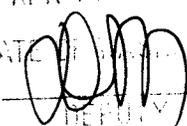


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STATE OF WASHINGTON  
BY 

Court of Appeals No. 35722-4-11

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COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION TWO

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

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 RESPONDENT CITY OF VANCOUVER

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**I. STATEMENT OF THE CASE**

**A. Statement of Facts**

**1. July 1997 Accident.**

On July 9, 1997, nine-year old Sunnie Yoeun, (“Yoeun”), was injured when he rode a bicycle eastbound out of the driveway of the apartment complex (“Complex”) located at 2100 Carlson Road, Vancouver, Washington, and into the right rear passenger side of a vehicle driven by William Steiner (“Steiner”).<sup>1</sup> At the time of the accident, Steiner was traveling southbound on Carlson Road in the western-most portion of the road.<sup>2</sup>

Yoeun’s grandmother took him to the Complex to visit his fourteen-year-old uncle, Andre Yoeunyuthy (“Yoeunyuthy”).<sup>3</sup> Immediately prior to the accident, Yoeun and Yoeunyuthy were riding bicycles in and out of the Complex parking lot directly onto Carlson Road.<sup>4</sup> Moments prior to the accident, Yoeunyuthy heard Steiner’s vehicle approaching.<sup>5</sup> Yoeunyuthy stopped his bike and yelled at Yoeun to stop.<sup>6</sup> Yoeun did not stop.<sup>7</sup> Yoeun rode into the street and directly into

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<sup>1</sup> CP 72-73; CP 75-76; CP 292-293; CP 295; CP 322.

<sup>2</sup> CP 83.

<sup>3</sup> CP 70; CP 73.

<sup>4</sup> CP 70; CP 72-73; CP 79-80.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

the right rear passenger side of Steiner's vehicle.<sup>8</sup>

## 2. Fence at Issue.

The fence at issue is a five-foot tall cyclone fence with slats, which runs parallel to Carlson Road between the two private driveways leading in and out of the Complex.<sup>9</sup> The subject fence is separated from the street by approximately ten feet of open ground.<sup>10</sup>

In 1986, Mr. Hudlicky owned the Complex.<sup>11</sup>

On August 2, 1986, the Channings, doing business as Evergreen State Fence Company, submitted a proposal for labor and materials to build a fence for Hudlicky at Carlson Road Apartments.<sup>12</sup>

On September 26, 1986, the City of Vancouver ("City") issued a building permit to Hudlicky to construct a "5' chain link fence w/ slats along front prop. line" of the Complex.<sup>13</sup> The City's copy of this building permit contains a notation stating, "Mis 10/15/86 CP-CN."<sup>14</sup> According to

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<sup>8</sup> CP 70; CP 72-73; CP 79-80; CP 292-293; CP 295; CP 322.

<sup>9</sup> CP 109 (Photo showing portion of subject fence); CP 111 (Photo showing overview of impact area with the car driving toward the camera - the bicycle came out of the fenced parking lot from the left in the left portion of the photo); CP 115-116 (Photos of the subject fence parallel to Carlson Road).

<sup>10</sup> *Id.*; CP 300; CP 302.

<sup>11</sup> CP 19; CP 86.

<sup>12</sup> CP 19; CP 33. Channings assert there is no evidence they built the subject fence. The Channings are reserving this issue. CP 328, footnote 1.

<sup>13</sup> CP 86.

<sup>14</sup> *Id.*

Cindy Peterson ("Peterson")<sup>15</sup>, the lead building inspector at the time this permit was issued, an employee other than herself made this notation.<sup>16</sup> This notation means that Cindy Peterson ("CP") conducted a miscellaneous inspection ("Mis") on October 15, 1986 ("10/15/86"), and that some type of correction notice ("CN") may have been issued.<sup>17</sup> However, multiple searches of the City's records failed to uncover any other record regarding the above referenced correction notice relating to the subject fence.<sup>18</sup> According to Peterson, it is possible that no additional correction notice or citation was listed in the case activity file because the problem noted in the original correction notice was corrected.<sup>19</sup> If the problem were corrected, there would be no further correction notice or citation.<sup>20</sup>

Peterson, who is currently the Building Official for the City, testified that the subject fence was compliant with City code in 1986, and is still compliant with current City code.<sup>21</sup>

Peterson does not know why the correction notice was issued.<sup>22</sup>

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<sup>15</sup> Cindy Peterson is also known as "Cindy Meyer", following her marriage. Both names are used interchangeably in this case. Cindy Meyer is currently the City Building Official.

<sup>16</sup> CP 89.

<sup>17</sup> CP 428, ¶ 6; CP 376; CP 380-1.

<sup>18</sup> CP 94-97.

<sup>19</sup> CP 430, ¶ 11.

<sup>20</sup> CP 430, ¶ 11.

<sup>21</sup> CP 101-107; CP 194 ¶ 6; CP 429, ¶ 6; CP 430-431.

<sup>22</sup> CP 429, ¶ 6.

Peterson does not know if there was a follow up visit to check for compliance.<sup>23</sup> Peterson did not, and cannot, testify there was, or was not, a follow-up visit by her or one of the other inspectors in this matter.<sup>24</sup> Peterson also checked the City's records for the subject fence.<sup>25</sup> There were no complaints directed at the subject fence, between the time the fence was built in 1986 and the date of the accident in 1997.<sup>26</sup> On the date of the accident, Peterson had no knowledge of any City building or zoning violation regarding the subject fence.<sup>27</sup>

Peterson testified the "Mis" notation on the correction notice was short for miscellaneous.<sup>28</sup> However, a "miscellaneous" notation does not represent an inherently dangerous and hazardous condition.<sup>29</sup>

Channing denies ever receiving a correction notice or being aware of any violation of any applicable City code provisions.<sup>30</sup>

In 1988, the current owners, the Ngs, purchased the Complex from Hudlicky's widow.<sup>31</sup>

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<sup>23</sup> CP 428, ¶ 4.

<sup>24</sup> CP 428, ¶ 4.

<sup>25</sup> CP 429, ¶ 7.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> CP 194, ¶ 7 – CP 195.

<sup>29</sup> CP 195, ¶ 7.

<sup>30</sup> CP 19.

<sup>31</sup> CP 35.

## **B. Procedure**

Between March, 2004 and August, 2004, Ms. Yoeun, Yoeun's mother, individually, and as Guardian ad Litem for minor Yoeun, sued the Ngs, the Steiners, and Anderson Glass Company.<sup>32</sup>

The Steiners and the Ngs moved for summary judgment. On November 17, 2004, the trial court issued its Memorandum of Decision.<sup>33</sup> The trial court granted the Steiners' motion for summary judgment dismissal.<sup>34</sup> The trial court granted the Ngs' motion for summary judgment regarding Yoeun's mother's claims against the Ngs, but denied the Ngs' motion for summary judgment regarding Yoeun.<sup>35</sup>

On January 7, 2005, the trial court entered Findings and Final Judgment on Plaintiffs' Claims Against Defendants Steiner, which granted final judgment of dismissal in favor of the Steiners.<sup>36</sup>

On January 27, 2005, Ms. Yoeun filed the Second Amended Complaint for Personal Injuries and Damages, adding the City to this lawsuit.<sup>37</sup> Ms. Yoeun alleged the City owed a duty to them to monitor and enforce City codes regarding the subject fence, and that the City's alleged failure to monitor and enforce City codes was a proximate cause of their

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<sup>32</sup> CP 647-660

<sup>33</sup> CP 661-664.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> CP 324.

<sup>37</sup> CP 665-667.

injuries.<sup>38</sup>

On September 6, 2005, Ms. Yoeun filed the Third Amended Complaint to add the Channings and the Hudlickys.<sup>39</sup> The Channings were named because they owned Evergreen State Fence Company.<sup>40</sup> Ms. Yoeun alleged the Channings negligently constructed/placed the subject fence in such a manner that it was in violation of City code, obstructed the view, and contributed to the accident.<sup>41</sup>

The Hudlickys were named because they owned the property and built and/or allowed the subject fence to be built on their property.<sup>42</sup>

The Hudlickys moved for summary judgment dismissal of the claims against them. On January 31, 2006, the Order granting summary judgment dismissal of all claims against the Hudlickys was entered.<sup>43</sup>

On June 13, 2006, the Channings also moved for summary judgment dismissal.<sup>44</sup> The Channings based their motion for dismissal on the following theories: the Yoeuns failed to allege any recognized cause of action, and the Yoeuns failed to allege a factual basis sufficient to support claims against the Channings.<sup>45</sup>

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<sup>38</sup> CP 667.

<sup>39</sup> CP 675-679.

<sup>40</sup> CP 676-678.

<sup>41</sup> CP 329, CP 678.

<sup>42</sup> CP 675-678.

<sup>43</sup> CP 44.

<sup>44</sup> CP 18-39.

<sup>45</sup> CP 19.

On June 28, 2006, the City moved for summary judgment dismissal of Plaintiffs' claims pursuant to CR 56.<sup>46</sup> The City based its motion for dismissal on the following theories: (1) the City did not owe a duty to Yoeun, or to his mother, based on the public duty doctrine because none of the exceptions to the public duty doctrine applied, and (2) the subject fence was in compliance with City code, then and now.<sup>47</sup>

On October 13, 2006, the trial court issued its Memorandum of Decision granting the City's and the Channings' motions for summary judgment dismissal of all claims against them.<sup>48</sup> The trial court held the driveway Yoeun rode his bike down was a private drive, and not a service drive.<sup>49</sup> The trial court also held the subject fence was "legal under the City code".<sup>50</sup> The trial court also held the "failure to enforce" exception to the public duty doctrine did not apply.<sup>51</sup>

On December 1, 2006, the Findings and Final Judgment on Plaintiffs' Claims Against Defendant City of Vancouver was entered.<sup>52</sup>

On December 6, 2006, the Findings and Final Judgment of Dismissal as to Defendants Evergreen State Fence Company and Roger

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<sup>46</sup> CP 40-207.

<sup>47</sup> *Id.*

<sup>48</sup> CP 495-499.

<sup>49</sup> CP 496-497.

<sup>50</sup> CP 497-498.

<sup>51</sup> CP 497-498.

<sup>52</sup> CP 615-622.

and Estella Channing dba Evergreen State Fence was entered.<sup>53</sup>

On December 27, 2006, Yoeun filed a Notice of Appeal to the Washington State Court of Appeals, Division II.<sup>54</sup>

## **II. ARGUMENT**

### **A. Standard of Review**

The appellate court reviews a grant of summary judgment de novo, engaging in the same inquiry as the trial court and viewing the facts and reasonable inferences from those facts in the light most favorable to the nonmoving party. *City of Spokane v. County of Spokane*, 158 Wn.2d 661, 671, 146 P.3d 893 (2006). When reviewing a grant of summary judgment, the Court limits its review to the record presented to the trial court at the time of the summary judgment. *Hines v. Data Line Systems*, 114 Wn.2d 127, 148, 787 P.2d 8 (1990).

This Court may uphold a grant of summary judgment on a ground different than that on which the trial court relied if such theory was argued and briefed by the parties below. *Bernal v. American Honda Motor Co.*, 87 Wn.2d 406, 414, 553 P.2d 107 (1976).

### **B. Summary Judgment Standard**

Summary judgment is appropriate “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the

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<sup>53</sup> CP 624-626.

<sup>54</sup> CP 627-640.

affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” *Stiefel et al. v. City of Kent*, 132 Wn. App. 523, 528, 132 P.3d 1111 (2006) (citations omitted); Wash. Super. Ct. Civ. R. (CR) 56(c). A “material fact” is a fact “upon which the outcome of the litigation depends.” *Balise v. Underwood*, 62 Wn.2d 195, 199, 381 P.2d 966 (1963) (citations omitted).

The Washington State Court of Appeals in *Ernst Home Center v. United Food and Commercial Workers Int’l Union, AFL-CIO, Local 1001, et al*, 77 Wn. App. 33, 40, 888 P.2d 1196 (1995), set forth the applicable standards for ruling on a motion for summary judgment:

In a motion for summary judgment, the moving party bears the initial burden of showing the absence of a material fact. *Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989) (citing *LaPlante v. State*, 85 Wn.2d 154, 158, 531 P.2d 299 (1975)). If the moving party is a defendant and meets this initial burden, then the inquiry shifts to the party with the burden of proof at trial -- the plaintiff. *Young*, at 225. The plaintiff must then set forth specific facts showing that there is a genuine issue of material fact for trial. *Young*, at 225-26 (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 332 n.3, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986) (Brennan, J., dissenting)).

The Washington State Court of Appeals in *Donohoe v. State*, 135 Wn. App. 824, 834 – n. 7, 142 P.3d 654 (2006) (citations omitted) stated:

[The appellate court] must consider all facts submitted and all reasonable inferences from them in the light most

favorable to the nonmoving party. But the non-moving party may not rely on speculation, argumentative assertions that unresolved factual issues remain, or consideration of affidavits at face value.

n7 “[A]fter the moving party submits adequate affidavits, the nonmoving party must set forth specific facts that sufficiently rebut the moving party’s contention and disclose that a genuine issue as to the material fact exists,” based on admissible, personal knowledge of a competent affiant.

Although the trial court must make all reasonable inferences in the light most favorable to the plaintiff, an inference is not reasonable unless it is deduced “as a logical consequence” of proven or admitted facts. *Fairbanks v. J.B. McLoughlin*, 131 Wn.2d 96, 101-02, 929 P.2d 433 (1997).

### **C. Respondent City is Entitled to Summary Judgment**

The Yoeuns premise their action against the City on the following:

(1) there was a sight triangle violation with the subject fence which abutted a “service drive”;<sup>55</sup> (2) the City had a duty to enforce its codes and did not, thus allowing the sight triangle violation to exist;<sup>56</sup> and, (3) but for the sight triangle violation, the accident would not have occurred because the driver of the car would have seen the bicyclist and the bicyclist would have seen the car in time to avert the accident.<sup>57</sup>

The City is entitled to summary judgment in this matter on the

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<sup>55</sup> Appellant’s Brief (App. Br.) at 11-13.

<sup>56</sup> App. Br. at 15-20

<sup>57</sup> App. Br. at 19-20.

following bases: (1) the public duty doctrine applies, and the City did not owe a duty to Plaintiffs because none of the exceptions to the public duty doctrine apply in this case; and/or, (2) the subject fence at issue was in compliance with the City code, at the time of the accident, and is still in compliance today.

**1. The Trial Court Did Not Err When it Found the Complex Driveways Were Private Driveways and Not Service Driveways.**

Ms. Yoeun argues the trial court erred when it found the subject apartment Complex driveways were “private drives”, not “service drives”.<sup>58</sup> Ms. Yoeun attaches Appendix 2 (“A-2”) to her brief and states A-2 is a copy of the City ordinance that governs the vision clearance for this particular location and type of driveway, Vancouver Municipal Code (“VMC”) § 20.93.240 (1981).<sup>59</sup>

Appendix 2 to Ms. Yoeun’s brief is not an accurate representation of the ordinance (VMC § 20.93.240), which was in effect in 1986 (when the fence was constructed) and in 1997 (when the accident occurred) because her version omits section (C)(3). Section (C)(3) provides for the sight triangle in the case of a “private driveway located within seven feet

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<sup>58</sup> App. Br. at 4-6.

<sup>59</sup> App. Br. at 5, A-2.

of an interior side property line”.<sup>60</sup> The correct version of VMC § 20.93.240, with subsection (C)(3), was included and discussed in documents submitted to the trial court numerous times by both Ms. Yoeun and the City.<sup>61</sup> VMC § 20.93.240 (C)(3) is appended hereto as Appendix 1 (“App. 1”) and provides as follows:

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

...

3. In the case of a private driveway located within seven feet of an interior side property line, two sides of this triangle are measured seven feet from the intersection of the property line and the right-of-way, one side extending up the common lot line and the other along the public way on the abutting property. The third side is a line across the corner of the abutting lot joining the other two sides. The two seven foot sides of the triangle may be reduced by one foot for each foot of clearance between the driveway and the interior property line.

In footnote 1 of her appellate brief, Ms. Yoeun attempts to argue the City relied upon, and the trial court considered, code provisions and

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<sup>60</sup> See CP 187-188 (Exhibit “A” to Declaration of Cottingham [Yoeun’s expert] filed with the trial court on October 21, 2004, CP 182-189); CP 199-200 (Affidavit of Jon Wagner in Support of Defendant City’s Motion for Summary Judgment, ¶¶ 4, 5, 9); CP 420 and CP 405-406 (Affidavit of Jon Wagner in Support of Defendant City’s Reply to Plaintiffs’ and Defendant Ngs’ Responses to City’s Motion for Summary Judgment, ¶¶ 7, 8); CP 416 (Affidavit of Alison Chinn in Support of City’s Reply, ¶¶ 3, 4); CP 431-2 (Affidavit of Cindy Meyer, fka Cindy Peterson, in Support of City’s Reply, ¶¶ 15, 18); CP 127 (Exhibit 10 in Support of City’s Motion for Summary Judgment); and, CP 389 (Deposition of Cindy Peterson taken August 17, 2004, ln. 6 – 25.)

<sup>61</sup> *Id.* (VMC § 20.93.240(C)(3) was a later codification of VMC § 20.93.240(C) – they are identical in language.)

drawings it should not have considered.<sup>62</sup>

Arguments in footnotes are ambiguously raised and need not be considered by this court. *State v. N.E.*, 70 Wn. App. 602, 606 n.3, 854 P.2d 672 (1993); *State v. Johnson*, 69 Wn. App. 189, 194 n.4, 847 P.2d 960 (1993). Assuming this court may consider the argument in footnotes, the City responds to Ms. Yoeun's allegations.

As discussed above, the ordinance Ms. Yoeun attached to her brief as A-2 is incomplete. The correct version of VMC §20.93.240 is attached as App. 1.

With regard to the drawings Ms. Yoeun alleges the trial court should not have considered, there was an illustration that was mistakenly adopted in the City's Code. However, it was discovered that one of the diagrams adopted to help illustrate the meaning of subsection (C)(3) of VMC § 20.93.240, was drawn incorrectly.<sup>63</sup> This diagram was adopted by the City after the accident, and was later corrected.<sup>64</sup> The corrected version of the diagram was attached as City Exhibit 12 to the City's Motion for Summary Judgment.<sup>65</sup>

In addition to providing the corrected illustration adopted by the

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<sup>62</sup> App. Br. at 5, footnote 1.

<sup>63</sup> CP 199, ¶ 7.

<sup>64</sup> *Id.* at ¶¶ 6 and 7.

<sup>65</sup> CP 200, CP 137 – 138.

City's Code, the City created Exhibits 19A and 19B<sup>66</sup> in order to illustrate the sight triangle requirements for a private driveway under VMC §20.93.240(C)(3) as part of its Reply to Plaintiffs' and Defendant Ngs' Responses to City's Motion for Summary Judgment ("City's Reply").<sup>67</sup> The purpose was to assist the trial court in understanding the language contained in VMC §20.93.240(C)(3) and how it interfaced with the subject driveway and subject fence.<sup>68</sup>

Therefore, contrary to Ms. Yoeun's assertions, the City and the trial court did not rely upon code provisions that were not adopted prior to the accident, nor did they rely upon improper diagrams.

**a. The driveway in question was a private driveway, not a service driveway.**

Ms. Yoeun incorrectly asserts the subject driveway is a service driveway within the definition provided in VMC §11.20.010, appended to her brief as A-1.<sup>69</sup>

VMC §11.20.010<sup>70</sup> defines the terms "private driveway" and "service driveway":

Private Driveway. "Private driveway," as used in this chapter, means any driveway constructed in accordance

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<sup>66</sup> CP 405-406 (Exhibits 19A and 19B are attached as Appendix 3 ("App. 3")).

<sup>67</sup> CP 356-357; CP 405-406; CP 419-420, ¶¶ 3, 7-8; CP 432, ¶ 18.

<sup>68</sup> CP 356-357.

<sup>69</sup> App. Br. at 4-7.

<sup>70</sup> CP 403, appended to this brief as Appendix 2 (App. 2).

with the city standard specifications in or upon any street and intended for use by the occupant as a private driveway to the property.

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.

(Emphasis added.)

Ms. Yoeun concludes, without analysis of the ordinance, the driveways belonging to the Complex were service driveways because “the City code fully contemplated service drives leading to residential developments”, “there was no requirement that a piece of property be zoned for commercial use before its driveway could qualify as a ‘service drive’”, and “there was no evidence presented that the driveways were used by private residents only, or that there was some other driveway set aside for public use”.<sup>71</sup> Ms. Yoeun argues, in a footnote, that 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.”<sup>72</sup> In another footnote, Ms. Yoeun argues “[t]he 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).” (Emphasis

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<sup>71</sup> App. Br. at 5-6.

<sup>72</sup> App. Br. at 6, footnote 2.

in original.)<sup>73</sup>

VMC § 20.93.240 acknowledges the possibility of a service drive to a “residential development”. However, the interpretation that all residential property have a “service drive”, as Ms. Yoeun asserts, would make the reference to, and definition of, a “private driveway” superfluous in VMC §11.20.010. There would be no reason to define and categorize a “private driveway” if Ms. Yoeun’s interpretation is correct. In statutory construction, the City ordinance is required to be interpreted and construed so that all the language used is given effect, with no portion rendered meaningless or superfluous. *Davis v. Dep’t of Licensing*, 137 Wn.2d 957, 963, 977 P.2d 554 (1999). Ms. Yoeun’s interpretation would render portions of the ordinance meaningless or superfluous, and therefore, the ordinance should not be construed in the manner she argues.

- i. **A service driveway is intended for use and used by the public for access to any place of business or public use.**

The definition of “service driveway” requires the driveway “is intended for use and used by the public for access to any place of business or public use.”<sup>74</sup> There is no dispute 2100 Carlson Road is an apartment complex. However, the driveways at the Complex were not intended for

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<sup>73</sup> App. Br. at 6, footnote 3.

<sup>74</sup> See App. 2 to City Respondent’s Brief.

use and used by the public for access to any place of business or public use within the meaning of the ordinance.

**a. The Complex was not a “place of business”.** At the time the building permit applications were submitted to the City in 1970 and 1971, the property at 2100 Carlson Road was zoned for residential use only.<sup>75</sup> Since 1970, the zoning designation for the subject property has been, and still is, residential.<sup>76</sup> The subject property has never been zoned commercial or business.<sup>77</sup> Operating a business at the subject property would be in violation of the City’s Zoning Code.<sup>78</sup> Anyone wishing to conduct business in the City of Vancouver is required by ordinance to obtain a City business license prior to engaging in business.<sup>79</sup> And, there is no business license requirement to operate an apartment complex, as the City does not define this as operating a business.<sup>80</sup>

After reviewing the subject site, the City’s Senior Planner (Jon Wagner), whose job it is to interpret the City’s Zoning Code, formed his opinion that the two driveways at 2100 Carlson Road are private driveways, to be used by the tenants and their guests as private driveways

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<sup>75</sup> See CP 419, ¶ 5.

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*; CP 432, ¶ 16.

<sup>79</sup> CP 424, ¶¶ 3 – 4.

<sup>80</sup> CP 419-420, ¶ 6; CP 425, ¶ 5.

to the property.<sup>81</sup> His opinion is further supported by the results of a business records search for any business located at 2100 Carlson Road, or for any business licenses issued to anyone who listed 2100 Carlson Road as his or her address. There has not been a City business license issued, from 1970 to the date of the accident, listing 2100 Carlson Road as a business location.<sup>82</sup> Likewise, there has not been a City business license issued during that time period to anyone who listed 2100 Carlson Road as his or her address.<sup>83</sup> It is illegal in the City of Vancouver to conduct business without first obtaining a business license.<sup>84</sup>

Therefore, the record fails to show how the Complex driveways were intended for use and used by the public for access to any place of business.

**b. The Complex was not a place for “public use”.** A driveway is a service driveway if it is intended for use and used by the public for access to public use.<sup>85</sup> This Complex was not a place of public use.

The term “public use” is not defined in the Zoning Code.<sup>86</sup> In interpreting an ordinance, if the term is not defined within the ordinance, words are given their ordinary, dictionary meaning unless contrary

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<sup>81</sup> CP 419-420, ¶ 6.

<sup>82</sup> CP 424, ¶ 4.

<sup>83</sup> *Id.*

<sup>84</sup> *Id.* at ¶ 3.

<sup>85</sup> CP 403; App. 2 (VMC § 11.20.010 -- “Service Driveway”.)

<sup>86</sup> CP 421, ¶ 10.

legislative intent is indicated. *Bellevue v. Lorang*, 140 Wn.2d 19, 24, 992 P.2d 496 (2000). The Merriam Webster's Collegiate Dictionary (10<sup>th</sup> Edition) does not define the term "public use". It does, however, define the words "public" and "use". The definition of the word "public" includes, "the people as a whole: POPULACE". Merriam Webster's Collegiate Dictionary 944 (10<sup>th</sup> Edition). The definition of the word "use" includes, "the privilege or benefit of using something". *Id.* at 1301. A reasonable interpretation of the term "public use" is, the privilege or benefit of using something by the people as a whole. In this case, "people as a whole" would mean everyone, not just tenants, their guests, and invitees.

There are places that can be used by all members of the public, including a public library, a public park, and a public roadway. These public use facilities are distinguishable from the driveways and property of a private apartment complex. There is nothing in the record to indicate or infer the Complex owners held their property open to all members of the public to enjoy the apartment complex and its grounds for activities including free parking in their lot, loitering on their grounds, or picnicking on their lawn, without the persons first obtaining permission directly from the owners, or indirectly by being guests of lawful tenants.

The City's Senior Planner (Jon Wagner) is not the only person to

label the subject driveway as “private”. On the day of the accident, one of the Vancouver police officers that responded to the accident call labeled both driveways to the Complex as “private driveways” in his official Police Traffic Collision Report.<sup>87</sup> The City’s Building Official, Cindy Meyer, also concluded the driveway in question was a private driveway.<sup>88</sup>

**b. The City Senior Planner’s and City Building Official’s determinations that the subject driveway is a private driveway are accorded great weight.**

The language of VMC §11.20.010 is unambiguous. However, if the court finds the ordinance is ambiguous, the City Senior Planner and City Building Official’s interpretation of the ordinance are accorded great weight in determining the intent. *See McTavish v. City of Bellevue*, 89 Wn. App. 561, 564, 949 P.2d 837 (1998).<sup>89</sup> Both of them have determined, after reviewing the records, the subject driveway was, and still is, a private driveway, not a service driveway.

In conclusion, the driveways at 2100 Carlson Road are private driveways because no business could legally operate there (zoning and business license violations), and the property was not open for use by all members of the public. Rather, the driveways were intended for the

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<sup>87</sup> CP 73.

<sup>88</sup> CP 432, ¶ 16.

<sup>89</sup> *See* CP 358-359.

tenants and permitted guests to access the property. Therefore, contrary to Ms. Yoeun's allegations, the Complex driveways at 2100 Carlson were not, and are not, service driveways. The City Senior Planner's and City Building Official's determinations that the driveways at 2100 Carlson Road were, and are still, private driveways are admissible and accorded great weight. There is no genuine issue of material of fact that the subject driveway was, and still is, a private driveway.

**2. The Subject Fence Was in Compliance with City Codes on the Date of the Accident, and Today.**

Ms. Yoeun's claim against the City is based upon an alleged violation of the City's sight triangle code at the subject fence, which the City allegedly failed to adequately address.<sup>90</sup> Contrary to Ms. Yoeun's assertions, the subject fence was in compliance with City Code on the date of the accident, and is still in compliance today.<sup>91</sup>

The applicable vision clearance code is VMC § 20.93.240(C)(3) because the driveway abutting the subject fence is a private driveway.<sup>92</sup> Ms. Yoeun's claim hinges on the subject driveway being characterized as a "service driveway" because there is a different sight triangle requirement for a service driveway as opposed to a private driveway, and the City's

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<sup>90</sup> CP 666-667; CP 677-678.

<sup>91</sup> CP 432, ¶ 18; CP 420, ¶¶ 7-8; CP 194-195, ¶¶ 6, 10; and CP 200, ¶¶ 12-13.

<sup>92</sup> See Discussion above in section (II)(C)(1)(a) and (b) – p. 14-21.

Senior Planner and Building Official both decided the subject fence satisfied, and still satisfies, the vision clearance requirements for a fence abutting a private driveway.<sup>93</sup>

A service driveway has a thirty (30) feet sight triangle – “a triangle whose base extends thirty feet along the street right-of-way line in both directions from the centerline of the service drive with the apex of the triangle thirty feet into the property on the centerline of said service drive.” VMC § 20.93.240 (C)(2).<sup>94</sup> A private driveway, that is located within seven feet of an interior side property line, has a sight triangle requirement of seven feet on the fence located along the interior side property line.<sup>95</sup>

The private driveway vision sight triangle requirement contained in VMC § 20.93.240 (C)(3), appended as Appendix 1, is directed toward the interior side-yard fence, which is perpendicular to Carlson Road.<sup>96</sup> This vision clearance requirement is not directed toward the subject fence.<sup>97</sup> The subject fence runs parallel to Carlson Road.<sup>98</sup> The subject fence is an

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<sup>93</sup> See App. 1 to this brief; CP 187-188; Discussion above in section (II)(C)(1)(a) and (b) – p. 14-21.

<sup>94</sup> CP 188; App. 1.

<sup>95</sup> CP 188; See Page 12 of City Respondent’s brief, above, and App. 1.

<sup>96</sup> CP 389-390, and CP 398 (Deposition of Cindy Peterson, page 26, ln. 6 – p. 27, ln. 14, and Correction Page on CP 398).

<sup>97</sup> *Id.*

<sup>98</sup> CP 432, ¶18; CP 419, ¶ 3; CP 109-111, CP 113, CP 115-116 (Photographs of the subject fence and driveway).

interior fence, but not an “interior side-yard fence”.<sup>99</sup>

City Exhibits 19A and 19B<sup>100</sup>, appended as Appendix 3 (“App. 3”), illustrate how the ordinance interfaces with the subject driveway and the subject fence.<sup>101</sup> City Exhibit 19A is a diagram depicting the site, labeling the corresponding locations of the sight triangle referred to in VMC § 20.93.240(C)(3). City Exhibit 19B contains the language of VMC §20.93.240(C)(3).<sup>102</sup> The street, road, and driveway measurements used for City Exhibit 19A were taken from the drawing by Plaintiffs’ witness, Cottingham, filed on October 9, 2004.<sup>103</sup>

Within City Exhibit 19A, the interior side property line is labeled, “A”; the intersection of the property line and the right-of-way is labeled, “B”; the line extending up the common lot line is labeled, “C”; the line extending along the public way on the abutting property is labeled, “D”; and, the line across the corner of the abutting lot is labeled, “E”. The sight triangle for the property is labeled with lines “E”, “D”, and “C”, the side of the driveway closest to the neighboring property south of the subject fence. Therefore, the subject fence (to the north of the

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<sup>99</sup> CP 389-390, and CP 398 (Deposition of Cindy Peterson, page 26, ln. 6 – p. 27, ln. 14, and Correction Page on CP 398).

<sup>100</sup> CP 405-406.

<sup>101</sup> CP 432, ¶ 18; CP 420, ¶ 7. *See* CP 187-188.

<sup>102</sup> CP 416, ¶¶ 3 – 4.

<sup>103</sup> CP 302 (Declaration of Ken Cottingham, filed October 9, 2004 - Exhibit G to Plaintiffs’ Response); CP 416, ¶ 3.

southernmost driveway) has no vision clearance requirement, and is in compliance with the Code even though it had a solid fence between 30 inches and 10 feet above the street grade all the way to the entrance of the southernmost driveway.<sup>104</sup>

VMC § 20.93.240 (C)(3) does not have a sight triangle requirement for the fence parallel to Carlson Road at the north side of the southernmost driveway. In this case, the sight triangle requirement applies only to the other fencing that runs perpendicular to Carlson Road, to the south of the southernmost driveway of the subject property.<sup>105</sup>

The version of VMC § 20.93.240 set forth in Appendix 1<sup>106</sup> is the ordinance that was in effect in 1986, 1997, and today.<sup>107</sup> Therefore, the subject fence, parallel to Carlson Road, was compliant with the City Code in 1986 (when fence was constructed), 1997 (when the accident occurred), and today.<sup>108</sup> There was, and still is, no vision clearance requirement for the subject fence. Therefore, there is no vision clearance violation regarding the subject fence, even if the fence is five feet in height with slats up to the northern edge of the subject driveway.

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<sup>104</sup> CP 432-433, ¶ 18; CP 420, ¶ 7.

<sup>105</sup> CP 420, ¶ 8.

<sup>106</sup> CP 187-188 (Exhibit "A" to Declaration of Cottingham [Yoeun's expert] filed with the trial court on October 21, 2004, CP 182-189); CP 127 (Exhibit 10 to City's Motion for Summary Judgment).

<sup>107</sup> CP 196, ¶ 14; CP 200, ¶ 9.

<sup>108</sup> CP 200, ¶ 12.

In her appellate brief, Ms. Yoeun now argues for the first time, the subject fence is six feet tall.<sup>109</sup> However, in documents Ms. Yoeun filed with the trial court, Ms. Yoeun agreed the subject fence was five feet tall.<sup>110</sup> In addition, Declarations of Ms. Yoeun's expert, (Ken Cottingham), have been contradictory – stating the subject fence was five feet in height<sup>111</sup> then later, a line was drawn through the “5” and “6” was added<sup>112</sup> but with conflicting five feet height comments in the written section of his drawing attached to that declaration – “The fence is full 5’ ht along D.W. and Carlson Rd and should be 30” in height”.<sup>113</sup>

All other parties to this lawsuit have always asserted the subject fence was/is five feet tall. The Complex owners' expert (Larry Tompkins) personally visited the site and measured the scene and opined the subject fence meets the height limitation of five feet.<sup>114</sup> The alleged fence builder, the Channings, stated the bid proposal for fencing at that site was for a five-foot fence.<sup>115</sup> The City presented photographic and other evidence of a five-foot tall fence in the form of exhibits to the City's

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<sup>109</sup> App. Br. at p. 13

<sup>110</sup> See Plaintiff's Response to City's Motion for Summary Judgment, p. 4, ln. 19 – p. 5, ln. 2 (CP 255-256); and, Plaintiff's Response to Channings' Motion for Summary Judgment, p. 2, ln. 2-3 (CP 233).

<sup>111</sup> CP 141, ¶ 6 (Declaration of Ken Cottingham filed June 21, 2004).

<sup>112</sup> CP 148, ¶ 10 (Declaration of Ken Cottingham dated October 9, 2004.)

<sup>113</sup> CP 150 – right hand side under “Notes” (Drawing attached to Declaration of Ken Cottingham dated October 9, 2004).

<sup>114</sup> CP 172, ¶ 6 – CP 173, ¶ c.

<sup>115</sup> CP 30, ¶¶ 5-6; CP 33 (Proposal for fence); CP 34 (Building permit for 5 foot fence).

Motion for Summary Judgment,<sup>116</sup> Affidavits of the City Building Official (Cindy Peterson) who measured the fence at five feet tall,<sup>117</sup> and affidavits of the City's Senior Planner and Building Official testifying to the code compliance of the fence.<sup>118</sup> Plaintiffs cannot now create an issue of material fact by asserting a different fence height, especially because they agreed the subject fence was five feet high in the trial court.

Ms. Yoeun may question the lack of a sight vision clearance requirement for the fence that parallels Carlson Road in this particular circumstance. Applicable principles of statutory construction that apply in this case are set forth by the Washington State Supreme Court in *Davis v. Dep't of Licensing*, 137 Wn.2d 957, 963-4, 977 P.2d 554 (1999):

In interpreting a statute, we do not construe a statute that is unambiguous. ... The court must give effect to legislative intent determined "within the context of the entire statute." Statutes must be interpreted and construed so that all the language used is given effect, with no portion rendered meaningless or superfluous. (Citations omitted.)

In judicial interpretation of statutes, the first rule is 'the court should assume that the legislature means exactly what it says. Plain words do not require construction'. (Citations omitted.)

"We do not inquire what the legislature meant; we ask only what the statute means." Oliver Wendell Holmes, *The Theory of Legal Interpretation*, 12 Harv. L. Rev. 417,

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<sup>116</sup> Exhibits to City's Motion for Summary Judgment (CP 109-110; CP 115-Exhibit to Officer Boynton's deposition – a photograph produced by Ms. Yoeun, containing the notation of "Fence is about 5' Tall").

<sup>117</sup> CP 195, ¶ 13; CP 196, ln. 4-7; CP 433, ln. 1.

<sup>118</sup> CP 432, ¶ 18; CP 420, ¶¶ 7 –8; CP 194-195, ¶¶ 6, 10; and CP 200, ¶¶ 12-13.

419 (1899). “It seems axiomatic that the *words* of a statute -- and *not* the legislator’s intent as such – must be the crucial elements both in the statute’s legal force and in its proper interpretation.” Laurence H. Tribe, *Constitutional Choices* 30 (1985).

In addition, it is not the province of the court to second-guess the wisdom of the legislative body’s policy judgment so long as the legislature does not offend constitutional precepts. *Davis*, 137 Wn.2d at 976.

In this case, the language of the ordinance is unambiguous. And, with the assistance of the diagram (City Exhibit 19A), the application of the ordinance is also clear. Even if this court finds the ordinance ambiguous, the City’s Building Official’s and the City’s Senior Planner’s interpretations of the ordinances are accorded great weight in determining the intent. *See McTavish v. City of Bellevue*, 89 Wn. App. 561, 564, 949 P.2d 837 (1998).

The interpretation of an ordinance is a question of law. *Schroeder Architects v. Bellevue*, 83 Wn. App. 188, 191, 920 P.2d 1216 (1996). Thus, the trial court could consider the sight triangle ordinance and make a summary judgment ruling regarding the sight triangle issue. Therefore, the trial court did not err when it found the Complex driveways were private drives, not service drives, and found the subject fence was in compliance with the City’s Codes.

**3. The Trial Court Did Not Err When it Found the City Did Not Owe Sunnie Yoeun a Duty of Care.**

Negligence consists of: (1) existence of a duty owed to the complaining party; (2) a breach of that duty; (3) a resulting injury; and, (4) a proximate cause between the claimed breach and resulting injury. See *Hertog v. City of Seattle*, 138 Wn. 2d 265, 275, 979 P.2d 400 (1999); *Hansen v. Washington Natural Gas Co.*, 95 Wn. 2d 773, 776, 632 P.2d 504 (1981). The determination of the existence of a duty is a question of law. *Taylor v. Stevens County*, 111 Wn. 2d 159, 168, 759 P.2d 447 (1988).

The Washington State Supreme Court in *Taylor v. Stevens County*, stated that before an action in negligence can be found, the plaintiffs must show that they are owed a duty of care by the defendant:

The threshold determination in a negligence action is whether the defendant owes a duty of care to the plaintiff. Whether the defendant is a governmental entity or a private person, to be actionable, *the duty must be owed to the injured plaintiff, and not one owed to the public in general.* This basic principle of negligence law is expressed in the “public duty doctrine.” Under the public duty doctrine, no liability may be imposed for a public official’s negligent conduct unless it is shown that ‘the duty breached was owed to the injured person as an individual and was not merely the breach of an obligation owed to the public in general (i.e., a duty to all is a duty to no one).’

*Id.* at 163 (citations omitted) (emphasis added).

**a. The Public Duty Doctrine Applies in Code Enforcement Cases.**

The public duty doctrine applies in code enforcement cases. Traditionally, state and municipal laws impose duties owed to the public as a whole and not to particular individuals. *Meaney v. Dodd*, 111 Wn.2d 174, 178, 759 P.2d 455 (1988), (citations omitted). The Washington State Supreme Court has applied the public duty doctrine to code compliance inspections. See, *Atherton Condo. Apartment-Owner Ass'n Bd. Of Dirs. v. Blume Dev. Co.*, 115 Wn.2d 506, 799 P.2d 250 (1990); *Taylor, supra*. The Washington State Supreme Court held that under the public duty doctrine “governmental entities do not owe an actionable duty of care to individuals for negligent failure to detect building code violations.” *Atherton, supra* at 529.

The Washington State Supreme Court in *Taylor*, 111 Wn.2d at p. 168-170, (emphasis added) explicitly held:

*that no duty is owed by local government to a claimant alleging negligent issuance of a building permit or negligent inspection to determine compliance with building codes. The duty to ensure compliance rests with individual permit applicants, builders and developers. ... [L]ocal government owes no duty of care to ensure compliance with the codes.*

Several policy considerations compel our conclusion that it is the duty of the individuals, not local government, to ensure compliance with building codes.

First, the primary purpose of building permits and building code inspections is to secure to local government consistent compliance with construction, zoning and land use ordinances. (Citations omitted.) ...

Second, placing the burden on local government to ensure compliance with building codes is unreasonable in light of budgetary and personnel constraints. ...

Third, the approval of construction plans and satisfactory inspections do not absolve a builder from the legal obligation to comply with statutes. ...

Fourth, imposing liability on individuals for noncompliance with building codes is consistent with this State's zoning vested rights doctrine. ...

Fifth, ... [r]equiring local government to indemnify an individual for losses resulting from the negligent administration of building codes imposes substantial costs on local government with little or no corresponding benefit.

Therefore, in order for a plaintiff to recover from a municipality in tort under the public duty doctrine, "a plaintiff must show the duty breached was owed to an individual and was not merely a general obligation owed to the public." *Babcock v. Mason Co. Fire Dist. No. 6*, 144 Wn. 2d 774, 30 P.3d 1261 (2001) (quoting *Beal v. City of Seattle*, 134 Wn. 2d 769, 784, 954 P.2d 237 (1998) (citations omitted).

- i. **The required elements of the failure to enforce exception to the public duty doctrine were not satisfied.**

There are four exceptions to the public duty doctrine in which a

duty might be found.<sup>119</sup> *Moore v. Wayman*, 85 Wn. App. 710, 718, 934 P.2d 707 (1997), *rev. denied*, 133 Wn.2d 1019 (1997). Ms. Yoeun argues only the failure to enforce exception – “the trial court erred when it found Plaintiff had not raised genuine issues of material fact on all elements of the ‘failure to enforce’ exception.”<sup>120</sup>

The Washington State Supreme Court in *Atherton, supra*, set forth the required elements of the failure to enforce exception to the public duty doctrine in a building code case. The required elements include proof that: (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; (3) the plaintiff is within the class the statute intended to protect; and (4) the public building official has actual knowledge of an inherently dangerous and hazardous condition. *Id.* The failure to enforce exception is construed narrowly by the courts so as not to “effectively overrule *Taylor* [*Taylor v. Stevens County*, 111 Wn.2d 159, 759 P.2d 447 (1988)] and eviscerate the policy considerations therein identified.” *Id.* The party asserting the failure to enforce exception has the burden of proving the required elements. *Atherton, supra* at 531.

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<sup>119</sup> See CP 46- 59 for discussion of the public duty doctrine and the four exceptions - (City’s Motion for Summary Judgment and Memorandum in Support Thereof, pages 7-20.)

<sup>120</sup> App. Br. at 15-16.

Ms. Yoeun does not establish the following elements to the failure to enforce exception: 1) actual knowledge by governmental agents of a statutory violation and failure to take corrective action despite a statutory duty to do so; 2) plaintiff is within the class the statute intended to protect; and 3) the public building official has actual knowledge of an inherently dangerous and hazardous condition.

**a. The City and the City’s Building Official did not have actual knowledge of a statutory violation and/or did not have a statutory duty to take corrective action.** Plaintiffs argue the City had actual knowledge of a sight triangle violation because the City’s Building Official issued a miscellaneous correction notice in 1986.<sup>121</sup>

Evidence of mere issuance of a miscellaneous correction notice is not enough to show actual knowledge on the part of the City or the City’s Building Official of an alleged code violation or an alleged inherently dangerous and hazardous condition. In *Moore*, 85 Wn. App. 710, 934 P.2d 707 (1997), the court held actual knowledge was not shown in an action stemming from the “grossly deficient construction of a new home”. The *Moore* court held the “critical issue is whether the County inspectors approved the house for habitation with *actual knowledge* that the house was in violation of the building code, such that it created an inherently

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<sup>121</sup> App. Br. at 20.

dangerous and hazardous condition.” *Id.* at 723. (Italics in original.) In *Moore*, the inspectors noted several building code violations in their inspection reports. The court stated the inspection reports are not evidence that the inspectors knew the conditions, in violation of the code, existed at the time the home was completed, but only that they noticed the defects during construction and informed the builder so he could fix them. *Id.* The inspectors testified that when these defects did not reappear in later reports, they assumed or knew that the defects had been corrected. However, the buyers rebutted the inspectors’ assertions with the testimony of experts that any qualified inspector should have known these defects had not been corrected. *Id.* The court held this evidence, taken in its most favorable light, shows only constructive knowledge, which was not enough. The court in *Moore* then quoted from *Zimbelman v. Chaussee Corp.*, 55 Wn. App. 278, 283, 777 P.2d 32 (1989) that “the County cannot be charged with knowing that the contractor would fail to correct the deficiencies identified by the County in the plans.” *Id.* at 24, (citation omitted).

In this case, the City’s inspector issued a miscellaneous correction notice, and there are no additional records to indicate what occurred after

this notice was issued.<sup>122</sup> And it is also reasonable that no additional records exist regarding this permit because the problem noted in the miscellaneous correction notice had been corrected.<sup>123</sup> Like the *Moore* case, the notation on the building permit of the miscellaneous correction notice was not evidence the City inspector knew the miscellaneous condition, in violation of the code, existed at the time the fence was completed or at the time of the accident. The most this evidence shows is constructive knowledge, which is not enough to satisfy Plaintiffs' burden. The City cannot be charged with knowing that the owner or builder would fail to correct the violation noted in the correction notice. *See Zimbelman*, 55 Wn. App. 283.

The City's Building Official did not have actual knowledge of the alleged sight triangle violation on the date of the accident.<sup>124</sup> It is Peterson's testimony that the subject fence was in compliance with City codes on the date of the accident, and is still in compliance with City codes today.<sup>125</sup> Between October 15, 1986 and July 9, 1997, the date of the accident, the City's Building Official did not have any actual knowledge of any City code violation regarding the subject fence.<sup>126</sup>

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<sup>122</sup> CP 428, §§ 4, 5.

<sup>123</sup> CP 430, § 11.

<sup>124</sup> CP 195, § 10.

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

Further, a search of City records showed no complaints by anyone, regarding the subject fence between the time the fence was built in 1986 and the date of the accident in 1997.<sup>127</sup> In addition, pursuant to a public records' request performed at Plaintiffs' request, it was discovered that there were no traffic accidents at 2100 Carlson Road for the five-year period prior to the date of the accident.<sup>128</sup> There is no evidence to support Plaintiffs' conclusion that the City or the City's Building Official had actual knowledge that an alleged code violation or an allegedly inherently dangerous and hazardous condition existed regarding the subject fence at 2100 Carlson Road.

Plaintiffs further argue that once Peterson issued a miscellaneous correction notice, she had a duty to follow specific steps to ensure the property owner made the required corrections.<sup>129</sup> The Washington State Court of Appeals in *Donohoe*, 135 Wn. App. at 849, stated the failure to enforce exception applies only where there is a mandatory duty to take a specific action to correct a known statutory violation. Thus, it is imperative that Plaintiffs show the City had a mandatory duty to take action once a violation was discovered. In an effort to show this, Plaintiffs cite to VMC 20.04.405 et seq., the City's Zoning code

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<sup>127</sup> CP 429, ¶ 7.

<sup>128</sup> CP 436, ¶¶ 3-6.

<sup>129</sup> App. Br. at 20.

enforcement and penalty section.<sup>130</sup> While the word “shall” is included several times within that section of the ordinance, this term is not directed toward a mandatory duty to act whenever a violation is discovered.

A mandatory duty does not exist if the government agent has broad discretion about whether or how to act. *Donohoe, supra* at 849. In this case, the City Zoning Administrator has great latitude in determining what to do when a code violation is discovered. For example, the Zoning Administrator decides: whether a criminal penalty will be applied in a case where he decides a civil remedy will not be effective;<sup>131</sup> whether to require abatement of the violation “[i]n addition to or as an alternative to any other judicial or administrative remedy provided herein or by law”;<sup>132</sup> and whether to negotiate a settlement, compromise or otherwise dispose of a lawsuit with the parties when it would be in the best interests of the City.<sup>133</sup>

Plaintiffs quote Peterson’s deposition out of context in an attempt to show the City had a duty to take additional steps<sup>134</sup> Peterson explained in her affidavit that her original testimony, regarding additional steps that might be taken once a correction notice is issued, was in response to

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<sup>130</sup> App. Br. at 22.

<sup>131</sup> VMC § 20.04.425 in Appendix A-5 of App. Br.

<sup>132</sup> VMC § 20.04.415 in Appendix A-5 of App. Br.

<sup>133</sup> VMC § 20.04.460 in Appendix A-5 of App. Br.

<sup>134</sup> See App. Br. at 19-20.

Plaintiffs' counsel's hypothetical about the process after a correction notice is issued and a perceived violation remains.<sup>135</sup> Peterson testified that it was possible that the reason no additional correction notice or citation was listed in the case file was because the problem noted in the original correction notice was corrected.<sup>136</sup>

Plaintiffs fail to show: 1) the miscellaneous correction notice was specifically for a sight triangle code violation for the subject fence; 2) the City's Building Official had actual knowledge a violation existed and the City took no corrective action; and 3) there was a mandatory duty for the City Building Official to take corrective action. Therefore, Plaintiffs fail to prove the second element of the failure to enforce exception.

**b. The Plaintiffs are not within the class the ordinance was intended to protect.** The third element of the failure to enforce exception requires the plaintiffs to be within the class of people the ordinance intended to protect. Ms. Yoeun concludes, without analysis, her son was within the class of persons to be protected by the City's Zoning code.<sup>137</sup>

The Washington Supreme Court discussed the purpose of building codes, the issuance of building permits, and building inspections in *Taylor v. Stevens*, 111 Wn.2d 159, 164, 759 P.2d 447 (1988):

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<sup>135</sup> CP 430, ¶ 11.

<sup>136</sup> *Id.*

<sup>137</sup> App. Br. at 20.

This court and the Court of Appeals have on numerous occasions rejected the contention that building codes impose a duty upon local governments to enforce the provisions of such codes for the benefit of individuals. (Citations omitted.) These cases recognize that building codes, the issuance of building permits and building inspections are devices used to secure to local government the consistent compliance with zoning and other land use regulations and code provisions governing the design and structure of buildings. (Citations omitted.) As such, the duty to issue building permits and conduct inspections is to protect the health and safety of the general public. Accordingly, we continue to adhere to the traditional public duty rule that building codes impose duties that are owed to the public at large.

In *Taylor*, the Court considered the language of the purpose section of the State Building Code Act, which provided in pertinent part:

The purpose of this chapter is to provide building codes throughout the state. This chapter is designed to effectuate the following purposes, objectives and standards:

(1) To promote the health, safety and welfare *of the occupants or users of buildings and structures and the general public.*

*Id.* at 164, (italics in original). Even though the plaintiffs in *Taylor* argued the language of the building code showed a clear intent to protect them from a house that did not conform with the building code, the Court in *Taylor* held that the State Building Code Act's building permit and inspection requirements imposed a duty owed to the general public as a whole. *Id.* at 166. "While the Act promotes the welfare of occupants, its

primary purpose is to require that minimum performance standards and requirements for building and construction materials be applied consistently throughout the state.” *Id.* at 165. The Court found no legislative intent that the statute was intended to protect the class of building occupants in addition to the general public. *Id.* at 166.

The purpose sections of the City’s Zoning and Building codes also show the City’s ordinances were intended to create a duty of care to the public in general, and not a specific duty owed to any individual.

The purpose and intent of the City’s Zoning Code, VMC § 20.01.200, attached as App. 4, provides in part as follows: “This title is intended to protect the public health, safety and welfare ...”.<sup>138</sup>

The purpose and intent of the City’s Building Code in effect on the date the fence permit was issued was Section 102 of the 1982 edition of the Uniform Building Code (“UBC”).<sup>139</sup> Section 102 of the UBC, attached as App. 5, provides:

The purpose of this code is to provide minimum standards to safeguard life or limb, health, property and public welfare by regulating and controlling the design, construction, quality of materials, use and occupancy, location and maintenance of all buildings and structures within this jurisdiction and certain equipment specifically regulated herein.<sup>140</sup>

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<sup>138</sup> See CP 420, ¶ 9; CP 411 (VMC § 20.01.200).

<sup>139</sup> CP 432, ¶ 17; CP 413 (Section 102, 1982 edition of the UBC).

<sup>140</sup> See CP 413.

In applying the Washington State Supreme Court's ruling and interpretation of the purpose language in *Taylor*, the City's Zoning and Building codes were never intended to protect a specific class of persons. The City's codes were intended to create a duty to the public in general.

Ms. Yoeun cites three cases in which the underlying statute or ordinance created a specific duty to the individual to meet this third element of the failure to enforce exception to the public duty doctrine – *Campbell v. City of Bellevue*, 85 Wn.2d 1, 530 P.2d 234 (1975), *Bailey v. Town of Forks*, 108 Wn.2d 262, 737 P.2d 1257 (1987), and *Honcoop v. State*, 111 Wn.2d 182, 759 P.2d 1188 (1988).<sup>141</sup> These cases are distinguishable from the present case. None of these three cases was a general building code case where the purpose of the applicable ordinance/statute was to promote the general health, safety, and welfare of the public.

In all three cases, the Washington State Supreme Court held the injured parties fell within the class of persons the respective ordinance/statute was intended to protect. Here, there are no facts in evidence to show the City intended to include a specific duty to those exiting a private driveway, whether by car or bicycle. Again, the City's Zoning and Building codes create a duty owed to the public in general,

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<sup>141</sup> App. Br. at 16-18.

and not a specific duty to any particular individual. Therefore, the third element of the failure to enforce exception is not proven.

**c. The City Building Official did not have actual knowledge of an inherently dangerous and hazardous condition.** The fourth element to the failure to enforce exception is, the public building official had actual knowledge of an inherently dangerous and hazardous condition. *Atherton*, 115 Wn.2d at 531. Ms. Yoeun concludes, without analysis, the subject “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.”<sup>142</sup> The fourth element has two prongs that must be satisfied. First, an “inherently dangerous and hazardous condition” must exist. Second, they must show the building official had actual knowledge of that condition.

1. The subject fence was not an inherently dangerous and hazardous condition. The Washington State Supreme Court in *Campbell*, defined “inherently dangerous” instrumentality:

An abandoned open structure which is so rotted and dilapidated that it is in imminent danger of collapse may be said to constitute a trap or an “inherently dangerous” instrumentality which is in the same class as an explosive substance, inflammable material, a live electric wire or a spring gun.

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<sup>142</sup> App. Br. at 20.

*Id.*, 85 Wn.2d at 12, quoting *Runkel v. New York*, 282 App. Div. 173, 176, 123 N.Y.S.2d 485 (1953). The Court also concluded that leaving a live electric wire unattended was inherently dangerous and hazardous. *Campbell*, 85 Wn.2d at 13. The Court in *Bailey*, concluded an officer who allows an obviously drunk driver to continue on his or her way sets loose an “inherently dangerous instrumentality”, much like leaving a live electric wire unattended (*Campbell*). *Bailey, supra* at 270.

However, when faced with the issue of whether a street intersection of two roads, with heavy growth of vegetation at the intersection, was inherently dangerous or of such character as to mislead a traveler exercising reasonable care, the Court in *Barton v. King County*, 18 Wn.2d 573, 139 P.2d 1019 (1943), held the intersection was not inherently dangerous. In *Barton*, the vegetation was so high it obscured the vision of persons traveling on each road – the bicyclist could not see the truck, and the truck driver could not see the bicyclist. The plaintiff alleged the vegetation at the intersection of the two roads caused the collision because it obscured both travelers’ view, and therefore the intersection was inherently dangerous. However, the Court held plaintiff’s contention “is untenable”. *Id.* at 576. The Court stated if it held the roads were rendered inherently dangerous to travelers exercising reasonable care due to vegetation obscuring the view, it would be to hold,

literally, that thousands of county road intersections are inherently dangerous. To so hold would impose an imponderable responsibility upon counties. ... Furthermore, such a holding would tend to relieve the operators of vehicles approaching such an intersection of their statutory duty to ‘operate the same in a careful and prudent manner and at a rate of speed no greater than is reasonable and proper under the conditions existing at the point of operation, taking into account ... *freedom of obstruction to view ahead and consistent with any and all conditions existing at the point of operation ....*’

*Id.* at 576-7, (italics in original).

The claims in the *Barton* case are similar to Plaintiffs’ claims in the present case. Plaintiffs allege Yoeun’s vision was obscured because of the alleged sight triangle violation where the fence and the private driveway meet Carlson Road, the obscured vision caused the accident, and therefore, the fence was inherently dangerous. However, following the reasoning of the Washington State Supreme Court in *Barton*, the users of the private driveway have a duty to operate their “vehicle” in a careful and prudent manner and at a rate of speed no greater than is reasonable and proper under the conditions existing at the point of operation, taking into account the freedom of obstruction to the view ahead and consistent with any and all conditions existing at the point of operation. Consistent with the Court’s ruling in *Barton*, a sight-obscured entry onto a public road from a private driveway is not an inherently dangerous and hazardous condition because the users of the private driveway can, and

should, exercise reasonable care to avoid injury.

The condition asserted by Plaintiffs in the present case is vastly different from the inherently dangerous and hazardous condition described in the *Campbell* and *Bailey* cases. In those cases, even if the victims used reasonable care, the injury was not any less likely to occur because the victims were unable to see, anticipate, or discern the life-threatening danger. In the present case, if there was any risk, the conditions were obvious to the users of the driveway and apartment complex, and the users could, and should, exercise reasonable care to avoid injury.

There is additional evidence to support the City's position that the subject fence was not an inherently dangerous and hazardous condition. The correction notice was coded with the letters "MIS", which is short for miscellaneous.<sup>143</sup> A miscellaneous correction notice is issued for minor conditions, and not for an inherently dangerous and hazardous condition.<sup>144</sup> An inherently dangerous and hazardous condition in terms of building/zoning codes will include the following types of facts: a wall that is in imminent danger of collapse, a live electric wire, non-functioning/malfunctioning fire/life safety systems, and blocked egress

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<sup>143</sup> CP 194, ¶ 7.

<sup>144</sup> CP 195, ¶ 7.

from a building/structure.<sup>145</sup>

The City received no complaints regarding the fence in general, or more specifically, about an alleged sight triangle violation, at 2100 Carlson Road between the time the fence was built in 1986 and the date of the accident.<sup>146</sup> Moreover, there have been no traffic accidents on Carlson Road, between Fourth Plain Boulevard and 18<sup>th</sup> Street for the five-year period prior to the date of the accident.<sup>147</sup> 2100 Carlson Road is approximately mid-way between Fourth Plain Boulevard and 18<sup>th</sup> Street.<sup>148</sup> These additional facts support the City's position that the subject fence was not an inherently dangerous and hazardous condition.

2. The subject fence did not create an inherently dangerous and hazardous condition. However, even if it had, Plaintiffs fail to prove the City and the City's Building Official had actual knowledge of any inherently dangerous and hazardous condition.<sup>149</sup> Please see the discussion above in section (II)(C)(3)(a)(i)(a) at p. 32-37.

Plaintiffs have the burden of proving all of the required elements of the failure to enforce exception. *Atherton*, 115 Wn.2d at 531. Plaintiffs have failed to do so. Plaintiffs cannot show the City owed

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<sup>145</sup> CP 431, ¶ 14.

<sup>146</sup> CP 429, ¶ 7.

<sup>147</sup> CP 436, ¶¶ 3-6.

<sup>148</sup> CP 436, ¶ 6.

<sup>149</sup> CP 429, ¶ 7; CP 436, ¶¶ 4-6.

Yoeun an individual duty of care.

**4. The Trial Court Did Not Err When it Found the City Did Not Undertake a Duty to Enforce the Zoning Code.**

Ms. Yoeun argues “the City still had a duty to enforce its building code because it ‘undertook’ that duty when it issued its correction notice.”<sup>150</sup> Plaintiffs argue the City’s issuance of a correction notice “signified the City’s voluntary assumption of a duty to enforce its zoning code.”<sup>151</sup> Ms. Yoeun cites to *Sado v. City of Spokane*, 22 Wn. App. 298, 588 P.2d 1231 (1979), *rev. denied* 92 Wn.2d 1005 (1979), and *Amann v. City of Tacoma*, 170 Wn. 296, 16 P.2d 601 (1932). Plaintiffs ignore the whole line of public duty doctrine cases.

Plaintiffs are asking this Court to overrule the Washington State Supreme Court because Plaintiffs’ argument is in direct conflict with the line of building code cases discussed in the public duty doctrine section of this Response Brief,<sup>152</sup> the City’s Motion for Summary Judgment,<sup>153</sup> and the City’s Reply Brief.<sup>154</sup> The Washington State Supreme Court has explicitly held,

*that no duty is owed by local government to a claimant alleging negligent issuance of a building permit or*

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<sup>150</sup> App. Br. at 23.

<sup>151</sup> App. Br. at 24.

<sup>152</sup> See City’s Response Brief, p. 28-30, *infra*.

<sup>153</sup> See CP 46-59 (City’s Motion for Summary Judgment).

<sup>154</sup> See CP 337-350 (City’s Reply Brief).

*negligent inspection to determine compliance with building codes. The duty to ensure compliance rests with individual permit applicants, builders and developers. ... [L]ocal government owes no duty of care to ensure compliance with the codes.*

*Taylor*, 111 Wn.2d at p. 168 (emphasis added). Governmental entities do not owe an actionable duty of care to individuals for negligent failure to detect building code violations. *Atherton*, 115 Wn.2d at 529.

The two cases Plaintiffs cite to support their position are distinguishable from the present case. *Sado* is not a building code inspection case. In *Sado*, the City of Spokane was accused of negligently constructing and maintaining an embankment and settling pond. For twenty-five years, Spokane gratuitously dumped and leveled riprap to create a huge embankment. Spokane's actions made the situation worse by interfering with the channel of a watercourse, which resulted in injury to property. In the present case, the City did nothing to make the situation worse.

*Amann* pre-dates the line of public duty doctrine cases, but the 1932 Washington State Supreme Court discusses potential liability if the City of Tacoma had "actual knowledge" of an "inherently dangerous and hazardous condition", without actually using those terms.<sup>155</sup> In *Amann*,

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<sup>155</sup> See App. Br. at 24, quoting from *Amann*, and CP 431, ¶ 14 (defining an inherently dangerous and hazardous condition in zoning/building terms to include "a wall that is in imminent danger of collapse").

the front wall of a building being demolished fell on a car parked on the city street, killing a child and injuring others. A building permit had been obtained for the demolition work. The subcontractor violated a city ordinance requiring demolition of the buildings story by story. Tacoma did not have actual knowledge of the hazardous actions of the subcontractor and was therefore, dismissed from the lawsuit.

**D. The Trial Court Did Not Err When It Held the City was Entitled to Judgment as a Matter of Law**

Plaintiffs' argument is premised on a series of assumptions, including the following: a) a sight triangle code violation for the subject fence existed in 1986; b) the "Mis" correction notice was issued in 1986 for this sight triangle code violation; c) no follow-up of any kind was done after the initial issuance of this correction notice; d) this violation existed on the date of the accident, eleven years later; and, e) the subject fence was not altered between 1986 and the date of the accident in 1997. While the trial court must make all reasonable inferences in the light most favorable to Plaintiffs, an inference is not reasonable unless it is deduced "as a logical consequence" of proven or admitted facts. *See Fairbanks v. J.B. McLoughlin*, 131 Wn.2d 96, 101-102, 929 P.2d 433 (1997). A series of assumptions by Plaintiffs cannot be the basis for reasonable inferences.

In addition to a series of assumptions, Plaintiffs rely upon

conclusions, without sound legal analysis. For example, Plaintiffs rely upon a declaration from Mr. Cottingham in which he opined “the fence was a proximate cause to the sudden confrontation of the bicyclist and the motor vehicle driver such that the reaction times of both were greatly diminished.”<sup>156</sup> Establishing cause-in-fact involves a determination of what actually occurred and is generally left to the trier of fact, not to an expert hired by Plaintiff. *See Griffin v. West RS, Inc., et al.*, 143 Wn.2d 81, 89, 18 P.3d 558 (2001). As discussed earlier in this Response Brief, Plaintiffs improperly rely upon other conclusions without analysis of applicable ordinances and/or caselaw. These faulty conclusions include: the subject driveway was a service driveway, not a private driveway;<sup>157</sup> the subject fence was inherently dangerous and hazardous;<sup>158</sup> Yoeun was within the class of persons intended to be protected by the City’s zoning code;<sup>159</sup> and, the City had a duty to enforce its building code.<sup>160</sup>

The trial court correctly held that the City was entitled to judgment as a matter of law. The existence of a duty is a question of law for the court to determine. *Tae Kim v. Budget Rent A Car Sys. Inc.*, 143 Wn.2d 190, 195, 15 P.3d 1283 (2001). The interpretation of the

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<sup>156</sup> App. Br. at 19-20, 25; CP 301, ¶ 12 (Declaration of Ken Cottingham dated October 9, 2004).

<sup>157</sup> App. Br. at 4-7.

<sup>158</sup> App. Br. at 20.

<sup>159</sup> App. Br. at 20.

<sup>160</sup> App. Br. at 20.

applicable ordinances is also a question of law. *Schroeder Architects v. Bellevue*, 83 Wn. App. at 191.

Plaintiffs' position is groundless because it is based upon assumptions and conclusions, without foundation and sound legal analysis. The City's position, on the other hand, is grounded upon proven and admitted facts and detailed legal analysis which provided the basis for the trial court's decision. The trial court's decision to grant the City's motion for summary judgment dismissal was correct and justified, and should be upheld.

### **III. CONCLUSION**

Based upon the foregoing, Respondent City respectfully requests that this Court affirm the trial court's granting of summary judgment dismissal on all claims against the City of Vancouver.

Respectfully submitted,



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# APP. 1

**Section 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 and parking setbacks, except in the City Center District (C) where the City Transportation Manager may authorize lesser requirements upon a finding that the public health, safety and welfare was considered.

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, 2 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 2 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 into the property on the centerline of said service drive.
- C. In the case of a private driveway located within 7 feet of an interior side property line, 2 sides of this triangle are measured 7 feet from the intersection of the property line and the right-of-way, one side extending up the common lot line and the other along the public way on the abutting property. The third side is a line across the corner of the abutting lot joining the other 2 sides. The two 7-foot sides of the triangle may be reduced by 1 foot for each foot of clearance between the driveway and the interior property line.

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b. The detached building shall not cover more than fifty percent of a required yard and/or side yard setback area.

c. The nearest wall of the detached building must be located a minimum of eight feet from the wall of the main building. Eaves must be at least four feet apart.

d. The detached building meets the fire resistant construction, as required in Title 17, with no openings in any wall facing the two foot setback area;

4. A detached building may be constructed as close as three feet to a side and/or rear property line provided:

a. No portion of the building shall exceed twelve feet in height above grade,

b. The detached building shall not cover more than fifty percent of a required rear and/or side yard setback area,

c. The nearest wall of the detached building must be located a minimum of eight feet from the wall of the main building. Eaves of adjacent buildings must be at least four feet apart. (Ord. 2701 § 1, 1987; Ord. M-2254 (part), 1981)

**20.93.240 Vision clearance.**

A. 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.

B. The provisions of this section shall take precedence over any building setbacks, except in the downtown commercial (DC) district where the planning commission may authorize lesser requirements upon the advice of the city traffic engineer.

C. There shall be no sight obstruction within any required yard area between thirty inches and

**A**

2093.240

ten feet above the street grade within the triangular vision clearance area established as follows:

1. In the case of street intersection, two sides of this triangle are lot lines measured twenty 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.

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

3. In the case of a private driveway located within seven feet of an interior side property line, two sides of this triangle are measured seven feet from the intersection of the property line and the right-of-way, one side extending up the common lot line and the other along the public way on the abutting property. The third side is a line across the corner of the abutting lot joining the other two sides. The two seven foot sides of the triangle may be reduced by one foot for each foot of clearance between the driveway and the interior property line. (Ord. M-2254 (part), 1981)

**20.93.250 Yard requirements.**

Exceptions to yard requirements shall be as follows:

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 twenty-four 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 eighteen inches into any required side, side street, or rear yard, and not exceeding six feet into any required front yard. This is not to be construed as prohibiting open porches or stoops not exceeding eighteen

inches in height, and not approaching closer than eighteen 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.

2. If there is a structure on one abutting lot with a front yard less than the required depth for the district, the front yard need not exceed a depth of halfway between the depth of the front yard on the abutting lot and the required front yard depth.

C. Solar Access. If a modification to a yard requirement is necessary in order to site dwellings in a manner which maximizes solar access, the planning commission may modify the yard requirement.

D. Flag Stem Lots. The setbacks for flag stem lots may be reduced upon review and approval of the zoning administrator, provided that no setback is less than five feet, and the dwelling is not less than twenty-five feet from any other dwelling.

E. Exception for Existing Setbacks. Additions to building floor area may be continued along existing setback lines so long as a minimum setback of three feet is maintained. This provision does not allow additional building height (Ord. M-2254 (part), 1981)

**20.93.300 Administration.**

Administration of interpretations and exceptions shall be as set forth in Sections 20.93.310 through 20.93.350. (Ord. M-2254 (part), 1981)

**20.93.310 Authorization for similar uses.**

The planning commission may rule by resolution that a use, not specifically named in the allowed uses of a district, shall be included among the allowed uses; provided, however, that the planning commission may not allow a use already allowed in any other zoning district. (Ord. M-2254 (part), 1981)

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# APP. 2

Vancouver Municipal Code

**Section 11.20.010 Definitions.**

**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.

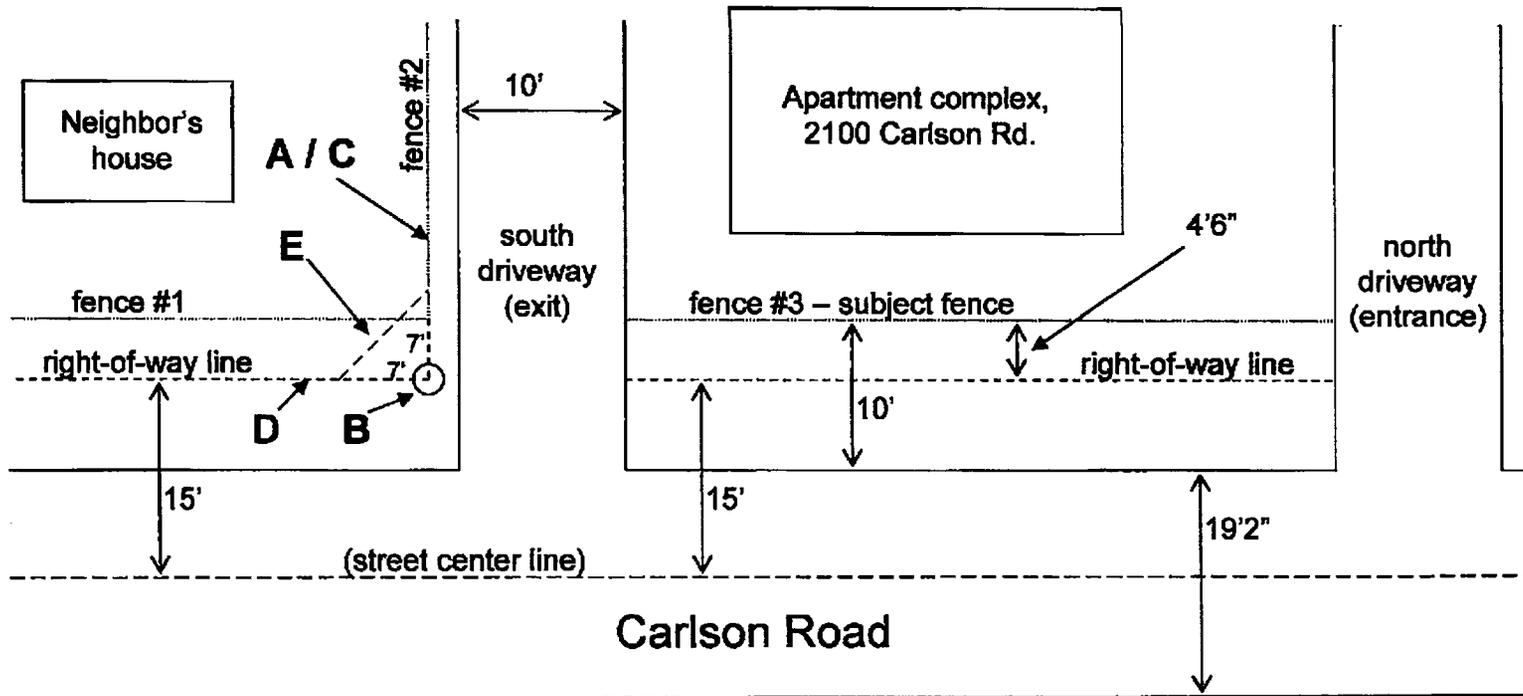
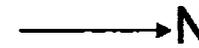
**Engineer.** "Engineer," as used in this chapter, means the city engineer or his duly authorized representative.

**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)

# APP. 3

# City Exhibit 19A\*



**Key:**

- A = Interior side property line
- B = Intersection of interior side property line and right-of-way
- C = Common lot line
- D = Public way (right-of-way)
- E = Line joining the outer lines of the sight triangle

\* For the purposes of the City's motion for summary judgment, this diagram utilizes the measurements provided by plaintiffs' witness Cottingham.  
 Source: City Exhibit 14 – Declaration of Ken Cottingham, filed Oct. 9, 2004.

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## City Exhibit 19B

### **Sight triangle requirements for a private driveway VMC 20.93.240(C)**

- In the case of a private driveway located within 7 feet of an interior side property line [A],
- 2 sides of this triangle are measured 7 feet from the intersection [B] of the property line [A] and the right-of-way [D],
- one side extending up the common lot line [C – synonymous with A]
- and the other along the public way [D] on the abutting [neighbor's] property.
- The third side is a line [E] across the corner of the abutting [neighbor's] lot joining the other 2 sides [A / C & D].

# **APP. 4**

**Division 1. Administration****Chapter 20.01****LEGAL PROVISIONS****Sections:**

- 20.01.100** Short title.
- 20.01.200** Intent and purpose.
- 20.01.300** Zoning map and text.
- 20.01.400** Conflicting regulations.
- 20.01.500** Severability and validity.
- 20.01.600** Repeal.

**20.01.100 Short title.**

This title shall be and may be cited as the "zoning ordinance of the city of Vancouver," and shall be codified as Title 20 in the Vancouver Municipal Code. (Ord. M-2254 (part), 1981)

**20.01.200 Intent and purpose.**

This title is adopted by the city council of the city of Vancouver to provide land use regulations for the city by zoning. This title is an exercise of the city's police and legislative authority as a first class city under the state Constitution and is consistent with state laws. This title is intended to protect the public health, safety and welfare and will, as contemplated by Section 18.04.070, encourage the most appropriate uses of land throughout the city, lessen traffic congestion and reduce frequency of traffic accidents, secure safety from fire, provide for adequate light and air, prevent overcrowding of land, avoid undue concentrations of population, promote coordinated development of unbuilt areas, encourage the formation and protection of neighborhoods and communities, secure an appropriate allotment of land in new development for all requirements of community life, conserve and restore natural beauty and other natural resources, encourage and protect access to direct sunlight for solar energy, facilitate adequate provision of public and private transportation and of public

utilities, discourage piecemeal, spot or strip development, or development inconsistent with or antagonistic to adequate existing neighborhoods, to protect city revenues, to provide a broad and diversified economic base, and to otherwise protect the public health, safety and welfare. (Ord. M-2254 (part), 1981)

**20.01.300 Zoning map and text.**

To accomplish the above goals and purposes, this title includes both a map, by which the city of Vancouver is divided into various zones, and a text, by which the uses, development standards, and other regulations for each zone are set forth. Said map and text are hereby found to provide proper zoning for the city and to meet all criteria of this title. (Ord. M-2254 (part), 1981)

**20.01.400 Conflicting regulations.**

Wherever any provision of this title imposes a restriction on the use of land greater than is provided by another ordinance, then this title shall prevail; provided, detailed land use regulations for the downtown, bounded by I-5 Freeway on the east, the Columbia River on the south, railroad right-of-way on the west and Fourth Plain Boulevard on the north, were adopted in 1977 by Ordinances M-1790 through M-1795. It is intended that zoning and zoning regulations for such area shall continue to be substantively as provided by those ordinances; however, by this title such zoning ordinances are repealed and replaced by substantially identical provisions in this title. (Ord. M-2254 (part), 1981)

**20.01.500 Severability and validity.**

If any section, subsection, sentence, clause or phrase of this title is for any reason held by a court of competent jurisdiction to be invalid, such decision shall not affect the validity of the remaining portions of this title. The Vancouver city council declares that should any section, paragraph, sentence or word of this title be declared for any reason to be void or unconstitutional, it is provided that all other parts of the

# APP. 5

(Continued)

**Part I**

**ADMINISTRATIVE**

**Chapter 1**

**TITLE, SCOPE AND GENERAL**

**Title**

Sec. 101. These regulations shall be known as the "Uniform Building Code," may be cited as such and will be referred to herein as "this code."

**Purpose**

Sec. 102. The purpose of this code is to provide minimum standards to safeguard life or limb, health, property and public welfare by regulating and controlling the design, construction, quality of materials, use and occupancy, location and maintenance of all buildings and structures within this jurisdiction and certain equipment specifically regulated herein.

**Scope**

Sec. 103. The provisions of this code shall apply to the construction, alteration, moving, demolition, repair and use of any building or structure within this jurisdiction, except work located primarily in a public way, public utility towers and poles, mechanical equipment not specifically regulated in this code, and hydraulic flood control structures.

Additions, alterations, repairs and changes of use or occupancy in all buildings and structures shall comply with the provisions for new buildings and structures except as otherwise provided in Sections 104, 307 and 502 of this code.

Where, in any specific case, different sections of this code specify different materials, methods of construction or other requirements, the most restrictive shall govern. Where there is a conflict between a general requirement and a specific requirement, the specific requirement shall be applicable.

Wherever in this code reference is made to the appendix, the provisions in the appendix shall not apply unless specifically adopted.

**Application to Existing Buildings and Structures**

Sec. 104. (a) **General.** Buildings and structures to which additions, alterations or repairs are made shall comply with all the requirements of this code for new facilities except as specifically provided in this section. See Section 1210 for provisions requiring installation of smoke detectors in existing Group R, Division 3 Occupancies.

(b) **Additions, Alterations or Repairs.** Additions, alterations or repairs may be made to any building or structure without requiring the existing building or structure to comply with all the requirements of this code, provided the addition, alteration or repair conforms to that required for a new building or structure. Additions, alterations or repairs shall not cause an existing building or structure to become unsafe or overloaded. Any building so altered, which involves a change

to multiply by	
<b>VOLUME</b>	
kg/m <sup>3</sup>	16.0185
kg/m <sup>3</sup>	0.593 276
t/m <sup>3</sup>	1.186 55
<b>FORCE</b>	
kN	8.896 44
kN	4.448 22
N	4.448 22
<b>TORQUE</b>	
N·m	1.355 82
N·m	0.112 985
kN·m	2.711 64
kN·m	1.355 82
<b>LENGTH</b>	
N/m	14.5939
N/m	175.127
kN/m	29.187 8
<b>FORCE PER UNIT AREA (1 Pa = 1 N/m<sup>2</sup>)</b>	
MPa	13.7895
kPa	95.7605
MPa	6.894 76
kPa	6.894 76
Pa	47.8803
kPa	101.3250
kPa	3.376 85
kPa	2.988 98
<b>J = 1 N·m = 1 W·s</b>	
Mj	3.6
kJ	1.055 06
J	1055.06
J	1.355 82
<b>HEAT TRANSFER</b>	
W/(m <sup>2</sup> ·K)	5.678 26
<b>DUCTIVITY</b>	
W/(m·K)	1.730 73
<b>LUX</b>	
lx (lux)	10.7639
<b>ILLUMINATION</b>	
cd/m <sup>2</sup>	10.7639
cd/m <sup>2</sup>	3.426 26
foot-candle	3.183 01

Pg. 25 TITLE SCOPE

5-B  
SEPAR.

5-C  
AREA

5-D  
MET.

GR. A  
OCC.

GR. P  
OCC.

GR. I  
OCC.

GR. T  
OCC.

GR. U  
OCC.

GR. V  
OCC.

GR. W  
OCC.

GR. X  
OCC.

GR. Y  
OCC.

GR. Z  
OCC.

SCOPE

OF  
E.I.F.

P 8

DET. A.

D. J.  
REQ.

PRO.  
LIVE

0-000000413  
City Exhibit 22

1 COURT OF APPEALS OF THE STATE OF WASHINGTON

2 DIVISION TWO

3 HON YOEUN, individually and as Guardian )  
4 Ad Litem for the minor SUNNIE YOEUN, )

) Case No. 35722-4-II

5 Appellants, )

) CERTIFICATE OF SERVICE

6 vs. )

7 CHIN FAI NG and JUDITH ANN NG, )  
8 husband and wife, individually and their )  
9 marital community; CITY OF VANCOUVER, )  
10 a Municipality; ESTATE OF STAN )  
11 HUDLICKY, SHIRLEY HUDLICKY and the )  
12 HUDLICKY MARTIAL COMMUNITY; )  
13 EVERGREEN STATE FENCE COMPANY, )  
14 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, )

15 Respondents. )

07 APR 17 11 51 AM  
STATE OF WASHINGTON  
BY [Signature]

16  
17 I hereby certify that I served BRIEF OF RESPONDENT CITY OF  
18 VANCOUVER:

19 Terry E. Lumsden  
20 3517 6<sup>th</sup> Avenue, #200  
Tacoma, WA 98406

21 By the following method:

22 x by **FEDEX priority overnight** full, true and correct copies thereof  
23 in a sealed FEDEX envelope, addressed to the attorney as shown above, the

1 last-known office address of the attorney, from Vancouver, Washington, on  
2 the date set forth below.

3 I hereby certify that I served BRIEF OF RESPONDENT CITY OF  
4 VANCOUVER:

5 Doug Foley  
6 Foley & Buxman, PLLC  
7 13115 NE 4<sup>th</sup> Street, Suite 260  
8 Vancouver, WA 98684

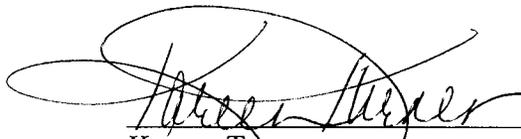
9 Norma S. Ninomiya  
10 500 E. Broadway #425  
11 Vancouver, WA 98660

12 By the following method:

13 x by **hand-delivery**, to the addresses of the attorneys as shown above,  
14 the last-known office addresses of the attorneys, on the date set forth below.

15 The undersigned hereby declares, under the penalty of perjury, that  
16 the foregoing statements are true and correct to the best of my knowledge.

17 Executed at Vancouver, Washington this 16<sup>th</sup> day of April, 2007.

18 

19 Karen Turner  
20 Paralegal to **ALISON CHINN**  
21 Assistant City Attorney  
22 City of Vancouver