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

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

vs.

CITY OF SEATTLE, and
KEITH ROSEMA and ANEE BRAR

Respondents.

APPELLANTS' REPLY BRIEF

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ARGUMENT

A. **Rosema Bears a “Heavy” Burden of Proof in Attempting to Establish that the Nonconforming Use was Discontinued.**

This Court has been asked to review the City of Seattle’s (“City”) decision that the nonconforming duplex use on the subject property is ongoing, and granting a remodel permit to An Yu and Shui-Xian Fu (with David Lee, collectively referred to herein as “Yu”). *DR 00003-00018* (“Land Use Decision”).

Keith Rosema and Anee Brar (collectively “Rosema”) appealed the Land Use Decision to Superior Court under the Land Use Petition Act, chapter 36.70C RCW (“LUPA”). Rosema bears the burden of proof at this Court, irrespective of the Superior Court’s decision. RCW 36.70C.130; *Quality Rock Products v. Thurston County*, 139 Wn. App. 125, 134, 159 P.3d 1 (2007); *Tahoma Audubon Society v. Park Junction Partners*, 128 Wn. App. 671, 681, 116 P.3d 1046 (2005). The Superior Court stayed its decision pending this Court adjudication of the case.

Specifically for nonconforming uses, the burden of proof is also expressly placed on the party asserting that a nonconforming use has been discontinued, i.e. Rosema. *Van Sant v. City of Everett*, 69 Wn. App. 641, 648-649, 849 P.2d 1276 (1993). Rosema’s burden is heavy. *Van Sant*, 69 Wn App. 641, 648.

Rosema incorrectly argues that Seattle Municipal Code (“SMC” or “City Code”) shifts its burden to Yu. *Corrected Response Brief of Keith Rosema and Anee Brar* (“Rosema Response”), page 25. The City Code section on which Rosema relies simply states the following: the City recognizes as a nonconforming use any residential development that would not be permitted under today’s regulations but which was permitted prior to July 24, 1957, and has not been discontinued. SMC 23.42.102 (A). SMC 23.42.102 does not address discontinuance or alter the burden of proof.

To the contrary, the City’s statement of intent regarding nonconforming uses is consistent with the heavy burden on Rosema:

It is the intent of these provisions to establish a framework for dealing with nonconformity that **allows most nonconformities to continue**. The code facilitates the maintenance and enhancement of nonconforming uses and developments so they may exist as an asset to their neighborhoods.

SMC 23.42.100 (B) (emphasis added).

B. This Court Should Weigh the Evidence in a Light Most Favorable to Yu.

In determining whether the nonconforming use is continuing or ongoing, the City was required to apply City Code and common law to the facts. In this regard, the Court applies the clearly erroneous standard: “a reviewing court may only reverse an administrative determination

when, after considering the entire record, the court is left with the definite and firm conviction that a mistake has been made.” *Woodinville Water Dist. v. King County*, 105 Wash. App. 897, 904, 21 P.3d 309 (2001). This standard sets yet another high bar for Rosema to overcome.

The Court views the evidence, and reasonable inferences there from, “in the light most favorable to the party who prevailed in the highest forum that exercised fact-finding authority.” *Freeburg v. City of Seattle*, 71 Wn. App. 367, 371, 859 P.2d 610 (1993). This rule is relevant to the Court’s consideration of evidentiary issues, including whether the City’s decision was a clearly erroneous application of the law to the facts. *Peste v. Mason County*, 133 Wn. App. 456, 477, 136 P.3d 140 (2006).

In this case, the City’s Department of Planning and Development (“Department”) was the highest forum that exercised fact-finding authority. The Department was charged with weighing the facts and all evidence submitted to it by all sources.

City Code does not provide an open recording hearing or administrative appeal for either this type of land use interpretation or remodel permit component of the Land Use Decision. SMC 23.88.010 (F)(2); SMC 23.76.004; *DR 00018*. State law does not require an open

record for this type of Land Use Decision, nor has Rosema ever asserted it was entitled to one. Instead, the City may, but is not required to, provide no more than one open record hearing and one closed record administrative appeal in a permit review process except if otherwise required for specific types of permits. RCW 36.70B.050 (2); RCW 36.70B.120 (each local jurisdiction to adopt process for reviewing project permit applications); *Compare* RCW 58.17.090, 58.17.095 (for preliminary plat applications, not applicable here, a local jurisdiction shall provide an open record pre-decision hearing either by ordinance or if demanded by any member of the public).

Therefore, the Department was the highest forum that exercised fact-finding authority. Yu was the prevailing party before that forum: the Department issued its Land Use Decision squarely in favor of Yu's position that the nonconforming use is ongoing and issued Yu's remodel permit.

Rosema wishes to avoid this rule instructing the Court on how to view the evidence. Rosema's arguments are incorrect, unsupported by statute or case law and would create confusion and complexity not consistent with LUPA.

First, Rosema asserts this rule has not been followed since enactment of the Land Use Petition Act, chapter 36.70C RCW. *Rosema Response*, page 23.

Second, Rosema argues the Court should not follow this rule because there was no ‘adversarial’ administrative process (presumably referring to an open record administrative hearing) and therefore the Department was not the “highest forum that exercised fact finding authority.” *Id.* Rosema requests the Court to limit its well established rule to undefined circumstances where some additional amount of administrative review is provided before the Land Use Decision is issued. *Rosema Response*, pages 23-24.

i. Post-LUPA decisions consistently apply this rule.

In reviewing LUPA cases, Washington Courts adhere to this rule on how to view the evidence, citing both to *Freeburg* and to other authority. *Peste*, 133 Wn. App. 456, 477 (LUPA case citing to *Freeburg* as authority for rule that the Court weighs “all inferences in a light most favorable to the party that prevailed in the highest forum that exercised fact-finding authority”); *Schofield v. Spokane County*, 96 Wn. App. 581, 588, 980 P.2d 277 (1999) (stating rule with citation to other authority); *Nagle v. Snohomish County*, 129 Wn. App. 703, 119 P.3d 914 (2005) (stating rule with citation to *Schofield*); *Griffin v. Thurston County*, 137

Wn. App. 609, 617, 154 P.3d 296 (2007), *review granted in part*, 163 Wash.2d 1011, 180 P.3d 1290 (2008) (LUPA case citing to *Freeburg* as authority for same rule).

ii. *The weighing of evidence rule is properly applied to all Land Use Decisions.*

No authority exists for Rosema's argument that this Court should make an administrative hearing a prerequisite to applying this rule on how to view the evidence. Rosema essentially asks the Court to follow the LUPA standards of review in RCW 36.70C.130, but to view and weigh the evidence differently for different Land Use Decisions. Rosema's approach is both unsupported in law and impractical in application.

LUPA does not treat Land Use Decisions differently based on what type of administrative process the local jurisdiction provided. RCW 36.70C.020 (2). LUPA's standards of review apply equally to every Land Use Decision. RCW 36.70C.130. Under LUPA, the quasi-judicial finder of fact under a Land Use Decision is always found at the local jurisdiction level. RCW 36.70C.120 (1).¹ Courts reviewing a Land

¹ The Land Use Decision here was quasi-judicial and has been properly treated as such by all parties throughout this case. *Raynes v. City of Leavenworth*, 118 Wn.2d. 237, 244, 821 P.2d 1204 (2002) (discussing distinction between quasi-judicial and legislative decisions); *see also Coffey v. City of Walla Walla*, 145 Wn. App. 435, 187 P.3d 272 (2008) (discussion of distinction in context of chapter 36.70B RCW (Local Projects

Use Decision have purely appellate authority limited to review of the factual record created by the local jurisdiction. *Id* (except in extenuating circumstances not found here, such as grounds for disqualification of officer).

Washington Courts consistently apply this rule on how to view evidence in all LUPA cases, irrespective of whether the Land Use Decision was based only on written submittals and evidence or also involved a pre-decision hearing or administrative appeal. *Compare, Nagle*, 129 Wn. App. 703, 709 (Court applied rule in reviewing County's decision that was issued without pre-decision hearing or administrative appeal); *Peste*, 133 Wn. App. 456, 465 (rule applied where public hearing was held by Board of Commissioners); *Schofield*, 96 Wn. App. 581, 584-585 (rule applied where Hearing Examiner held pre-decision hearing and Board of Commissioners heard administrative appeal).

As a practical matter, Rosema's argument would require the Court to create new categories of Land Use Decisions based on the type of administrative review performed. Such categorization of Land Use Decisions is not supported by LUPA, is inconsistent with the Court's

Review Act), Growth Management Act, chapter 36.70A RCW and LUPA (chapter 36.70C RCW)).

consistent application of this rule, and would be unnecessarily confusing in application.

Rosema must adhere to the very well established rule that evidence, and reasonable inferences there from will be viewed “in the light most favorable to the party who prevailed in the highest forum that exercised fact-finding authority.” *Freeburg*, 71 Wn. App. at 371; *Nagle*, 129 Wn. App. at 709.

C. The Nonconforming Duplex Was Never Discontinued under the Framework Set Up in Seattle Municipal Code.

Rosema must satisfy its heavy burden of proof based on the standards adopted by the City. All of the City’s regulations must be read harmoniously with the City’s statement of intent to allow nonconforming uses to continue. SMC 23.42.100 (B). Further, nonconforming uses are vested rights and “may not be voided easily.” *City of University Place v. McGuire*, 144 Wn.2d 640, 652, 30 P.3d 453 (2001); *Van Sant v. City of Everett*, 69 Wn. App. 641, 649, 849 P.2d 1276 (1993).

As the arguments and evidence reveal, Rosema has failed to demonstrate the Land Use Decision was an erroneous interpretation of the law, an either an erroneous application of the law to the facts or not supported by substantial evidence.

- i. *The nonconforming use was not discontinued under the methods contained in SMC 23.42.104 (B).*

Rosema concurs that the nonconforming use was legally established. Therefore, the burden shifts to Rosema, the party claiming discontinuance. *Van Sant*, 69 Wn. App. at 648. Rosema must demonstrate both that there was the intent to discontinue the use and an actual overt act or failure to act. *Id.*, at 648, *citing* 8A E. McQuillin, *Municipal Corporations*, §25.192. The requirement for an overt act provides important notice to the property owner, the City, the general public, and anyone researching the property regarding use.

This case hinges on City Code determination of how a nonconforming use is discontinued. SMC 23.42.104. This Code section applies to all possible types of nonconforming uses, including residential, commercial, industrial, natural resource or other.

The full text of Subsection (B) to SMC 23.42.104 follows:

B. A nonconforming use that has been discontinued for more than 12 consecutive months shall not be reestablished or recommenced. A use is considered discontinued when:

1. A permit to permanently change the use of the lot or structure was issued and acted upon; or
2. The structure or a portion of a structure is not being used for the use allowed by the most recent permit, except that interruption of a nonconforming use by a temporary use authorized pursuant to Section 23.42.040, if no structures are demolished, is not a discontinuation of the previous nonconforming use; or

3. The structure is vacant, or the portion of the structure formerly occupied by the nonconforming use is vacant. The use of the structure is considered discontinued even if materials from the former use remain or are stored on the property. A multifamily structure with one or more vacant dwelling units is not considered vacant and the use is not considered to be discontinued unless all units in the structure are vacant.

4. If a complete application for a permit that would allow the nonconforming use to continue, or that would authorize a change to another nonconforming use, has been submitted before the structure has been vacant for 12 consecutive months, the nonconforming use shall not be considered discontinued unless the permit lapses or the permit is denied. If the permit is denied, the nonconforming use may be reestablished during the six months following the denial.

SMC 23.42.104.

In its Land Use Decision, the City properly considered the entirety of Subsection (B) and Rosema's arguments related thereto, applied Subsection (B) to the facts and concluded that the nonconforming duplex use was not discontinued. *DR 00014-16*.

- a. The nonconforming use was not discontinued by operation of Subsection (B)(2).

Subsection (B)(2), on which Rosema relies, provides that a nonconforming use is discontinued if the structure, or portion thereof is not being "used for the use allowed by the most recent permit."

A "use" is zoning term of art, defined as "the purpose for which land or a structure is designed, built, arranged, intended, occupied, maintained, let or leased." SMC 23.84A.040. "Use" is not limited to

occupancy, but instead “use” can be established through other means, such as design, build, arrangement or maintenance.

If a property owner wishes to change the current use, City Code contains a permit process for doing so: “change of use of any structures, buildings or premises, or any part thereof, requires approval according to the procedures set forth in Chapter 23.76...” SMC 23.40.002. If a property owner changes the use, either through a change of use permit or other permit (e.g. remodel), the property owner may lose the nonconforming use. SMC 23.42.104 (B)(2).

The Land Use Decision states the City’s longstanding practice that “a use established by permit remains valid, absent clear evidence that it has lapsed.” *DR 00014*. This practice is consistent with SMC 23.42.100 (B), preserving nonconforming uses, and common law that nonconforming uses “may not be voided easily.” *McGuire*, 144 Wn.2d 640, 652. The City’s conclusion, based on applying evidence to Subsection (B), was that nonconforming duplex use did not lapse. *DR 00014* (Conclusion 4).

Here, the property and structure are used for that use allowed by the most recent permit, as “use” is defined in City Code. The permit history consistently reflects a duplex use from the time the duplex was

legally established in 1955. *DR 00110-113; 00129*. The most recent permit was issued to the Nelsons in 1993 for remodel work to the duplex kitchen and was based on an express assertion of an existing duplex. *DR 00161-163*. The Nelsons maintained the duplex unit completely intact since the 1993 permit. The Nelsons and then Yu have consistently paid all City bills for two units and maintained all attributes of the duplex. Therefore, the use, i.e. the duplex use for which the land and structure was ‘designed’, ‘built’, ‘arranged’ and ‘maintained’, has never been discontinued per Subsection (B)(2).

The Land Use Decision correctly concluded that the permit history supports recognition of the existing use and structure as a duplex. Rosema cannot dispute the public record of permit history that consistently asserts the duplex use. As the Department explained, in most cases the inquiry would end with that permit history “since permit records are typically and rightfully relied upon in determining the legally established use of land.” *DR 00014*. Even so, the Department weighed all facts submitted into the record and also reviewed the matter under Subsection (B)(3).

- b. The nonconforming use was not discontinued by operation of Subsection (B)(3).

Subsection (B)(3) applies where there is a nonconforming use that involves two or more units in a structure, and circumstances where one or more units are vacant. For multifamily structures, i.e. two or more units, Subsection (B)(3) unequivocally allows the nonconforming use status to even if a unit or units remain vacant for longer than 12 months or even a period of years.

The liberal nature of SMC 23.42.104 (B)(3) is consistent with the City's intent to allow most nonconformities to continue. For a multifamily building, if the owner wishes to discontinue the use, something more must occur other than leaving the unit vacant: either the structure is left totally vacant for 12 months *or* the City issues a permit that changes the use of the structure. SMC 23.42.104 (B)(2) and (3).

Rosema does not assert that the nonconforming use was discontinued under Subsection (B)(3).

- c. Rosema's attempt to recharacterize Subsection (B) is not supported by City Code's plain language.

Rosema instead attempts to contort Subsections (B)(2) and (B)(3) through a strained application of the Code. *Rosema Response*, page 33. Rosema would carve out a distinction between leaving a second unit unoccupied, or vacant, versus merely living in a duplex house as if it

were a single family home. *Rosema Response*, pages 34-35. This distinction is not found in Subsection (B).

The Code does not distinguish between vacancy and the use of one unit in conjunction with another unit. Subsection (B)(3) clearly states that “the use is not considered to be discontinued unless all units in the structure are vacant.” SMC 23.42.104 (B)(3) (emphasis added). It does not matter if a unit is vacant, unoccupied, or occupied along with another or other units in the multi-family building. Subsection (B)(3) does not preclude use of one unit in conjunction with another for even an extended period of time. Each unit as a nonconforming use will still be ongoing and can later be rented separately, so long as no structural or permit changes are made under Subsection (B)(2). This is consistent with the general rule that nonconforming uses may continue absent clear proof because they are a vested right. *Van Sant*, 69 Wn. App. at 649.

Whether or not the Nelsons used the second unit for their own other personal purposes is irrelevant. The second unit was physically preserved and even remodeled; no change of use permit ever even requested. Under both Subsections (B)(2) and (B)(3), the nonconforming use lawfully continued during the tenure of the Nelsons’ ownership. Yu, as the Nelsons’ successor in interest, were entitled to

begin occupying the second duplex unit as a separate rental upon their purchase of the property.

Finally, even if the Court concludes there is an ambiguity between Subsections (B)(2) and (B)(3), the Court must give the City's interpretation great weight and ensure that all language in City Code be given meaning and be read in harmony to avoid conflict. *Neighbors v. King County*, 88 Wn. App. 773, 778, 946 P.2d 1188 (1997); *HJS Development, Inc. v. Pierce County ex rel. Dept. of Planning and Land Services*, 148 Wash.2d 451, 471-2, 61 P.3d 1141 (2003).

- d. Rosema's application of Subsection (B) to the facts is equally unsupportable.

Rosema's distinction is also not borne out when applying the facts to the plain language of Subsection (B). Rosema would limit the term "use" to just actual occupancy. However, as explained above, the term "use" is a zoning term with a much more liberal meaning under City Code. Again, use is established not just by occupancy, but equally by design, build, arrangement or maintenance. SMC 23.84A.040. In this case, "use" is established by the design and build, remodel and ongoing maintenance of the two unit, duplex building.

Rosema relies on Mr. Nelson's declaration to assert that the Nelsons used the basement duplex unit as part of a single-family house.

Rosema Response, page 35. However, Mr. Nelson contradicted himself in admitting that the Nelsons preserved the duplex use but, at the same time, ‘intending’ the house to be a single family house. *DR 00058* (compare typed and handwritten portions of Paragraph 5).

The Nelsons preserved the duplex unit as a separate unit, and paid separate utilities (electrical, garbage, mail) on that separate unit, for eighteen years. *DR 00058*. Mr. Nelson readily admitted that the City’s sanitation worker required two garbage pick-ups because “we could possibly rent the basement out.” *DR 00058*. Therefore, the Nelsons paid for two garbage collections for eighteen years. *DR 00058*. Consistent with Mr. Nelson’s ready admission that they could rent the second unit at any time, the Nelsons maintained two electrical meters and left the separate entrance to the basement unit intact. *DR 00058* (handwritten paragraphs 5 and 6). The Nelsons also applied for the two remodel permits they obtained on the basis of a duplex use. *DR 00151-155; 00161-163*. The record shows also that the Nelsons paid separate water and sewer for the duplex as well. *See e.g. DR 00052*. Between garbage and electricity alone, the Nelsons spent thousands of dollars to maintain two dwelling units. *See e.g. DR 00053-54*; (electricity costs to maintain the second unit necessarily amounted to several thousands of dollars over

eighteen years) *DR 00052* (garbage collection costs over eighteen years equally necessarily amounted to thousands of dollars.

Therefore, while Mr. Nelson may have intended, in hindsight, to live in the house as if it were a single-family house, the Nelsons at the same time expressly preserved the duplex unit in every way possible such that it could be rented out at any time, at substantial financial cost. The Nelsons did this with the admitted knowledge that the second unit could be rented out at any time. *DR 00058*.

Rosema also mishandles Mr. Nelson's declaration with respect to the Nelsons' removal of internal partitions. *Rosema Response*, page 35. Mr. Nelson's declaration clearly states that the Nelsons removed internal partitions remaining from the unlawful triplex use but preserved the duplex in all aspects. *DR 00058*, paragraph 4 (Nelson's striking of the pre-prepared language incorrectly asserting he made modifications to convert the duplex and clarification that he left the duplex entrance intact). There is no evidence, and it is simply not the case, that the Nelsons removed internal partitions related to the duplex. Rosema's implication that the Nelsons' removed internal partitions related to the

duplex in making its arguments of discontinuance under Subsection (B) is unsupported by the record.

The Land Use Decision properly weighed the evidence, correctly applied the facts to SMC 23.42.104 (B) and was supported by substantial evidence. The City found that Mr. Nelson's declaration was at best 'equivocal': while Mr. Nelson asserted he thought of his house as a single-family house and intended to be such, the Nelsons never took any overt actions consistent with that intent. *DR 000014* (Conclusion paragraph 5); *see also DR 0004-5* (Finding paragraph 8). All permit records were based on the duplex, and all of the Nelsons' outward actions preserved the duplex unit as such. *DR 000014* (Conclusion paragraph 5).

ii. The other City Code sections on which Rosema relies are irrelevant.

Rosema argues that two City Code sections, SMC 23.42.108 (B) and SMC 23.44.008(F) should be used to "expressly state what is necessarily implied in SMC 23.42.104." *Rosema Response*, page 31.

Nothing in SMC 23.42.104 requires the Court to imply something not expressly stated therein. Even if SMC 23.42.104 did need interpretation and the aid of other code sections to interpret its meaning, the Court gives deference to the City's interpretation of City Code.

Neighbors, 88 Wn. App. 773, 778 (1997) (local jurisdiction's interpretation of Code entitled to deference in event of ambiguity or conflict). Even if SMC 23.42.104 requires interpretation, Rosema fails to provide meaningful argument contrary to the City's application of City Code as set forth in the Land Use Decision.

There is no reason to undertake a forced interpretation of the City's Code in the manner Rosema desires. SMC 23.42.108, SMC 23.44.008 and SMC 23.42.104 each have separate and independent meaning and can be read to give each effect without implying anything.

Rosema appears to argue that SMC 23.42.108 and SMC 23.44.008 should be used to waive the requirement that the Nelsons had to discontinue as set forth in SMC 23.42.104 (B). *Rosema Response*, page 32. These code sections simply do not address how a nonconforming use can be discontinued, either voluntarily or against the property owners desires.

SMC 23.42.108 is entitled "Change from nonconforming use to conforming use." This Code section provides that, in any zone, "a nonconforming use may be converted to any conforming use if all development standards are met." However, for single-family zones specifically, "a nonconforming use may be converted to single-family

dwelling unit, even if all development standards are not met.” SMC 23.42.108 (B). This Code section does not address, modify or change the rules related to discontinuance of a nonconforming use. This Code section also does not waive the requirement for at least a change of use permit. SMC 23.40.002. This Code simply is a sensible provision that a nonconforming structure can be converted to single-family without having to conform to current standards such as setbacks.

SMC 23.44.008 is entitled “Development standards for uses permitted outright.” Subsection (F) provides simply that a structure may be converted to single family use even the structure does not conform to current development standards. This Code section also does not address, modify or change the rules related to discontinuance of a nonconforming use. This Code section also does not waive the requirement for at least a change of use permit. SMC 23.40.002. Instead, it provides that a structure that has been used for something else can be turned into a single-family structure even if the structure would be nonconforming as to current development standards.

Each of these sections has its own plain meaning, but neither changes the requirements set forth in SMC 23.42.104.

D. The Nelsons Did Not Take any Overt Act or Fail to Act in a Manner that Discontinued the Nonconforming Duplex.

City Code and common law, and the facts of this case, all lead to the conclusion that the nonconforming duplex use is ongoing. Rosema has failed to carry the heavy burden of proof to show that the City's decision was a clearly erroneous application of the law to the facts or not based on substantial evidence. While the Nelsons' neighbor, Rosema, may wish that the Nelsons had discontinued the nonconforming use, the Nelsons simply did not do so.

The Nelsons did not take any overt act as required by SMC 23.42.104 (B) to discontinue the nonconforming duplex. During the time they owned the property, the Nelsons never took any overt act showing to the world that they discontinued the nonconforming use. The Nelsons had the resources to retain Conner Homes for two remodel permits and, for example, could easily have obtained a simple change of use permit at that same time. Such a change of use permit, however, might have been at odds with the 1993 permit to remodel the duplex kitchen.

Since the duplex use was established in 1955, all City public record has been expressly based on the duplex use. *DR 00110-113; 00129-131; 00111; 00141; 00151-155; 00161-163.* Rosema's attempt to

divorce the Nelsons from their 1992 and 1993 permits is not supported by the evidence. Conner Construction was the Nelsons' authorized representative for the permits. The Nelsons never asserted that Conner exceeded that authority. On the Nelsons behalf, Conner asserted and concurred with the City that the property use is duplex. The Nelsons did not disavow the duplex use upon receiving either permit.

The Nelsons sold the property with the duplex in place, based on public records reflecting the duplex use, and at a price consistent with the duplex use. *DR 00050*. Mr. Yu even discussed the duplex use with Mr. Nelson prior to purchase. *DR 00050*. However, even if the Nelsons had sold the property without mention of the duplex, such would not be conclusive evidence. *McGuire*, 144 Wn.2d, 640, 653. As in *McGuire*, there was no overt act or actual omission that would constitute proof that the nonconforming use was abandoned. *Id.*

Rosema relies heavily on the King County Assessor records. *Rosema Response*, pages 37-38. The Land Use Decision addressed this issue in some detail and found that the King County assessor material reflected that a separate unit was maintained. *DR 00005, 00015* (Finding paragraph 10; Conclusion paragraph 6). That conclusion was based on the actual assessor materials contained in the record. *DR 00036*. While

there was some discrepancy in the King County notes, the Land Use Decision that the King County records reflect two units is based on substantial evidence.

Even if any evidence is as Rosema perceives it, the most Rosema can assert is that some contradictory factual material exists. However, the substantial evidence standard does not require all evidence to be consistent; even if some evidence is contradictory, the Land Use Decision must be upheld if it is based on substantial evidence. *State ex rel. Evergreen Freedom Foundation v. Washington Educ. Ass'n*, 111 Wn. App. 586, 613, 49 P.3d 894 (2002), *rev. denied*, 148 Wn.2d 1010, 66 P.3d 639 (2003).

The City properly weighed all the evidence, and made a rational decision. Rosema has not shown any clearly erroneous application of the law to the facts. To the contrary, the City understood and properly applied the code consistent with past practice. The Land Use Decision was based on substantial evidence. The Land Use Decision correctly concluded that the nonconforming use remains ongoing.

E. There is No Basis for Rosema to Request Attorneys Fees.

Rosema's request for fees under RAP 18.9 is entirely without merit.

First, Rosema improperly requests fees because Rosema alleges Yu did not specifically cite to two City Code sections noted in the Superior Court's decision.² *Rosema Response*, page 44. However, this Court directly reviews the Land Use Decision on the administrative record, without reference to the Superior Court decision. *HJS Development, Inc. v. Pierce County*, 148 Wash.2d 451, 468, 61 P.3d 1141 (2003). Rosema does not dispute *HJS* but also improperly fails to address *HJS* in making its argument. Rosema's request on this basis is without merit.

Second, Rosema fails to recognize that the Superior Court placed its decision on an indefinite stay pending this Court's review. This stay implicitly acknowledges this case is properly before this Court. Further, Rosema's request is a tacit failure to recognize its burden of proof under LUPA and common law. Again, there is no merit to Rosema's assertion that no debatable issue exists.

Third, Rosema's attempt to fold in an argument related to compensatory damages is wholly improper. *Rosema Response*, page 46.

² Rosema's reference to Superior Court as a "trial court" is misleading: the Superior Court was not a 'trial court' in the common sense of being a trier of fact. The Superior Court is the lower court that reviewed the City's Land Use Decision in an appellate, as opposed to trial capacity, based on the administrative, evidentiary record that the City, as the fact finder, compiled in its review process. "Appellate court" is defined as a "court with jurisdiction to review decisions of lower courts or administrative agencies." *Black's Law Dictionary*, 378 (8th ed., 2004).

Rosema never requested damages in its Petition and has provided no basis for asserting a damages claim before this Court.

Yu respectfully requests the Court to deny Rosema's request for fees.

CONCLUSION

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

Dated this 2nd day of November, 2010.

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