

COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION TWO

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HON YOEUN, individually and as Guardian ad Litem for the minor SUNNIE  
YOEUN,

Appellants,

v.

CHIN FAI NG and JUDITH ANN NG, husband and wife, individually, and their  
marital community; CITY OF VANCOUVER, a Municipality; ESTATE OF  
STAN HUDLICKY, SHIRLEY HUDLICKY and the HUDLICKY MARITAL  
COMMUNITY; EVERGREEN STATE FENCE COMPANY, formerly a  
Washington corporation, and "JOHN and JANE DOE," shareholders of the  
dissolved corporation EVERGREEN STATE FENCE COMPANY; ROGER and  
ESTELLA CHANNING, individually and as husband and wife, dba  
EVERGREEN STATE FENCE,

Respondents.

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**BRIEF OF APPELLANTS**

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Terry E. Lumsden, WSBA # 5254  
Law Offices of Terry E. Lumsden  
Attorney for Appellants  
3517 6<sup>th</sup> Avenue, # 200  
Tacoma, Washington 98406  
(253) 573-1644

STATE OF WASHINGTON  
COURT OF APPEALS  
DIVISION TWO  
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## **I. ASSIGNMENTS OF ERROR**

1. The trial court erred in granting Evergreen State Fence Company and Roger and Estella Channing's (hereinafter "Evergreen") motion for summary judgment dismissal and entering findings and a final judgment in favor of Evergreen.

2. The trial court erred in granting the City of Vancouver's (hereinafter "City") motion for summary judgment dismissal and entering findings and a final judgment in favor of the City.

## **II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

A. The trial court erred in finding that the driveway was not a service drive (Assignment of Errors 1 and 2).

B. The trial court erred in finding that Evergreen could not be liable for the condition of the fence after title to the property passed to the Ngs (Assignment of Error 1).

C. The trial court erred in finding that Evergreen did not owe Sunnie Yoeun a duty of reasonable care (Assignment of Error 1).

D. The trial court erred in finding that the City did not owe Sunnie Yoeun a duty of reasonable care (Assignment of Error 2).

E. The trial court erred in ruling that the Defendants were entitled to judgment as a matter of law (Assignment of Error 1 and 2).

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### III. STATEMENT OF THE CASE

#### A. FACTUAL HISTORY

On July 9, 1997, Sunnie Yoeun, aged 9, was severely injured when he rode a borrowed bicycle out of the parking area of an apartment complex owned by Chin Fai Ng and Judith Ng. CP 69-70. His grandmother was babysitting him while she was visiting a tenant. *Id.* Sunnie had never been to the apartment complex before. *Id.* His injuries occurred when he collided with a motor vehicle approaching from his left on a City right-of-way that intersected with the apartment complex driveway. *Id.*

The driveway down which Sunnie was riding was partially hidden by a chain link fence with brown slats interwoven in the links, making the fence "solid." CP 110; CP 183. The fence had been constructed for the previous owners of the apartment complex by Roger and Estella Channing, d/b/a Evergreen State Fence. CP 247.

On October 15, 1986, the City sent the property owners a correction notice for the fence. CP 86. However, Evergreen claims it never received a copy of the correction notice and did not know the fence violated any applicable City code provisions. CP 19. The City has no records showing that it followed up on or enforced its correction notice. CP 42-43.

## B. PROCEDURAL HISTORY

On June 1, 2006, Evergreen moved for summary judgment dismissal of Ms. Yoeun's negligence claims (brought on Sunnie Yoeun's behalf). CP 18-39. The City filed a separate motion for summary judgment dismissal on June 28, 2006. CP 40-189.

The trial court issued a Memorandum of Decision on Evergreen's and the City's motions on October 13, 2006. CP 495-99. In its Decision, the trial court decided that the driveway down which Sunnie had ridden was not a "service drive," but a private drive. CP 496-97. Under City code provisions for private drives, the fence was "legal" and did not obstruct the required sight triangle. CP 496.

The trial court also concluded that Evergreen could not be held liable for negligent construction since title to the property had transferred from the prior owners to the Ngs. CP 498-99. The trial court also determined that the public duty doctrine shielded the City from liability, holding that the "failure to enforce" exception did not apply. CP 497-98.

In its Decision, the trial court also referenced an earlier ruling regarding summary judgment motions by William and Jane Doe Steiner and the prior property owners. CP 495. In the earlier ruling, the trial court had recognized that the slats in the fence "create[d] some sight difficulties[;] a driver's view is partially blocked as is the child's view on

the bicycle.” CP 559. The trial court found that “it is reasonably foreseeable that children would ride bikes within that area.” CP 559.

#### IV. ARGUMENT

This Court reviews summary judgments *de novo* and performs the same inquiry as the trial court. *Blumenshein v. Voelker*, 124 Wn. App. 129, 133, 100 P.3d 344, 347 (2004). CR 56 provides that a motion for summary judgment may be granted

if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is **no genuine issue of material fact** and that the moving party is entitled to judgment as a matter of law.

CR 56(c) (emphasis added). A material fact is one on which the result of litigation depends. *Lybbert v. Grant County*, 93 Wn. App. 627, 631, 969 P.2d 1112 (1999). All facts and reasonable inferences must be considered in the light most favorable to the nonmoving party. *Blumenshein*, 124 Wn. App. at 133. **Issues of negligence and causation are questions of fact not usually susceptible to summary judgment.** *Id.* at 136.

##### A. THE TRIAL COURT ERRED IN FINDING THAT THE DRIVEWAY WAS NOT A SERVICE DRIVE.

In response to both Evergreen’s and the City’s motions for summary judgment, Ms. Yoeun argued that the fence violated City code provisions regarding “service drives.” The Vancouver Municipal Code (“VMC”) defined “service drive” as “any driveway constructed in

accordance with the city standard specifications in or upon any street and intended for use and used by the public for access to any place of business or public use.” VMC 11.20.010 (1957), appended hereto as A-1.

Significantly, **the City code fully contemplated service drives leading to residential developments, such as apartment complexes:** “Nothing in this Title shall be deemed to permit a sight obstruction within any required yard area **at the . . . service drive to a . . . residential development.**”

VMC 20.93.240 (1981) (emphasis added), appended hereto as A-2.<sup>1</sup>

Notably, there was no requirement that a piece of property be zoned for commercial use before its driveway could qualify as a “service drive.” *Id.*

In this case, there was no question that the driveway on which Sunnie rode was “in or upon” a street. CP 73. The City acknowledged that the fence in question ran between two driveways which were directional (one was used as an entrance and one was used as an exit). CP 55; CP 405. Significantly, there was **no** evidence presented that the driveways were used by private residents only, or that there was some

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<sup>1</sup> In its motion for summary judgment below, the City relied on code provisions and drawings that had not been adopted until after Sunnie was injured. CP 198-99; 260. The trial court should not have considered those materials because they were irrelevant. The trial court should have applied the law that was in effect at the time of the accident. *See Wagner v. Wagner*, 95 Wn.2d 94, 98, 621 P.2d 1279 (1980) (parties are presumed to contract with reference to existing statutes).

**other** driveway set aside for public use.<sup>2</sup> Ms. Yoeun, on the other hand, presented evidence that members of the public, such as Sunnie's grandmother, did in fact use the driveways. CP 284; 287. Ms. Yoeun at the very least raised a genuine issue of material fact as to whether the driveway was "used by the public" for "public use," as contemplated by the City code.

The trial court, without any factual or legal basis, concluded that service drives were "for supplying materials, commodities, garbage service, and other types of limited activity." CP 496-97. Yet **the City code itself did not provide for such a limitation.** Furthermore, even if service drives were intended for such activities, there was no evidence before the trial court that the driveway on which Sunnie was riding was **not** used for those activities.<sup>3</sup> The City code did not preclude private use of a service drive, and did not limit the definition of a "service drive" to driveways serving commercially zoned property only. The trial court erred in interpreting City code to mean something other than what its plain

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<sup>2</sup> To the contrary, the self-serving declarations of Cindy Peterson and Jon Wagner raised the inference that the driveways fit the definition of "service drives" because members of the public used the driveways, but the City chose to call them "private drives" after being joined as a defendant in the action below. *See* CP 196; CP 200-01 ("The driveway at issue is considered a private driveway by City employees **even though it is the driveway for the Carlson Road complex.**") (emphasis added). *See also* CP 354.

<sup>3</sup> The fact that the driveways serviced an **apartment complex** gave rise to the inference that the driveways would have been used for the business purposes of the complex's manager(s). The City did not present any evidence that the driveways were never used for business purposes.

language provided.

B. THE TRIAL COURT ERRED IN FINDING THAT EVERGREEN COULD NOT BE LIABLE FOR THE CONDITION OF THE FENCE AFTER THE TITLE TO THE PROPERTY HAD PASSED TO THE NGS.

In its motion for summary judgment, Evergreen argued that claims against it should be dismissed because a **vendor** “does not remain liable for injuries caused by dangerous conditions on the premises once the property has passed from his possession or control.” CP 22. The trial court was ultimately persuaded by this argument. CP 498-99. However, Evergreen **never held an ownership interest in the apartment complex property and never owned the fence**, so it was not a “vendor” and the trial court erred in granting summary judgment on a theory of “vendor” non-liability. **Evergreen’s liability arose out of its own negligence and/or failure to follow the City code** (see Section C below).

Evergreen cited to four cases in support of its argument below. In the first, *Porter v. Sadri*, 38 Wn. App. 174, 685 P.2d 612 (1984), *rev. denied* 102 Wn.2d 1021 (1984), the plaintiffs sued the builder of their home because Mrs. Porter was injured when she fell through a window that had the wrong type of glass. However, because the prior owners had replaced the improper glass themselves **after the builder completed its work**, the court found that the builder’s use of improper glass was not the

proximate cause of Mrs. Porter's injury. *Id.* at 177-78.

In this case, there was no evidence of an intervening, superseding event (such as a subsequent modification or repair) that broke the chain of proximate cause between Evergreen's negligence and Sunnie's injuries. However, there was evidence that Evergreen failed to build the fence "to code." CP 86; CP 401. Under such different circumstances, *Porter* did **not** provide the trial court with a legal basis for granting summary judgment.

Neither did *Dipangrazio v. Salmonsens*, 64 Wn.2d 720, 393 P.2d 936 (1964). There, the plaintiffs sued the builder of their home after a guest fell through a glass door and was injured. Notably, the plaintiffs did **not** make a specific claim of negligent construction, but rather alleged that the glass door itself was defective and that it should not have been used. The jury found for the builder. On appeal, the court could not find any evidence of negligence or breach of warranty:

**Defendants Salmonsens were not retailers of a product; they were residential house constructors and sold this house and lot to the McClanes. Building materials available to them and customarily used as standard products in construction were purchased on the market from a reputable wholesaler in whom they had complete confidence. Selection of the door was made from a catalogue of defendant Northwest and purchased as a unit after its fabrication. The parties stipulated, and the jury was so instructed, that in 1957 in the Greater Seattle area, in excess of 90 per cent of all aluminum-framed,**

**sliding-glass doors in homes of the same general type and price class as the McClanes' used an aluminum-framed, sliding-glass door glazed with 3/16 inch crystal glass. . . .**

We have reviewed and studied the record of this case carefully. We are unable to find any evidence of negligence on the part of the defendants Salamonsen. Although the factual pattern is slightly different, in *Ringstad v. I. Magnin & Co.*, 39 Wash.2d 923, 926, 239 P.2d 848 (1952), we recognized the general rule that there is **no obligation on a retailer of a chattel to test a product** in the absence of some circumstance suggesting the necessity therefor. There is no such circumstance in the instant case, and we know of no reason why the same rule should not apply.

Nor do we find that the evidence supports a conclusion of breach of warranty by defendants Salamonsen. They sold land with a house on it.

*Id.* at 723-24 (emphasis added).

Here, Ms. Yoeun did not bring a products liability claim or allege a breach of warranty by Evergreen; rather, her claims were based on negligent construction and/or violation of City code. *Dipangrazio* did not address those issues. *Dipangrazio* was not on point and did not support the trial court's grant of summary judgment dismissal.

In *Bailey v. Gammell*, 34 Wn. App. 417, 661 P.2d 612 (1984), claims were not brought against the builder, but against the former homeowner. The claims were dismissed because the former owner did not own the home at the time of the injury.

Here, Ms. Yoeun's claims were against the builder, Evergreen, who never owned the apartment complex property or the fence. Issues of ownership were irrelevant and *Bailey* did not provide a legal basis for dismissal of Ms. Yoeun's claims.

Finally, in *Wilson v. Thermal Energy, Inc.*, 21 Wn. App. 153, 583 P.2d 679 (1978), *rev. denied* 92 Wn.2d 1002 (1979), a tenant sued the former owner of property after he fell through a glass door. The trial court dismissed the claim. On appeal, the court reversed the trial court's order, finding that the plaintiff had plead a proper "post-sale" theory of liability. *Id.* at 154-55. Here, again, Evergreen never held an ownership interest in the property or the fence. Thus, rules relating to "vendors" and "vendees" did not apply and *Wilson* was not dispositive on Evergreen's motion for summary judgment dismissal.

To the extent that the trial court's dismissal of claims against Evergreen was based on the above cases and legal theories involving "vendors" and "vendees," the trial court erred. Its Findings and Final Judgment of Dismissal in favor of Evergreen must be reversed.

C. THE TRIAL COURT ERRED IN FINDING THAT EVERGREEN DID NOT OWE SUNNIE YOEUN A DUTY OF REASONABLE CARE.

1. Evergreen's duty arose under the Vancouver Municipal Code.

In its motion for summary judgment dismissal, Evergreen argued that because it allegedly did not receive any notice that the fence violated the zoning code, the Plaintiff's claims should be dismissed. In agreeing with Evergreen, the trial court overlooked one important point of law:

It is the general rule that parties are presumed to contract with reference to existing statutes . . . and **a statute which affects the subject matter of a contract is incorporated into and becomes a part thereof.**

*Wagner v. Wagner*, 95 Wn.2d 94, 98, 621 P.2d 1279 (1980) (emphasis added).

The Proposal signed by Roger Channing evidenced an agreement to supply materials and install a 5 foot slatted fence with posts set in concrete. CP 247. The Vancouver zoning code, which regulated the size, placement, and type of fencing that could be erected, clearly affected the subject matter of the Proposal. **The zoning code was therefore incorporated into and became a part of the Proposal, and Evergreen was bound to comply with all applicable zoning regulations.** By virtue of its Proposal, **Evergreen was deemed to have had full knowledge of the zoning code** in effect at the time, and cannot now be heard to say that it was unaware of any violations. Evergreen's alleged lack of notice of the law was not a proper basis for dismissal of the Plaintiff's claims.

Under the Vancouver Municipal Code in effect at the time of the

accident, it was “**unlawful** for any person, firm, or corporation to erect, construct, establish, move into, alter, enlarge, use, or cause to be used, any buildings, structures, or improvement or use of premises located in any zone described in [the zoning code] contrary to the provisions of [the zoning code].” VMC 20.04.100 (1981), appended hereto as A-3. The city zoning code specifically prohibited any obstruction of the sight triangle with a fence: “**No fence . . . may be constructed in violation of the corner sight triangle provisions of Section 20.93.240.**” VMC 20.91.250(A) (1986) (emphasis added), appended hereto as A-4.

The sight triangle provisions in effect at the time were as follows:

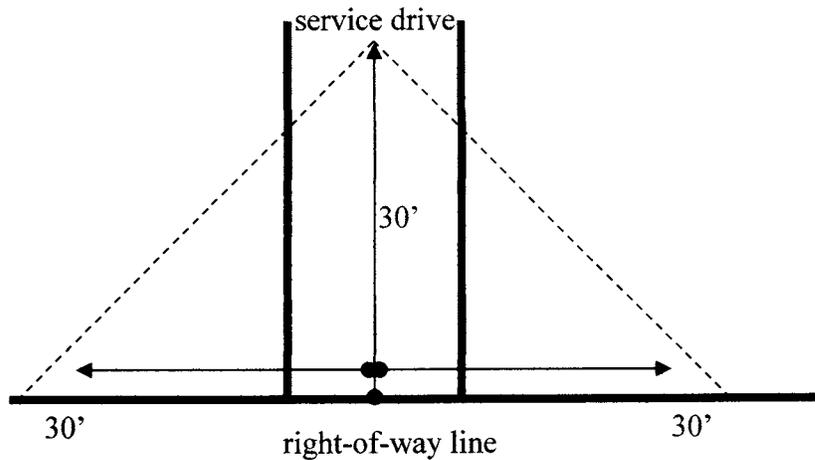
**Nothing in this Title shall be deemed to permit a sight obstruction within any required yard area at the street intersection or service drive to a commercial, industrial, or residential development interfering with the view of the operation of motor vehicles on the streets to such an extent as to constitute a traffic hazard. . . .**

There shall be **no sight obstruction** within any required yard area **between 30 inches and 10 feet above the street grade within the triangular vision clearance area established as follows: . . .**

B. In the case of service drives, **a triangle whose base extends 30 feet along the street right-of-way line in both directions from the centerline of the service drive with the apex of the triangle 30 feet into the property on the centerline of said service drive.**

VMC 20.93.240 (1981) (emphasis added), appended hereto as A-2.

Based on the foregoing language, the sight triangle for a service drive would be approximately configured thus:



*See also CP 147-68.* It was unlawful for any fence within the dashed lines to be greater than **30 inches** tall. *Id.* VMC 20.93.240 (1981), appended hereto as A-2.

Yet in this case, the portion of the fence built inside the sight triangle was **six feet** tall, over twice the legal height. CP 148. Evergreen had a statutory duty to use reasonable care in building the fence so that it complied with sight triangle regulations. Because the trial court concluded that the zoning code did not impose any duty on Evergreen, the trial court erred and its Findings and Final Judgment of Dismissal in favor of Evergreen must be reversed.

2. Alternatively, Evergreen's duty arose from common law.

Evergreen argued below that Washington did not recognize a cause of action for "negligent construction," so that plaintiffs who had suffered physical injuries due to badly built structures were not permitted to

recover from careless builders. CP 22-23.

The Washington Supreme Court has flatly rejected this argument and abandoned the “completion and acceptance doctrine” espoused by Evergreen:

Under the completion and acceptance doctrine, once an independent contractor finishes work on a project and the work has been accepted by the owner, the contractor is no longer liable for injuries to third parties, even if the work was negligently performed. . . . Under the modern, *Restatement* approach, **a builder or construction contractor is liable for injury or damage to a third person as a result of negligent work, even after completion and acceptance of that work, when it was reasonably foreseeable that a third person would be injured due to that negligence.** Restatement (Second) of Torts §§ 385, 394, 396 (1965). . . .

**We join the vast majority of our sister states and abandon the ancient completion and acceptance doctrine.** [citations omitted] We find it does not accord with currently accepted principles of liability because it was grounded in the long abandoned privity rule that a negligent builder or seller of an article was liable to no one but the purchaser. . . .

The doctrine is also harmful because it weakens the deterrent effect of tort law on negligent builders. **By insulating contractors from liability, the completion and acceptance doctrine increases the public’s exposure to injuries caused by the negligent design and construction of improvements to real property and undermines the deterrent effect of tort law. . . . Accordingly, the common law completion and acceptance doctrine is hereby abandoned, and we join the courts who have adopted the *Restatement* approach.**

*Davis v. Baugh Industrial Contractors, Inc.*, \_\_\_ Wn.2d \_\_\_, \_\_\_, 150

P.3d 545, 546-48 (2007) (italics in original; boldface added). The Washington Supreme Court went on to reverse the trial court's grant of summary judgment in favor of Baugh, and remanded the case for trial on Davis' negligent construction claims. *Id.* at 548-49.

Here, the trial court had already recognized that there were issues of material fact regarding the danger posed by the fence. The trial court stated that the slats in the fence "create[d] some sight difficulties[;] a driver's view is partially blocked as is the child's view on the bicycle." CP 559. Based on *Davis*, the trial court erred in concluding that Evergreen owed no duty of care to Sunnie Yoeun. The trial court should have allowed a jury to decide if Evergreen performed its work negligently in creating a sight obstruction. The trial court erred in granting Evergreen's summary judgment motion.

**D. THE TRIAL COURT ERRED IN FINDING THAT THE CITY DID NOT OWE SUNNIE YOEUN A DUTY OF REASONABLE CARE.**

**1. The trial court erred in applying the public duty doctrine.**

The City argued below that it could not be held liable for Sunnie's injuries under the public duty doctrine. The trial court agreed and granted the City's motion for summary judgment dismissal. CP 497-98. However, the trial court erred when it found that the Plaintiff had not

raised genuine issues of material fact on all elements of the “failure to enforce” exception to the public duty doctrine.

In *Campbell v. City of Bellevue*, 85 Wn.2d 1, 530 P.2d 234 (1975), the first case in which the Washington Supreme Court recognized the public duty doctrine, the plaintiff sued the city after its inspector failed to follow up on corrective measures that were supposed to have been taken to make a faulty electrical system safe. The city argued that the public duty doctrine precluded liability. In finding that **the city was liable for its failure to enforce its electrical code**, the Washington Supreme Court explained:

In the instant case, **the City’s electrical inspector was alerted to and knew of the nonconforming underwater lighting system and of the extreme danger created thereby** to neighboring residents in proximity to the stream in question. Yet, the inspector failed to comply with the City’s ordinances [citations omitted] directing that he sever or disconnect the lighting system until it was brought into compliance with electrical code requirements. **These requirements were not only designed for the protection of the general public** but more particularly for the benefit of those persons or class of persons residing within the ambit of the danger involved, a category into which the plaintiff and his neighbors readily fall.

Accordingly, we find municipal liability.

*Id.* at 13 (emphasis added).

The Washington Supreme Court again applied the exception and found that a city could be held liable for its failure to enforce regulations

in *Bailey v. Town of Forks*, 108 Wn.2d 262, 268-69, 737 P.2d 1257

(1987):

Facts alleged by Ms. Bailey satisfy all three requirements of the failure to enforce exception. First, the Forks police officer was a governmental agent with a duty to enforce statutory requirements. State statutes prohibit and establish criminal sanctions for driving or being in physical control of a motor vehicle while under the influence of alcohol. . . . Second, Ms. Bailey alleged that the police officer took no corrective action and possessed actual knowledge of statutory violations. . . . Finally Ms. Bailey, riding as a passenger on a motorcycle, came within the class RCW 70.96A.120(2) and RCW 46.61.515 were intended to protect. . . .

Although Ms. Bailey must now prove that Forks breached its duty and that the officer's breach proximately caused her injuries, judgment on the pleadings was improper. We reverse.

*Id.*

The rule of *Campbell* and *Bailey* was applied in *Honcoop v. State*, 111 Wn.2d 182, 759 P.2d 1188 (1988). There, the Washington Supreme Court delineated with further specificity the "failure to enforce" exception to the public duty doctrine:

We held that a general duty of care to the public can be owed to an individual where (1) governmental agents responsible for enforcing statutory requirements (2) possess actual knowledge of a statutory violation, fail to take corrective action despite a statutory duty to do so, and (3) the plaintiff is within the class the statute is intended to protect . . .

*Id.* at 190. The *Honcoop* court determined on the record before it that the

plaintiff had satisfied the first and third elements of the exception, but not the second element dealing with “actual knowledge.”

The “failure to enforce” exception was again restated in *Atherton Condominium Apartment-Owners Association Board of Directors v. Blume Development Co.*, 115 Wn.2d 506, 531, 799 P.2d 250 (1990):

[T]he failure to enforce exception to the public duty doctrine recognizes a duty where a public building official has *actual knowledge* of an inherently dangerous and hazardous condition, is under a duty to correct the problem and fails to meet this duty.

*Id.* (italic in original).

The “failure to enforce” exception to the public duty doctrine has also been applied by lower courts. *See, e.g., Zimbelman v. Chausee Corp.*, 55 Wn. App. 278, 821, 777 P.2d 32 (1989), *rev. denied* 114 Wn.2d 1007, 788 P.2d 1077 (1990) (a duty shall continue to be recognized where a public official knew of an inherently dangerous and hazardous condition, is under a duty to correct the problem, and fails to meet this duty); *Moore v. Wayman*, 85 Wn. App. 710, 722-23, 934 P.2d 707 (1997), *rev. denied* 133 Wn.2d 1019, 948 P.2d 387 (1997) (failure to enforce exception applies where a governmental agent has actual knowledge of a statutory violation, but fails to take corrective action despite the statutory duty to do so).

In the present case, the City produced a document showing that on

October 15, 1986, a correction notice for code violations relating to the fence was issued to the property owners of the apartment complex property. CP 86. Cindy Peterson, a building inspector for the City in 1986, admitted that she was the person who inspected the property and issued the correction notice. CP 93 – 94 (Peterson Deposition at 17:15 – 18:9). Ms. Peterson testified that in 1986, the procedure for handling code violations was to first issue a correction notice, then follow up with a second visit and correction notice, refer the notice to the department manager for citation, then assess a penalty to the property owner of \$10 per day for each day that the violation was not corrected. CP 96 and 99 (Peterson Deposition at 20:8-15 and 23:12-25). However, Ms. Peterson admitted that **there was no evidence that the City took any action after she wrote the October 15, 1986 correction notice.** CP 94 (Peterson Deposition at 18:10-17).

Furthermore, the Plaintiff's expert transportation engineer examined the fence, reviewed photographs of the fence taken in 1989, analyzed the applicable building code provisions, and concluded that the fence in question violated the building code by obstructing the sight triangle. CP 147-169. The violation was a proximate cause of the accident in which Sunnie was injured, because the fence kept Sunnie and the motorist on the intersecting street from seeing each other early enough

to have sufficient time to react. *Id.*

Based on the foregoing facts, the Court erred in finding that the Plaintiff had not satisfied all of the elements of the “failure to enforce” exception to the public duty doctrine. There is no question that Cindy Peterson had **actual notice** of one or more code violations because **she issued a correction notice** to the property owner (just like the inspector in *Campbell*).<sup>4</sup> The fence was inherently dangerous and hazardous because it obstructed the view of oncoming traffic on both the City’s right-of-way and the apartment complex property. According to Ms. Peterson, once her correction notice was issued, the **City should have followed specific steps** (including a second notice, a citation, and daily penalties) **to ensure that the property owner made the required corrections**. There is **no evidence that the City ever took those steps**. Sunnie was within the class of persons intended to be protected by the City’s zoning code, because he rode through the sight triangle and should not have had his view of the roadway obstructed by the fence. The City had a duty to enforce its building code, but failed to do so. The trial court should have applied the “failure to enforce” exception and denied the City’s motion.

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<sup>4</sup> In her deposition, Ms. Peterson denied that the fence in question violated the building code. However, there was no question that the City (through Ms. Peterson) issued a correction notice regarding the fence in 1986, and that the correction notice was a **party admission** under ER 801(d)(2). Thus, Ms. Peterson’s deposition testimony merely created a credibility issue that the Court could not and should not have resolved on summary judgment.

In ruling on the City's motion, the trial court referenced *Donohoe v. State*, 135 Wn. App. 824, 142 P.3d 654 (2006). CP 498. In *Donohoe*, a personal representative of the decedent's estate brought negligence claims against DSHS, alleging that it failed to reasonably ensure compliance with nursing home regulations. DSHS moved for summary judgment, arguing that the public duty doctrine shielded it from liability. The personal representative argued that the failure to enforce exception applied. The trial court disagreed, and granted DSHS's motion.

In analyzing the issue on appeal, this Court noted that the failure to enforce exception was construed narrowly, and that it only applied when there was a mandatory duty to take specific action to correct a known statutory violation. *Id.* at 849. Such a duty does not exist if the government agent has broad discretion about whether and how to act. *Id.*

Looking at the law and facts before it, the Court concluded that DSHS had broad discretionary authority to take a wide variety of enforcement actions. *Id.* The nursing home in question was in substantial compliance with state and federal regulations, so any enforcement action by DSHS would have been **discretionary**, not mandatory. *Id.*

Here, on the other hand, the City did **not** have broad discretionary authority about how to enforce the zoning code. Under the Vancouver Municipal Code, it was **required** to enforce the sight triangle regulations:

It shall be the duty of the Zoning Administrator to determine the applicability of this Ordinance for enforcement purposes. All departments, officials, and employees of the City vested with the duty or authority to issue permits, **shall** conform to the provisions of this Title and shall issue no permit, certificate, or license for any use, building, or purpose which violates or fails to comply with conditions or standards imposed by this Title. **Any permit, certificate, or license issued in conflict with the provisions of this Title, intentionally or otherwise, shall be void.** The Building Superintendent **shall** be responsible for carrying out the enforcement provisions of the Vancouver Municipal Code, at such time as a violation has been determined under the provisions of this Chapter.

VMC 20.04.405 (1981), appended hereto as A-5 (emphasis added). The VMC goes on to list specific penalties for violations. VMC 20.04.410 - .460 (1981), appended hereto as A-5. Cindy Peterson testified that it was her job to follow up on violations and to follow the City's enforcement procedures. CP 96 and 99 (Peterson Deposition at 20:8-15 and 23:12-25). *See also* VMC 2.03.020 (1990), appended hereto as A-6 (Department of Community Preservation and Development responsible for zoning enforcement). Unlike DSHS, the City had a **mandatory duty** to enforce its zoning code, and there was a **non-discretionary** enforcement procedure that was to be followed. *Donohoe* is distinguishable and does not support the trial court's decision to apply the public duty doctrine.

In short, viewing the evidence in a light most favorable to the Plaintiff, the Plaintiff raised genuine issues of material fact on all elements

the “failure to enforce” exception to the public duty doctrine. The trial court erred in applying the public duty doctrine and granting the City’s motion for summary judgment dismissal.

2. Alternatively, the trial court erred in concluding that the City did not “undertake” a duty to enforce the zoning code.

Alternatively, the City still had a duty to enforce its building code because it “undertook” that duty when it issued its correction notice. It has long been the rule in Washington that when a city voluntarily assumes a duty by affirmative conduct, **the assumption will give rise to liability if the performance is not done with reasonable care.** *Sado v. City of Spokane*, 22 Wn. App. 298, 301, 588 P.2d 1231 (1979), *rev. denied* 92 Wn.2d 1005 (1979).

In *Amann v. City of Tacoma*, 170 Wn. 296, 16 P.2d 601 (1932), the city had issued a permit to a contractor to demolish a building and construct a new building. The permit required the contractor to follow the Tacoma city building code. The building code contained a specific provision that during demolition, demolished materials would be immediately lowered to the ground. The contractor did not follow that provision, and during demolition, a wall fell on a vehicle parked on an abutting city street. The plaintiff brought a claim against the city, but the city was dismissed. On affirming the trial court’s dismissal, the

Washington Supreme Court distinguished the case from one in which the city has **actual knowledge** of a code violation:

Had [the city] granted to the respondent church the right to use the street, and then **knowingly** suffered it to so use it as to endanger the lives of persons traveling upon the street, **a different question would be presented**. . . . In this connection it may be added that this case does not involve a nuisance which the city **knowingly** permitted to be maintained so near the street as to make it dangerous for travelers thereon. . . .

The correct rule applicable here, we think, is that, where the city issues a permit . . . and the act for which the municipality gives a permit is, in itself, entirely proper and safe, and from which no injury could result except in the negligence of the person doing it, the municipality is not liable, **unless it is negligent in taking proper precautions to prevent injury, after notice that the licensee has rendered the street unsafe for use**.

*Id.* at 303-04 (emphasis added).

This case is like the hypothetical described above, where a city knows about a danger created in connection with the issuance of a permit, but is negligent in taking proper precautions to prevent injury. There is no question here that the City's affirmative conduct of **issuing a correction notice** signified the City's voluntary assumption of a duty to enforce its zoning code. The correction notice was also evidence that the City had actual notice of an inherently hazardous and dangerous code violation. The City did not use reasonable care in ensuring that the property owner made the required corrections to the fence, as it admits that there is no

record of it ever following up on the correction notice. **The City did not follow its own mandatory enforcement procedures.** The trial court erred in finding that the City did not affirmatively assume a duty of reasonable care to Sunnie.

E. THE TRIAL COURT ERRED IN FINDING THAT THE DEFENDANTS WERE ENTITLED TO JUDGMENT AS A MATTER OF LAW.

Significantly, in discussing Sunnie's accident, the trial court found that "it is reasonably foreseeable that children would ride bikes within that area." CP 559. If such activity was foreseeable, the Defendants should have known that injury could occur if visibility on the roadway and driveway was obscured, and should have taken reasonable measures to maintain visibility.

In response to the Defendants' summary judgment motions, the Plaintiff presented law and facts showing that both Evergreen and the City owed a duty of reasonable care to Sunnie. CP 232-316. The Plaintiff presented evidence that the Defendants breached their duties, as Evergreen constructed a fence that was over twice the legal height, and the City was negligent for failing to enforce its sight triangle regulations. *Id.* The Plaintiff presented expert testimony that the Defendants' breach was a proximate cause of Sunnie's injuries. *Id.* The trial court agreed that there were issues of fact present regarding safety. CP 559.

Given the numerous issues of material fact that were before the trial court, it was error to grant the Defendants' motions for summary judgment. The Defendants had not established that they were entitled to judgment as a matter of law. The trial court should have denied their motions so that a jury could determine whether Evergreen's fence was in fact unsafe; whether the City was negligent for failing to follow up on its correction notice; and the nature and extent of Sunnie's damages. The trial court's entry of the Findings and Final Judgment on Plaintiffs' Claims Against City of Vancouver (CP 615-23) and Findings and Final Judgment of Dismissal as to Defendants Evergreen State Fence Company and Roger and Estella Channing DBA Evergreen State Fence (CP 624-26) was error and must be reversed.

**V. CONCLUSION**

Based on the foregoing, the Appellants respectfully request that the Court reverse the Findings and Final Judgments entered in this matter, and remand this case for trial against Defendants Evergreen and the City.

Respectfully submitted,

**THE LAW OFFICES OF  
TERRY E. LUMSDEN**

 # 13982  
TERRY E. LUMSDEN, WSBA # 5254  
Of Attorneys for Appellants

# **Appendix A-1**

Municipal Code - City Government - City of Vancouver, Washington, USA <http://www.ci.vancouver.wa.us/MunicipalCode.asp?menuid=10462&...>

City of Vancouver, USA

*"A colorful past, a bright future"*

Official Website of the  
City of Vancouver, Washington

VMC 11.20.010-1957

Person. "Person," as used in this chapter, means and includes an individual, firm, association, corporation or other organization except the city of Vancouver or employees thereof and except the state of Washington or employees thereof, while acting in the course of their employment for the city or state.

Inspector. "Inspector," as used in this chapter, means the city building inspector or his duly authorized representative.

Engineer. "Engineer," as used in this chapter, means the city engineer or his duly authorized representative.

Service Driveway. "Service driveway," as used in this chapter, means any driveway constructed in accordance with the city standard specifications in or upon any street and intended for use and used by the public for access to any place of business or public use.

Private Driveway. "Private driveway," as used in this chapter, means any driveway constructed in accordance with the city standard specifications in or upon any street and intended for use by the occupant as a private driveway to the property. (Ord. M-356 §§ 1, 2, 1957)

# **Appendix A-2**

20.93 INTERPRETATIONS AND EXCEPTIONS.

20.93.100 RESPONSIBILITY. It shall be the responsibility of the Zoning Administrator to interpret and apply the provisions of this Title.

20.93.200 EXCEPTIONS.

20.93.210 LOT SIZES. If at the time of passage of this Title, a lot, or the aggregate of contiguous lots or land parcels held in single ownership has an area of dimension less than required for the zoning district in which the property is located, the lot or aggregate holdings may be occupied by any permitted use in the district subject to compliance with all other requirements of the district and reasonable setbacks thereof, provided, however, that the use of a lot in a residential district which has an area deficiency shall be limited to a single-family dwelling. All lots shall have a minimum of 20 feet of access to a public or private street.

20.93.220 HEIGHT LIMITATIONS. Height limitations set forth elsewhere in this Title shall not apply to the following: barns, silos, water towers and tanks, or other farm buildings and structures, provided they are not less than 50 feet from every lot line; chimneys, church spires, belfries, cupolas, domes, smokestacks, flagpoles, grain elevators, cooling towers, solar energy collectors, monuments, fire house towers, masts, aerials, elevator shafts, street lights, power or communication distribution lines, and other similar projections; and outdoor theater screens, provided said screens contain no advertising matter other than the name of the theater.

20.93.230 ACCESSORY BUILDINGS AND USES.

- A. A greenhouse or hothouse may be maintained accessory to a dwelling, provided there are no sales.
- B. An accessory building shall not be located within 8 feet of a principal building existing or under construction on the same lot, and no accessory building shall exceed 1 story in height.

20.93.240 VISION CLEARANCE. Nothing in this Title shall be deemed to permit a sight obstruction within any required yard area at the street intersection or service drive to a commercial, industrial, or residential development interfering with the view of the operation of motor vehicles on the streets to such an extent as to constitute a traffic hazard.

The provisions of this Section shall take precedence over any building setbacks, except in the downtown commercial districts where the Planning Commission may authorize lesser requirements upon the advice of the City Traffic Engineer.

There shall be no sight obstruction within any required yard area between 30 inches and 10 feet above the street grade within the triangular vision clearance area established as follows:

- A. In the case of street intersection, two sides of this triangle are lot lines measured 20 feet from their intersection, and the third side is a line across the corner of the lot joining the extremities of the other two sides.
- B. In the case of service drives, a triangle whose base extends 30 feet along the street right-of-way line in both directions from the centerline of the service drive with the apex of the triangle 30 feet onto the property on the centerline of said service drive.

#### 20.93.250 YARD REQUIREMENTS.

- A. Projections into Required Yards. Certain architectural features may project into required yards or courts as follows:
  1. Cornices, canopies, eaves, belt courses, bay windows, sills or other similar architectural features, or fireplaces; but these may not in any case extend more than 24 inches into any required yard area.
  2. Fire escapes, open-uncovered porches, balconies, landing places, or outside stairways may not in any case extend more than 18 inches into any required side or rear yards, and not exceeding 6 feet into any required front yard. This is not to be construed as prohibiting open porches or stoops not exceeding 18 inches in height, and not approaching closer than 18 inches to any lot line.
- B. Exceptions to Front Yard Requirements.
  1. If there are structures on both abutting lots with front yards less than the required depth for the district, the front yard for the lot need not exceed the average front yard of the abutting structures.

# **Appendix A-3**

20.04 APPLICATION AND ENFORCEMENT.

20.04.100 COMPLIANCE. Except as provided in Section 20.04.200, et. seq., no building or other structure shall be constructed, improved, altered, enlarged, or moved, nor shall any use or occupancy of premises within the City be commenced or changed; nor shall any condition of or upon real property be caused or maintained, after the effective date of this Title, except in conformity with conditions prescribed for each of the several zones established hereunder. It shall be unlawful for any person, firm, or corporation to erect, construct, establish, move into, alter, enlarge, use, or cause to be used, any buildings, structures, or improvement or use of premises located in any zone described in this Title contrary to the provisions of this Title.

20.04.200 NONCONFORMING PROVISIONS.

20.04.210 PURPOSE. A use lawfully occupying a structure or site on the effective date of this Title or of amendments thereto which does not conform to the use regulations or development standards for the district in which it is located, shall be deemed to be a nonconforming use and may be continued, subject to the regulations hereinafter.

20.04.220 NONCONFORMING LOTS OF RECORD. If at the time of passage of this Title, a lot as shown on records of the County Auditor has an area, width, or depth dimension less than required for the zoning district in which the property is located, such lot shall be deemed nonconforming and may be occupied by any permitted use in the district, provided the lot was created in conformance with the rules and regulations in effect at the time of its creation.

20.04.230 NONCONFORMING USES.

- A. The Planning Commission may grant an application for a change of use if, on the basis of the application and the evidence submitted, it makes the following findings:
1. That the proposed use is classified in a more restrictive category than existing or preexisting use by the district regulations of this Title. The classifications of a nonconforming use shall be determined on the basis of the district in which it is first permitted, provided that a conditional use shall be deemed to be in a less restrictive category than a permitted use in the same category.

# **Appendix A-4**

- B. Nursery schools, kindergartens, and day-care centers serving more than four persons shall have a minimum site size of 10,000 square feet, and shall provide and thereafter maintain outdoor play areas with a minimum area of 100 square feet per child of total capacity. A site-obscuring fence of at least 4 feet but not more than 6 feet in height shall be provided, separating the play area from abutting lots. Adequate off-street parking and loading space shall be provided.

20.91.240 DOMESTIC ANIMALS. A minimum of one (1) acre is required for the first bovine, horse, goat, sheep, or similar large farm animal. For each additional animal, an additional 10,000 square feet must be provided. No swine are permitted. The raising and keeping of animals for commercial purposes is prohibited.

20.91.245 DRIVE-IN THEATERS. Drive-in theaters shall be located only on a major state highway or major city thoroughfare arterial, and shall provide ingress and egress so designed as to minimize traffic congestion. Said theaters shall be so screened from R districts, so that any noise shall not disturb residents or prospective residents, shall maintain signs and other lights only in such a way as not to disturb neighboring residents, and shall be so designed that the screen shall be set back from and shall not be clearly visible from any street or highway.

20.91.250 FENCES, WALLS, AND HEDGES.

- A. Fences and hedges are deemed accessory uses, and so are walls which serve the purpose of enclosing unroofed areas outside buildings. No fence and no such wall may hereinafter be constructed, and no hedge may be hereafter maintained, except as they conform to Section 20.93.240.
- B. In any Commercial or Industrial District, notwithstanding the yard requirements, a fence, wall, hedge, or other like screening device may be required by the Project Review Committee as a condition to the approval of a proposed commercial or industrial improvement on a lot abutting, or across a street or alley from, an adjacent property in a residential district, if the Committee finds that such screening is necessary to prevent an unreasonable interference with the use and enjoyment of the residential lot.

# **Appendix A-5**

20.04.400 ENFORCEMENT AND PENALTIES.

20.04.405 ENFORCEMENT. It shall be the duty of the Zoning Administrator to determine the applicability of this Ordinance for enforcement purposes. All departments, officials, and employees of the City vested with the duty or authority to issue permits, shall conform to the provisions of this Title and shall issue no permit, certificate, or license for any use, building, or purpose which violates or fails to comply with conditions or standards imposed by this Title. Any permit, certificate, or license issued in conflict with the provisions of this Title, intentionally or otherwise, shall be void. The Building Superintendent shall be responsible for carrying out the enforcement provisions of the Vancouver Municipal Code, at such time as a violation has been determined under the provisions of this Chapter.

20.04.410 PENALTY. Violation of any provision of this ordinance shall be a misdemeanor. Each day a violation is allowed to exist shall constitute a separate offense which, upon conviction, shall be subject to a fine of up to \$500.

20.04.415 ABATEMENT. In addition to or as an alternative to any other judicial or administrative remedy provided herein or by law, the Zoning Administrator may by written notice order a land use ordinance violation to be abated. The Zoning Administrator may order any person who creates or maintains a violation of any land use ordinance, or rules and regulations adopted thereunder, to commence corrective work and to complete the work within such time as he determines reasonable under the circumstances. If the required corrective work is not commenced or completed within the time specified, the Zoning Administrator will proceed to abate the violation and cause the work to be done. He will charge the costs thereof as a lien against the property and as both a joint and separate personal obligation of any person who is in violation.

20.04.420 CUMULATIVE CIVIL PENALTY. In addition to, or as an alternative to any other penalty, any violation shall incur a cumulative civil penalty in the amount of \$10 per violation per day from the date set for correction until the violation is corrected, plus court and attorney costs associated with collection.

20.04.425 CIVIL PENALTY SCOPE. The civil penalty shall generally be applied to first violations or other violations when deemed effective and appropriate. The criminal penalty shall be used when in the opinion of the Zoning Administrator or city attorney, the civil remedy will not be effective, timely, or for a second or subsequent violation.

20.04.430 CITATION - ASSESSMENT OF PENALTY. Whenever the Zoning Administrator determines that a continuing violation of this Ordinance is occurring, he is authorized to issue a citation prepared in compliance with statutes and court rules, directed to the person or persons permitting, committing, or causing such a violation.

20.04.435 CITATION FORM. A citation issued under these provisions shall contain the following information:

- A. The name and address of the person or persons to whom the notice of violation is directed.
- B. The street address when available or a legal description sufficient for identification of the building, structure, premises, or land upon which or within which the violation is occurring.
- C. A concise description of the nature of the violation.
- D. A statement of the action required to be taken as determined by the official and a date for correction which shall be not less than three weeks from the date of service of the citation unless the Zoning Administrator has determined the violation to be eminently hazardous.
- E. A statement that a cumulative, civil penalty in the amount of \$10 per violation per day shall be assessed against the person to whom the notice of violation is directed for each and every day following the date set for correction on which the violation continues.
- F. A statement that the Zoning Administrator's determination of violation may be appealed to the Board of Adjustment by filing with the planning department written notice of appeal within ten days of service of the notice of violation and that the per diem civil penalty shall not accrue while an administrative appeal is pending.

20.04.440 SERVICE OF CITATION. The citation shall be served upon person or persons to whom it is directed, either personally, or in a manner provided for personal service of notices of complaint in District Court, or by mailing a copy of the citation by certified mail, postage prepaid, return receipt requested, to such person at his last known address. Proof of personal service shall be made at the time of service by a written declaration under penalty of perjury, executed by the person effecting service, declaring time, date and the manner by which service was made.

20.04.445 APPEAL OF CITATION. A citation issued pursuant to this Ordinance constitutes a determination from which an administrative appeal may be taken by the filing of a notice of appeal with the building department within ten days of the service of the notice of violation. Such appeal shall be heard by the Board of Adjustment. The cumulative civil penalty provided for in this Ordinance shall not accrue while an administrative appeal is pending.

20.04.450 TIME EXTENSION. For good cause, the Zoning Administrator may extend the date for correction of the violation as stated in the citation; provided that such extension shall not affect or extend the time within which an administrative appeal may be filed.

20.04.455 COLLECTION OF CIVIL PENALTIES. The civil penalty constitutes a personal obligation of the person or persons to whom the citation is directed. The City Attorney on behalf of the City is authorized to collect the civil penalty by use of appropriate legal remedies, the seeking or granting of which shall neither stay nor terminate the accrual of additional per diem penalties so long as the violation continues.

20.04.460 COMPROMISE, SETTLEMENT AND DISPOSITION OF SUITS. The Zoning Administrator and the City Attorney are hereby authorized to negotiate a settlement, compromise or otherwise dispose of a lawsuit with the parties or their legal representatives named in a lawsuit for the collection of civil penalties when to do so would be in the best interests of the City.

# **Appendix A-6**

Municipal Code - City Government - City of Vancouver, Washington, USA <http://www.ci.vancouver.wa.us/municipalcode.asp?menuid==10462&...>

Vancouver, WA

*"A colorful past, a bright future"*

Official website of the  
City of Vancouver, Washington

The department of community preservation and development shall be headed by a director who shall report to the city manager. Such department shall be responsible for land use planning, zoning administration, housing development and regulation, building permits and code enforcement, preservation of housing and neighborhood amenities, community development, economic development, business district revitalization, coordination with other public bodies, and related functions. (Ord. M-2915 § 2, 1990; Ord. M-2816 § 2, 1989)

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HON YOEBUN, individually, and as Guardian  
ad Litem for the minor SUNNIE YOEBUN,

Plaintiffs,

vs.

CHIN FAI NG and JUDITH ANN NG,  
husband and wife, individually and their  
marital community; CITY OF VANCOUVER,  
a Municipality; STAN HUDLICKY, deceased,  
ESTATE OF STAN HUDLICKY, SHIRLEY  
HUDLICKY and THE HUDLICKY  
MARITAL COMMUNITY; EVERGREEN  
STATE FENCE COMPANY, formerly a  
Washington corporation; and "JOHN and  
JANE DOE," shareholders of the dissolved  
corporation EVERGREEN STATE FENCE  
COMPANY; ROGER and ESTELLA  
CHANNING, individually and as husband and  
wife, dba EVERGREEN STATE FENCE  
COMPANY.

Defendants.

NO. 04-2-01170-5

**CERTIFICATE OF SERVICE**

Michelle R. Rammell states and declares as follows:

That on the 15<sup>th</sup> day of March 2007, I caused to be served a true and correct copy  
of the following:

**CERTIFICATE OF SERVICE**

Page 1 of 2

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**LAW OFFICES OF  
TERRY E. LUMSDEN.**  
3517 6<sup>th</sup> AVENUE, SUITE 200  
TACOMA, WASHINGTON 98406  
TELEPHONE (253) 573-1644  
FAX (253) 573-1744

1 1. Brief of Appellants:  
2

3 Ms. Norma S. Ninomiya Managing Attorney 4 500 E. Broadway, Suite 425 Vancouver, WA 98660	XX U.S. Mail, Postage Prepaid _____ Hand-Delivered _____ Overnight Mail _____ Facsimile Transmission
5 Mr. Douglas Foley, Esq. 6 Bullivant Houser Bailey, PC 805 Broadway St., Ste. 400 7 Vancouver, WA 98660-3310	XX U.S. Mail, Postage Prepaid _____ Hand-Delivered _____ Overnight Mail _____ Facsimile Transmission
8 Ms. Alison Chinn, Assistant City Attorney City of Vancouver 9 PO Box 1995 Vancouver, WA 98668-1995	XX U.S. Mail, Postage Prepaid _____ Hand-Delivered _____ Overnight Mail _____ Facsimile Transmission

10 I declare under penalty of perjury under the laws of the State of Washington, that  
11 the foregoing is true and correct to the best of my knowledge.  
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13 DATED this 15<sup>th</sup> day of March 2007.  
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17 Michelle R. Rammell  
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**CERTIFICATE OF SERVICE**

Page 2 of 2

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**LAW OFFICES OF  
TERRY E. LUMSDEN.**  
3517 6<sup>th</sup> AVENUE, SUITE 200  
TACOMA, WASHINGTON 98406  
TELEPHONE (253) 573-1644  
FAX (253) 573-1744