits requiring plans.

a. A general vicinity map and legal description of the site;

b. A site plan showing:

- 1) location of existing buildings and structures, easements, utilities and other surface and above-ground improvements on the site;

- 2) the approximate location of all buildings, structures, impervious surface and other improvements on adjacent land;

- 3) the location of existing and planned temporary and permanent drainage control facilities, existing and proposed drainage

Introduction: User Information

The Land Use Code contains provisions typically associated with determining what use may be made of a person's property. It is organized in subtitles which describe the general provisions of Title 23 (Subtitle I), incorporate City approvals necessary for the division of land (Subtitle II), detail the establishment of zones and the use regulations and development standards applicable within zones (Subtitle III) and coordinate the administrative and enforcement procedures necessary to implement the land use regulations (Subtitle IV).

While the provisions of Title 23 are integrated and extensive, they do not include all requirements conceivably related to development. For example, with the exception of the coordination of environmental review requirements in the Master Use Permit process, those regulations detailing construction specifications, i.e., building, grading, drainage, etc., are set forth in Title 22, "Building and Construction Codes." Landmark districts and landmark preservation provisions are found in Title 25. The City's SEPA ordinance and environmentally critical areas ordinance are also set forth in Title 25.
(Ord. 110381 § 1(part), 1982.)

Subtitle I.

General Provisions

**Chapter 23.02
TITLE AND PURPOSE**

Sections:

- 23.02.010 Title.**
- 23.02.020 General purpose and general provisions**

23.02.010 Title.

This title shall be known as the Land Use Code of The City of Seattle.
(Ord. 110381 § 1(part), 1982.)

23.02.020 General purpose and general provisions

A. The purpose of this Land Use Code is to protect and promote public health, safety and general welfare through a set of regulations and procedures for the use of land which are consistent with and implement the City's Comprehensive Plan. Procedures are established to increase citizen awareness of land use activities and their impacts and to coordinate necessary review processes. The Land Use Code classifies land within the City into various land use zones and overlay districts in order to regulate uses and structures. The provisions are designed to provide adequate light, air, access, and open space; conserve the natural environment and historic resources; maintain a compatible scale within an area; minimize traffic congestion and enhance the streetscape and pedestrian environment. They seek to achieve an efficient use of the land without major

disruption of the natural environment and to direct development to lots with adequate services and amenities.

B. Other regulations apply, such as but not limited to building and construction codes (SMC Title 22) and provisions for environmental review, critical areas, noise control, tree protection, and historic preservation (SMC Title 25).

C. All structures or uses shall be built or established on a lot or lots.

D. A grant of a waiver, modification, departure, exception or variance from one specific development standard does not relieve the applicant from compliance with any other standard.
(Ord. 123209, § 1, 2009; Ord. 117570 § 4, 1995; Ord. 110381 § 1(part), 1982.)

**Chapter 23.04
APPLICABILITY**

Sections:

- 23.04.010 Transition to the Land Use Code**
- 23.04.040 Major Institution transition rule.**

23.04.010 Transition to the Land Use Code

A. General Rules of Interpretation. Except as otherwise provided, all permits and land use approvals lawfully issued pursuant to repealed provisions of Title 24 or pursuant to a Title 24 zoning classification no longer applicable to the property shall remain in full force and effect for two (2) years from the effective date of repeal or zoning reclassification or until the expiration date of the respective permit or approval if the date is less than two (2) years from the effective date of repeal or zoning reclassification; provided, that permits issued after the effective date of repeal or zoning reclassification shall remain in full force and effect for two (2) years from the date the permit is approved for issuance as described in Chapter 23.76, Procedures for Master Use Permits and Council Land Use Decisions.

B. Existing Contract Rezones. Contract rezones approved under Title 24 shall remain in effect until the date specified in the rezone property use and development agreement (PUDA). If no expiration date is specified, the rezone shall remain in effect for two years from the effective date of Title 23 zoning for the property or, in the case of downtown, from the effective date of Ordinance 112303* adopting permanent Title 23 zoning for downtown. When Title 23 zoning goes into effect, the property may, at the election of the property owner, be developed pursuant to either the existing rezone property use and development agreement or Title 23. When the contract rezone expires the property shall be regulated solely by the requirements of Title 23. If a property is subject to a PUDA approved under Title 24 and the owner wishes to develop under Title 23, the property may be released from the conditions of the PUDA by the City Council without following the PUDA amendment procedures in 23.76.058.

*Editor's note—Ordinance 112303 was adopted on June 10, 1985.

	Part 1		
	Uses		
23.60.840	Uses permitted outright on waterfront lots in the UI Environment.	23.60.942	"V."
		23.60.944	"W."
		23.60.946	"Y."
			Subchapter XVII
			Measurements
23.60.842	Special uses permitted on waterfront lots in the UI Environment.	23.60.950	Measurements in the Shoreline District.
23.60.844	Conditional uses on waterfront lots in the UI Environment.	23.60.952	Height.
23.60.846	Council conditional uses on waterfront lots in the UI Environment.	23.60.954	View corridors.
		23.60.956	Calculation of lot depth.
		23.60.958	Calculation of percent of a lot occupied by a specific use.
23.60.848	Principal uses prohibited on waterfront lots in the UI Environment.	23.60.960	Calculation of percent of lot occupied by a water-dependent use for purposes of the water-dependent incentive in the Urban Harborfront Environment.
23.60.850	Permitted uses on upland lots in the UI Environment.		
23.60.852	Prohibited uses on upland lots in the UI Environment.	23.60.962	Calculation of lot width for piers accessory to residential development.
23.60.854	Public facilities.		
	Part 2		
	Development Standards		
23.60.870	Development standards for the UI Environment.		
23.60.872	Height in the UI Environment.		
23.60.874	Lot coverage in the UI Environment.		
23.60.876	View corridors in the UI Environment.		
23.60.878	Setbacks in the UI Environment.		
23.60.880	Development standards specific to water-related uses on waterfront lots in the UI Environment.		
23.60.882	Regulated public access in the UI Environment.		
	Subchapter XVI		
	Definitions		
23.60.900	Definitions generally.		
23.60.902	"A."		
23.60.904	"B."		
23.60.906	"C."		
23.60.908	"D."		
23.60.910	"E."		
23.60.912	"F."		
23.60.914	"G."		
23.60.916	"H."		
23.60.918	"I."		
23.60.920	"J."		
23.60.922	"K."		
23.60.924	"L."		
23.60.926	"M."		
23.60.928	"N."		
23.60.930	"O."		
23.60.932	"P."		
23.60.934	"R."		
23.60.936	"S."		
23.60.938	"T."		
23.60.940	"U."		
			Severability —The Seattle Shoreline Master Program is declared to be severable. If any section, subsection, paragraph, clause or other portion of any part adopted by reference is for any reason held to be invalid or unconstitutional by any court of competent jurisdiction, such invalidity or unconstitutionality shall not affect the validity or constitutionality of the remaining portions of the Seattle Shoreline Master Program. If any section, subsection, paragraph, clause or any portion is adjudged invalid or unconstitutional as applied to a particular property, use or structure, the application of such portion of the Seattle Shoreline Master Program to other property, uses or structures shall not be affected. (Ord. 113466 § 5, 1987.)
			Subchapter I Purpose and Policies
		23.60.002	Title and purpose.
			A. Title. This chapter shall be known as the "Seattle Shoreline Master Program."
			B. Purpose. It is the purpose of this chapter to implement the policy and provisions of the Shoreline Management Act and the Shoreline Goals and Policies of the Seattle Comprehensive Plan by regulating development of the shorelines of the City in order to:
			1. Protect the ecosystems of the shoreline areas;
			2. Encourage water-dependent uses;
			3. Provide for maximum public use and enjoyment of the shorelines of the City; and
			4. Preserve, enhance and increase views of the water and access to the water.
			(Ord. 118793 § 1, 1997; Ord. 118408 § 4, 1996; Ord. 113764 § 1(part), 1987; Ord. 113466 § 2(part), 1987.)
		23.60.004	Shoreline goals and policies.
			The Shoreline Goals and Policies are part of the Land Use Element of Seattle's Comprehensive Plan. The Shoreline Goals and Policies and the purpose and location criteria for each shoreline environment designation contained in SMC Section 23.60.220 shall be considered in making all discretionary decisions in the

card certifying that they have completed the Flagger's Course as conducted by The State of Washington, Department of Labor and Industries.

(Ord. 108200, § 2(11.14.390), 1979.)

11.14.225 Flammable liquid.

"Flammable liquid" means any liquid defined as flammable by the Seattle Fire Code.*

(Ord. 108200, § 2(11.14.393), 1979.)

11.14.227 Food vehicle

"Food vehicle" means a licensed and operable motor vehicle used to serve, vend, or provide food or nonalcoholic beverages for human consumption from a fixed location or along a route in a public place as authorized by Public Health—Seattle & King County and Chapter 15.17.

(Ord. 123668, § 1, 2011; Ord. 123659, § 2, 2011.)

11.14.228 Food-vehicle zone

"Food-vehicle zone" means a portion of a public place designated by a sign or other traffic control device that is reserved for the exclusive use of food vehicles that are permitted to vend in the curb-space portion of the public place.

(Ord. 123659, § 3, 2011.)

11.14.230 Foreign career consul.

A "foreign career consul" means a career foreign service diplomat who is a citizen of the country he represents and who has been appointed by his government to be one of its official foreign policy spokesmen in this country.

(Ord. 108200, § 2(11.14.396), 1979.)

11.14.235 For-hire car.

"For-hire car" means for-hire vehicles as defined by the Seattle License Code.†

(Ord. 108200, § 2(11.14.399), 1979.)

11.14.237 Free-floating car sharing

A. "Free-floating car sharing" means a system in which a fleet of vehicles is made available for use by members of a free-floating car sharing organization whereby: a) persons or entities that become members are permitted to use free-

*Editor's note—The Fire Code is codified in Title 22 of this Code.

†Editor's note—The License Code provisions regarding for-hire vehicles are codified in Chapters 6.310 and 6.315 of this Code.

floating car sharing vehicles from the fleet on a limited, fee-per-use basis; b) free-floating car sharing vehicles may be parked in any on-street parking space within the free-floating zone pursuant to meeting the standards and restrictions set forth in Title 11 including Section 11.23.160; and c) a separate written agreement is not required each time a member reserves or uses a vehicle from the fleet.

B. "Free-floating zone" or "FFZ" means a geographic area with a delineated boundary in which a free-floating car sharing vehicle may be parked.

C. "Free-floating car sharing permit" means a permit issued by SDOT to vehicles in a free-floating car sharing fleet that allows each free-floating car sharing vehicle to utilize the parking privileges authorized through the free-floating car sharing program as described in Section 11.23.160.

(Ord. 124063, § 1, 2012.)

11.14.240 Hazardous materials.

"Hazardous materials" means any material defined as hazardous by the Seattle Fire Code.‡

(Ord. 108200, § 2(11.14.400), 1979.)

11.14.245 Highway.

"Highway" means the entire width between the boundary lines of every way publicly maintained when any part thereof is open to the use of the public for purposes of vehicular travel. (RCW 46.04.431)

(Ord. 108200, § 2(11.14.405), 1979.)

11.14.250 Hours of darkness.

"Hours of darkness" means the hours from one-half (½) hour after sunset to one-half (½) hour before sunrise, and any other time when persons or objects may not be clearly discernible at a distance of five hundred (500) feet. (RCW 46.04.200)

(Ord. 108200, § 2(11.14.410), 1979.)

11.14.255 Hulk hauler.

"Hulk hauler" means any person who deals in vehicles for the sole purpose of transporting and/or selling them to a licensed motor vehicle wrecker or scrap processor in substantially the same form

‡Editor's note—The Fire Code is codified in Title 22 of this Code.

structure, except for those features that are otherwise allowed as exceptions to the applicable height limit of the zone.

"Porch" means an elevated platform extending from a wall of a principal structure, with steps or ramps to the ground providing access by means of a usable doorway to the structure. A porch may be connected to a deck. (See also "Deck.")

"Power plant." See "Utility."

"Preliminary plat" means a neat and approximate drawing of a proposed subdivision showing the general layout of streets and alleys, lots, blocks and other elements of a subdivision, that is submitted to furnish a basis for the approval or disapproval of the general layout of a subdivision.

"Principal structure" means the structure housing one or more principal uses as distinguished from any separate structures housing accessory uses.

"Principal use." See "Use, principal."

"Private club." See "Institution."

"Private usable open space." See "Open space, usable, private."

"Project permit" or "Project permit application." See RCW 36.70B.020.

"Property Use and Development Agreement" means an agreement, executed by the legal or beneficial owner of property whose zoning classification is changed by a contract rezoning, which subjects the property to restrictions on its use and development.

"Public atrium" means a feature consisting of an indoor public open space that provides opportunities for passive recreational activities and events, and for public gatherings, in an area protected from the weather, and including such amenities as seating, landscaping and artwork.

"Public benefit feature" means an amenity, use, or other feature of benefit to the public in a Downtown zone, that is provided by a developer and that can satisfy wholly or in part conditions to qualify for an increase in chargeable floor area. Examples include public open space, pedestrian improvements, housing, and provision of human services.

"Public Benefit Features Rule" means the DPD Director's Rule 20-93, subject heading Public Benefit Features: Guidelines for Evaluating Bonus and TDR Projects, Administrative Procedures and Submittal Requirements in Downtown Zones, to the extent the provisions thereof have not been superseded by amendments to, or repeal of, provisions of this title. References to the "Public Benefit Features Rule" for provisions on a particular subject also shall include, where applicable, any successor rule or rules issued by the Director to incorporate provisions on that subject formerly included in Rule 20-93, with any appropriate revisions to implement amendments to this title since the date of such rule.

"Public boat moorage." See "Boat moorage, public."

"Public convention center" means a public facility of three hundred thousand (300,000) square feet or more, the primary purpose of which is to provide facilities for regional, national and international conventions and that is owned, operated or franchised by a unit of

general or special-purpose government. A public convention center may include uses such as shops, personal services and restaurants, which may be owned, operated or franchised by either a unit of general- or special-purpose government or by a private entity.

"Public display space." See "Museum."

"Public facility" means a public project or city facility.

"Public project" means a facility owned, operated or franchised by a unit of general or special-purpose government except The City of Seattle.

"Public school site, existing" means any property acquired and developed for use by or for the proposed public school before November 12, 1985. A public school site may be divided by streets or alleys.

"Public school site, new" means any property that has not been previously developed for use by a public school that is to be constructed, expanded or remodeled. A public school site may be divided by streets or alleys. A school property may include both a new school site and existing school sites.

(Ord. 124378, § 91, 2013; Ord. 124172, § 64, 2013; Ord. 123913, § 47, 2012; Ord. 122497, § 14, 2007; Ord. 122311, § 100, 2006)

23.84A.032 "R"

"Rail transit facility." See "Transportation facility."

"Railroad switchyard." See "Vehicle storage and maintenance" under "Transportation facility."

"Railroad switchyard with mechanized hump." See "Vehicle storage and maintenance" under "Transportation facility."

"Rain garden" see "bioretention facilities"

"Receive-only communication device." See "Communication devices and utilities."

"Reception window obstruction." See "Communication devices and utilities."

"Recreational area, common" means a space of appropriate size, shape, location and topographic siting to provide landscaping, pedestrian access or opportunity for recreational activity, either in or out of doors, for all the residents of a structure containing dwelling units. Parking areas and driveways are not common recreational areas.

"Recreational marina." See "Boat moorage" under "Parking and moorage" under "Transportation facility."

"Recreational vehicle" means a wheeled vehicle designed for temporary occupancy with self-contained utility systems and not requiring a separate highway movement permit for highway travel. A recreational vehicle is not a dwelling unit.

"Recycling." See "Utility."

"Regional development credit" means an entitlement to development potential on property in unincorporated King, Snohomish, or Pierce County as defined and certified by King, Snohomish, or Pierce County.

"Regional development credit, agricultural" means a regional development credit that King, Snohomish, or Pierce County has designated as having originated from a parcel zoned for agricultural uses.

"Regional development credit, forest" means a regional development credit that King, Snohomish, or Pierce County has designated as having originated from a parcel zoned for forestry uses.

"Regional development credit, rural" means a regional development credit that King, Snohomish, or Pierce County has designated as having originated from a parcel that was not specifically zoned for agricultural or forestry uses.

"Religious facility." See "Institution."

"Research and development laboratory." See "Laboratory, research and development."

"Residential district identification sign" means an off-premises sign that gives the name of the group of residential structures, such as a subdivision.

"Residential hillside terrace" means an amenity feature consisting of an extension of the public sidewalk on lots with slopes of ten percent or more, which through design features provides public street space, better integrates development with the street environment on sloping lots, and makes pedestrian movement up and down steep slopes in downtown residential areas easier and more pleasant.

"Residential structure" means a structure containing only residential uses and permitted uses accessory to the residential uses.

"Residential use" means any one or more of the following:

1. "Accessory dwelling unit" means one or more rooms that

a. are located within an owner-occupied dwelling unit, or within an accessory structure on the same lot as an owner-occupied dwelling unit;

b. meet the standards of Section 23.44.041, or 23.45.545, or Chapter 23.47A, as applicable;

c. are designed, arranged, and intended to be occupied by not more than one household as living accommodations independent from any other household; and

d. are so occupied or vacant.

2. "Adult family home" means an adult family home defined and licensed as such by The State of Washington in a dwelling unit.

3. "Apartment" means a multifamily residential use that is not a cottage housing development, rowhouse development, or townhouse development.

4. "Artist's studio/dwelling" means a combination working studio and dwelling unit for artists, consisting of a room or suite of rooms occupied by not more than one household.

5. "Assisted living facility" means a use licensed by The State of Washington as a boarding home pursuant to RCW 18.20, that contains at least two assisted living units for people who have either a need for assistance with activities of daily living (which are defined as eating, toileting, ambulation, transfer [e.g., moving from bed to chair or chair to bath], and bathing) or some form of cognitive impairment but who do not need the skilled critical care provided by nursing homes. See "Assisted living unit."

6. "Carriage house" means a dwelling unit in a carriage house structure.

7. "Carriage house structure" means a structure within a cottage housing development, in which one or more dwelling units are located on the story above an enclosed parking garage at ground level that either abuts an alley and has vehicle access from that alley, or is located on a corner lot and has access to the parking in the structure from a driveway that abuts and runs parallel to the rear lot line of the lot. See also "Carriage house."

8. "Caretaker's quarters" means a use accessory to a non-residential use consisting of a dwelling unit not exceeding 800 square feet of living area and occupied by a caretaker or watchperson.

9. "Congregate residence" means a use in which rooms or lodging, with or without meals, are provided for nine or more non-transient persons not constituting a single household, excluding single-family dwelling units for which special or reasonable accommodation has been granted.

10. "Cottage housing development" means a use consisting of cottages arranged on at least two sides of a common open space or a common amenity area. A cottage housing development may include a carriage house structure. See "Cottage," "Carriage house," and "Carriage house structure."

11. "Detached accessory dwelling unit" means an accessory dwelling unit in an accessory structure.

12. "Domestic violence shelter" means a dwelling unit managed by a nonprofit organization, which unit provides housing at a confidential location and support services for victims of domestic violence.

13. "Floating home" means a dwelling unit constructed on a float that is moored, anchored or otherwise secured in the water.

14. "Mobile home park" means a tract of land that is rented for the use of more than one mobile home occupied as a dwelling unit.

15. "Multifamily residential use" means a use consisting of two or more dwelling units in a structure or portion of a structure, excluding accessory dwelling units.

16. "Multifamily residential use, low-income disabled" means a multifamily residential use in which at least 90 percent of the dwelling units are occupied by one or more persons who have a handicap as defined in the Federal Fair Housing Amendments Act and who constitute a low-income household.

17. "Multifamily residential use, low-income elderly" means a residential use in which at least 90 percent of the dwelling units are occupied by one or more persons 62 or more years of age who constitute a low-income household.

18. "Multifamily residential use, low-income elderly/low-income disabled" means a multifamily residential use in which at least 90 percent of the dwelling units (not including vacant units) are occupied by a low-income household that includes a person who has a handicap as defined in the Federal Fair Housing Amendment Act or a person 62 years of age or older, as long as the housing qualifies for exemptions from prohibitions

against discrimination against families with children and against age discrimination under all applicable fair housing laws and ordinances.

19. "Nursing home" means a use licensed by The State of Washington as a nursing home, which provides full-time convalescent and/or chronic care for individuals who, by reason of chronic illness or infirmity, are unable to care for themselves, but that does not provide care for the acutely ill or surgical or obstetrical services. This definition excludes hospitals or sanitariums.

20. "Rowhouse development" means a multi-family residential use in which all principal dwelling units on the lot meet the following conditions:

a. each dwelling unit occupies the space from the ground to the roof of the structure in which it is located;

b. no portion of a dwelling unit, except for an accessory dwelling unit or shared parking garage, occupies space above or below another dwelling unit;

c. each dwelling unit is attached along at least one common wall to at least one other dwelling unit, with habitable interior space on both sides of the common wall, or abuts another dwelling unit on a common lot line;

d. the front of each dwelling unit faces a street lot line;

e. each dwelling unit provides pedestrian access directly to the street that it faces; and

f. no portion of any other dwelling unit, except for an attached accessory dwelling unit, is located between any dwelling unit and the street faced by the front of that unit.

21. "Single-family dwelling unit" means a detached structure having a permanent foundation, containing one dwelling unit, except that the structure may also contain an accessory dwelling unit where expressly authorized pursuant to this Title 23. A detached accessory dwelling unit is not considered a single-family dwelling unit for purposes of this Chapter 23.84A.

22. "Townhouse development" means a multi-family residential use that is not a rowhouse development, and in which:

a. each dwelling unit occupies space from the ground to the roof of the structure in which it is located;

b. no portion of a dwelling unit occupies space above or below another dwelling unit, except for an attached accessory dwelling unit and except for dwelling units constructed over a shared parking garage; and

c. each dwelling unit is attached along at least one common wall to at least one other dwelling unit, with habitable interior space on both sides of the common wall, or abuts another dwelling unit on a common lot line.

"Restaurant." See "Eating and drinking establishment."

"Retail sales and services, automotive." See "Sales and services, automotive."

"Retail sales and services, general." See "Sales and services, general."

"Retail sales and services, non-household." See "Sales and services, heavy"

"Retail sales, major durables." See "Sales and services, heavy"

"Retail sales, multi-purpose." See "Sales and services, general"

"Retail shopping" means an amenity feature consisting of uses provided at street level that contribute to pedestrian activity and interest.

"Rezone" means an amendment to the Official Land Use Map to change the zone classification of an area.

"Rezone, contract" means an amendment to the Official Land Use Map to change the zone classification of an area, subject to the execution, delivery, and recording of a property use and development agreement executed by the legal or beneficial owner of the property to be rezoned.

"Right-of-way" means a strip of land platted, dedicated, condemned, established by prescription or otherwise legally established for the use of pedestrians, vehicles or utilities.

"Right-of-Way Improvements Manual" means a set of detailed standards for street, alley and easement construction, adopted by a joint Administrative Rule of Seattle Department of Transportation and the Department of Planning and Development.

"Roadway" means that portion of a street improved, designed, or ordinarily used for vehicular travel and parking, exclusive of the sidewalk or shoulder. Where there is a curb, the roadway is the curb-to-curb width of the street.

"Roof, butterfly." See "Butterfly roof."

"Roof, shed." See "Shed roof."

"Roof plane" means a section of the roof system divided from another section by a physical separation, exterior wall, roof apex, or change in the direction of pitch. Change in the degree of roof pitch such as occur on a gambrel roof and projections such as dormers or skylights shall not serve to divide a section into multiple planes.

"Rooftop feature" means any part of or attachment to the structure that projects above a roof line.

"Rowhouse development." See "Residential use."

"Rowhouse unit" means a dwelling unit in a rowhouse development.

"Rules" means administrative regulations promulgated and adopted pursuant to this Land Use Code and the Administrative Code.

"Rural development credit" means the allowance of floor area on a receiving lot that results from the transfer of development potential from rural unincorporated King County to the Downtown Urban Center pursuant to King County Code Chapter 21A.55 or successor provisions and pursuant to the provisions of Section 23.49.011.

(Ord. 124378, § 92, 2013; Ord. 124172, § 65, 2013; Ord. 123939, § 19, 2012; Ord. 123913, § 48, 2012; Ord. 123589, § 101, 2011; Ord. 123564, § 11, 2011; Ord.

CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on this day I sent a copy of the City of Seattle's Reply

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

Dated this 25th day of June, 2015.


ROSE LEE HAILEY