

65607-4

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No. 65607-4-I

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.

CORRECTED
RESPONSE BRIEF OF KEITH ROSEMA AND ANEE BRAR

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I. INTRODUCTION

This appeal is frivolous. Appellants fail to address the basis for the trial court's decision, and the issues are not debatable.

The subject property, a house built in 1914, was established as a duplex by permit in 1955. The duplex then became a nonconforming use in 1957 when the City's zoning code first prohibited duplexes in single-family zones. The subject property was used as a duplex, and even for a while as an illegal triplex, until it was purchased by Sue and Jerry Nelson in 1991. The Nelsons used the subject property as their single-family home from then until 2009, when they sold it to Appellants An Yu and Shui-Xian Fu (hereafter "the Yus"). The Rosemas, who moved in next door in 1998, always understood the property to be the Nelsons' single-family home and did not know of its prior duplex use. The County Assessor recognized in 2001 that the property was "Returned to use as single family residence by current owner," and the Assessor has valued it as a single-family residence since then. When the Nelsons put their property up for sale in 2009 they listed

it as a single-family residence, thereby acknowledging the house did not have the additional value it would have as a duplex. When the Nelsons negotiated the sale of their property to Yu, they filled out the required Seller Disclosure Statement, stating that there was no nonconforming use on the property, and this acknowledgment was signed by the Yus.

After their purchase, the Yus immediately started making physical changes to the subject property, without benefit of a building or use permit from the City, to convert the subject property into a duplex boarding house. The Rosemas asked the City's Department of Planning and Development ("DPD") to confirm that the subject property was a single-family residence, but DPD instead issued a code Interpretation concluding that the property was still a duplex because the Nelsons had not removed all the physical manifestations of the prior duplex use, such as the two electric meters.

The Rosemas appealed DPD's Interpretation to the superior court pursuant to the Land Use Petition Act, Chapter 36.70C RCW

(“LUPA”). As required by RCW 36.70C.040, the Rosemas named the Yus (the owners) and David Lee (the applicant) as additional parties. These additional parties did not participate in the proceedings before the superior court, not even filing a notice of appearance.¹

The superior court reversed DPD, finding that the Interpretation ignored the express distinctions in the City’s code between nonconforming *uses* and *structures*. The Yus have no knowledge of how the subject property was *used* during the years the Nelsons lived there, and the undisputed evidence of *use* – from Mr. Nelson’s declaration, from Mr. Rosema’s declarations, from the Assessor’s records, and from the Seller Disclosure Statement – showed that the duplex use was terminated long ago by the Nelsons. In both the chapter of the code dealing with nonconforming uses (Chapter 23.42 SMC) and in the chapter dealing with single-family uses (Chapter 23.44 SMC) the code

¹ The Rosemas did not move for a default judgment because their challenge was to DPD’s decision, and a party to a LUPA appeal is not required to file an answer, RCW 36.70C.080(6).

expressly provides that a nonconforming structure need not be converted into a conforming single-family structure in order for a nonconforming use of that structure, such as a duplex use, to be changed to single-family use. Seattle Municipal Code (“SMC”) 23.42.108.B (“In single-family zones, a nonconforming use may be converted to a single-family dwelling unit, even if all development standards are not met . . .”) and 23.44.008.F (“ . . . any structure occupied by a permitted use other than single-family residential use may be converted to single-family residential use even if the structure does not conform to the development standards for single-family structures . . .”). The superior court cited and quoted both these code provisions in sections 8 and 9 of its Findings, Conclusions, and Order of the Court.

The City accepted the court’s decision as a correct interpretation of its code, and did not appeal. This appeal is brought only by the Yus, who chose not to participate in any way in the superior court proceedings. The Yus’ appeal is frivolous because their argument ignores the code provisions relied upon by

the superior court that demonstrate that their argument is without merit. Only by pretending that SMC 23.42.108.B and 23.44.008.F do not exist are the Yus able to argue that the physical condition of a building is determinative of single-family use. DPD's Interpretation can be excused because its author did not have the benefit of an adversarial process, but the Yus have no such excuse because these provisions were briefed by the Rosemas and cited by the trial court in sections 8 and 9 of its decision.

If the Yus had acknowledged the existence of the code language that contradicts their argument, they would have nothing to argue. Pursuant to RAP 18.9, the Rosemas request their attorneys fees for having to respond to an appeal from a party that did not participate in the proceedings below and that now, on appeal, does not address the basis for the trial court's decision, and instead makes an argument that is not even debatable because it simply pretends that the basis for the trial court's decision does not exist.

II. RESPONSIVE STATEMENT OF THE CASE

The Yus' statement of the case is incomplete and includes statements about two matters that are not supported by the record. This Response will first quote the statement of the facts from the Rosemas' opening brief to the superior court, and then address specific statements in the Yus' brief that are not supported by the record.

A. Statement Of The Case From The Rosemas' Opening Brief

1. The Early Years: 1914 – 1991

The subject property, located at 5211 21st Avenue Northeast, was constructed in 1914.² It is typical for its neighborhood: a large house (3,220 square feet) on a small lot (5,000 square feet).³ The usable area of the lot is much smaller than 5,000 square feet, however, because the eastern portion of the lot is a steep slope. The subject property and the nine neighboring properties to the

² DR 00037; 00164 (The Rosemas adopt the same convention as appellants and cite to the certified documentary record, Clerk's Papers Sub 9, as "DR").

³ DR 00034-38.

north and south front to the east on 21st Avenue East, but a slope that is much too steep for vehicular access rises from the west side of that street. The front yards of the houses on the block consist of this steep slope, but the houses take their vehicular access from a 10'-wide private easement at the top of the bluff, immediately in front of the houses.⁴

The subject house was legally converted into a duplex in 1955,⁵ before duplexes were prohibited in single-family zones by the adoption of Seattle's 1957 zoning code.⁶ The subject house was first assessed as a duplex in 1957.⁷ In the 1970s it was used as a triplex, and the then owners asserted that it had been legally converted into a triplex, without benefit of permit, before 1957. The Seattle Hearing Examiner resolved this issue against the

⁴ DR 00039; 00115-16.

⁵ DR 00113.

⁶ DR 00130.

⁷ DR 00170.

owners and affirmed the subject property's status as a duplex rather than a triplex in a decision dated December 9, 1976.⁸

In 1980, a neighbor complained that the house continued to be used as a triplex, and a City investigation determined that it stopped being used as such in May, 1980.⁹

2. The Nelson Years: 1991 – 2009

Sue and Jerry Nelson purchased the legal nonconforming duplex in 1991 with the intent of using it as their single-family home, and they used it as their single-family home until they sold it in 2009.¹⁰ The Nelsons were the only residents for those 18 years.¹¹

The subject property was still physically configured as a triplex when the Nelsons bought it, and they removed internal partitions

⁸ DR 00129-131.

⁹ DR 00147.

¹⁰ DR 00058.

¹¹ DR 00058.

and an external entrance “to physically convert it from the triplex it had been to our single family home.”¹²

The Nelsons twice asked City inspectors to recognize their home as a conforming single-family residence. They were told they needed to remove the electrical junction box in the basement that made it possible for there to be a second stove in the house (there is no such requirement in the City’s code), but the Nelsons decided not to do so after consulting with electricians and concluding that it would be prohibitively expensive.¹³ They simply paid for their electricity off two meters instead. A City employee also required them to purchase a second garbage container because of the kitchen in the basement, even though nothing in the code requires this either.¹⁴

¹² DR 00058.

¹³ DR 00058.

¹⁴ DR 00058.

The County Assessor noted in 2001 that the subject property was “Returned to use as single family dwelling by current owner.”¹⁵

Keith Rosema moved into his house to the south of the subject property in October, 1998.¹⁶ Jerry Nelson told Mr. Rosema that the house previously had been a duplex, and Jerry and Sue Nelson were the only residents of the subject property until the summer of 2009, when they sold to the Yus.¹⁷ When the Nelsons listed their house for sale, they listed it as a single-family home.¹⁸ In the Seller Disclosure Statement provided to the Yus on April 1, 2009, the Nelsons answered “no” to the question:

Are there any zoning violations, nonconforming uses, or any unusual restrictions on the property that would affect future construction or remodeling?¹⁹

¹⁵ DR 00036.

¹⁶ DR 00081.

¹⁷ DR 00058; 00081.

¹⁸ DR 00058; 00081.

¹⁹ DR 00100.

3. The Current Ownership

The Yus purchased the subject property on July 9, 2009, for \$650,000, a price that is consistent with its assessed value in 2009, as a single-family residence, of \$681,000.²⁰ The Assessor's records state that the subject property's "Present Use" is "Single Family (Res Use/Zone)."²¹

The City received a complaint on July 17, 2009 about construction work being done on the property, and a building inspector visited the property on July 21, 2009. The inspector posted a Stop Work order and directed the Yus to obtain building permits before proceeding.²²

On July 31, 2009, the Yus submitted an application to establish the duplex use for the record and to legalize the remodeling work they already were doing.²³

On August 14, 2009, the Rosemas' attorney submitted to DPD a request for interpretation, supported by the Declaration of Keith

²⁰ DR 00035-36.

²¹ DR 00034; 00037.

²² DR 00064.

Rosema.²⁴ This request asked DPD to confirm that the nonconforming duplex had been discontinued and could not be reestablished or recommenced.

On September 9, 2009, DPD sent a Correction Notice to David Lee, the Yus' contractor (emphasis added):²⁵

You have applied to establish use “for the record” of a 2-unit building on the above-captioned property. . . . Seattle Municipal Code (SMC) Section 23.42.102 A allows any residential development in a residential zone that would not be permitted under current regulations to be recognized as a legally nonconforming use or development through the “establish the use for the record” process, provided that the use existed prior to July 24, 1957 **and has not been discontinued** as set forth in Section 23.42.104. In order to support an application to establish use for the record, you are required to provide documentation showing that the use commenced at a time when it was permitted outright under applicable regulations then in effect **and has remained in continuous use** since that time.

. . . SMC Section 23.42.102, 23.42.104, and DPD Director’s Rule 17-93, Establishment for the Record of Uses not Established by Permit, effective December 1, 1993, **require evidence that a**

²³ DR 00001; 00083-87.

²⁴ DR 00079.

²⁵ DR 00061-62.

nonconforming use has been in existence continuously, with no interruption that would constitute abandonment or discontinuance of a nonconforming use, since the time it commenced. Under Section 23.42.104 B 2, **a nonconforming use may be discontinued if the structure containing the nonconforming use has not been used for the use allowed by the most recent permit for a period of more than 12 months. . . .**

DPD has received a request for a formal interpretation of the Land Use Code from neighbors of the property, indicating that the structure has not been used as a duplex since the time of the 1993 permit and further asserting that the home was sold as a single family residence. A copy of the request for interpretation is enclosed with this letter for your reference. Given the information in this request, **it is reasonable to ask that you provide some documentation that the structure has been used as a duplex since 1993.** Such documentation could include reverse telephone directory listings showing occupancy of both units, utility records, tax assessment history from the King County Assessor's Office, or similar documentation as discussed in DPD Client Assistance Memo (CAM) No. 217.

The Yus did not provide the requested documentation to demonstrate that the structure had been used as a duplex from 1993 until the date of their purchase.

On September 11, 2009, the Rosemas' attorney submitted a letter providing additional information: the Declaration of Jerry Nelson and the Second Declaration of Keith Rosema.²⁶ Mr. Nelson's Declaration confirmed that he and his wife intentionally terminated the duplex use and lived in the house as their single-family home from 1991 until they sold it to the Yus as a single-family house in 2009. The Rosemas' attorney also questioned the legality of the proposed parking, because the plans submitted by the Yus showed only two parking spaces for the proposed duplex, both located on the east side of the private driveway easement. Subsequent to this letter, on October 9, 2009, the Yus submitted revised plans depicting five outdoor parking spaces.²⁷

On November 4, 2009, DPD issued the Interpretation at issue in this appeal,²⁸ concluding:

The use of the structure addressed as 5211 21st Avenue Northeast is as a duplex or two-unit multifamily structure, and it may continue to be

²⁶ DR 00055-60.

²⁷ DR 00084.

²⁸ DR 00003-17.

operated as a duplex in accordance with permits issued by the City of Seattle.

This Interpretation also concluded that the five parking spaces proposed in the revised plans complied with the Code.

On November 13, 2009, DPD issued a Construction Permit for the work that the Yus had commenced in July to increase the number of bedrooms from six to nine.²⁹ Under the City's code, 16 unrelated people can live in the subject property if it is a legal nonconforming duplex.³⁰ The approved plans depict five parking spaces: two in a side yard, and three in the front yard on either side of the private driveway easement that parallels 21st Avenue Northeast.³¹

²⁹ DR 00001. The subject property in fact will have ten bedrooms, because one room is listed on the plans as a family room but there will be no families living in what is intended to be a rooming house for students.

³⁰ SMC 84A.008 allows one household for each dwelling unit, and SMC 23.84A.016 defines a household as any number of related persons or 8 or fewer non-related persons.

³¹ DR 00084.

B. Statements Not Supported By The Record In The Yus' Brief

1. Yus' Assertions Regarding Prior Permit Applications

On pages 4 and 5 of their brief, the Yus refer to building permit applications submitted by the Nelsons in 1992 and 1993.³² The Yus assert that “The Nelsons expressly noted on their materials that the structure was an existing, nonconforming duplex.”³³ In fact, none of these applications were filled out or signed by the Nelsons. There is no evidence that the Nelsons ever saw the applications, and the notations simply reflect DPD’s records at the time.

The 1992 application comprises two sets of documents: a “Subject to Field Inspection Application Request” dated “6/11/92,”³⁴ and a “Master Use and Construction Application Permit” dated “6/19/92”.³⁵ The applicant on both documents is Dennis Conner of Conner Construction. Mr. Conner signed the

³² Corrected Appellants’ Opening Brief, 4-5

³³ Corrected Appellants’ Opening Brief, 4.

³⁴ DR 151-153.

6/11/92 document as the applicant and the “Applicant’s Signature” on the 6/19/92 document is “Via Mail.” The handwritten reference to a “EXIST. NONCONFORMING DUPLEX” on the 6/11/92 document is written in a different hand than that of the person filling out the application, who presumably was Mr. Conner, and the reference to a duplex presumably was written by the City employee accepting the application.³⁶ The 6/19/92 document includes a description of the structure, printed by the City, as an “existing duplex.”³⁷

There are two applications from 1993. The one from May has the letters “SFR” crossed out and the word “DUPLEX” written in a different hand. This application again was submitted by Conner Construction and signed by a representative of that company, Don Borne.³⁸ The application from July includes a printed description of the structure as an “existing duplex bldg,” and this application is

³⁵ DR 154-155.

³⁶ DR 00151.

³⁷ DR 00154.

³⁸ DR 00163.

submitted by Conner Construction and the applicant's signature is "via mail."³⁹

In short, all the applications were submitted by Connor Construction, and the descriptions of the property as a duplex appear to have been written or printed on the forms by the City.⁴⁰ In addition, Mr. Nelson states in his declaration that "Twice we asked inspectors from the City of Seattle to recognize that our home was now a conforming single-family residence."⁴¹ Mr. Nelson explains that the City's inspectors refused to do so unless the Nelsons removed the second electrical junction box, which they decided not to do because of cost. The fact that application forms accepted by DPD in the 1990s reflect the undisputed fact that DPD's records at that time indicated the subject property was a duplex, does not contradict Mr. Nelson's declaration about how he was *using* the property at that time.⁴² In addition, these

³⁹ DR 00161.

⁴⁰ DR 00151-55(June 1992); 00163 (May 1993); 00161-62 (July 1993).

⁴¹ DR 00058.

⁴² DR 00058.

applications all pre-date the entry in the Assessor's records from 2001 that the subject property was "Returned to use as single family dwelling by current owner."⁴³

2. Yus' Assertion Regarding How The Property Was Advertised For Sale

Also on page 5, in the last paragraph, the Yus assert that "The Nelsons appear to never have described the structure as either single-family or multifamily duplex in their sale materials (presumably this would be unnecessary due to immediate visual inspection)."⁴⁴

This assertion is directly contradicted by the declarations of both Mr. Nelson and Mr. Rosema. Mr. Nelson states in paragraph 3 of his declaration that "We listed it for sale as a single-family house and we made no representations to the buyer that it was anything else."⁴⁵ Mr. Rosema states in paragraph 4 of his declaration that "After the Nelsons put their home up for sale, I looked at the listing for the home on the Windermere web site, and

⁴³ DR 00036.

⁴⁴ Corrected Appellants' Opening Brief, 5.

the home was listed for sale as a single-family home, not as a duplex.”⁴⁶

III. RESPONSIVE ARGUMENT

The Yus argue that they are entitled to resume using the subject property as a duplex because the Nelsons did not remove all physical manifestations of the prior duplex use during the 18 years that the Nelsons lived in and used the house as their single-family home. The Yus thus argue that the physical condition of the property is determinative and overrides both the Nelsons’ actual use of their property and their intent, which the Nelsons manifested by numerous overt acts, including (1) using the property as their single-family residence,⁴⁷ (2) telling Mr. Rosema it had formerly been a duplex,⁴⁸ (3) telling the County Assessor in 2001 that they had returned the property to single-family use,⁴⁹ (4) listing the

⁴⁵ DR 00058.

⁴⁶ DR 00081.

⁴⁷ DR 00058 and 00081

⁴⁸ DR 00081

⁴⁹ DR 00036

property for sale as a single-family residence,⁵⁰ and (5) completing the Seller Disclosure Statement with the Yus, informing them their were no nonconforming uses on the property.⁵¹

The Yus' argument that the physical condition of a building is determinative of use is the same argument made by DPD in its Interpretation, an argument that is contradicted in particular by the two sections of the City code that the superior court cited as the basis for its decision, that expressly state just the opposite: that *no* physical changes to a nonconforming structure need be made in order for the use of that structure to become a conforming single-family residential use:

In single-family zones, a nonconforming use may be converted to a single-family dwelling unit, even if all development standards are not met.

SMC 23.42.108.B (See CP 11)

Except for a detached accessory dwelling unit, any structure occupied by a permitted use other than single-family residential use may be converted to single-family residential use even if the structure

⁵⁰ DR 00081

⁵¹ DR 00100

does not conform to the development standards for single-family structures . . .

23.44.008.F (See CP 11)

The Yus' brief simply ignores the Code sections that repudiate their argument, making their entire brief irrelevant. The Rosemas' Responsive Argument that follows will closely track portions of their Reply Brief in superior court, which succinctly reviewed the applicable code provisions, because the Yus have not responded to these arguments that were adopted by the superior court as the basis for its decision.

A. Standard of Review

The Rosemas agree that this court directly reviews the administrative record that the superior court reviewed, rather than the superior court's decision. The superior court recognized this fact, stating in the introduction to its decision: "The Court makes the following limited findings and conclusions, based upon its

review of the administrative record, in order to set forth the basis for its decision.”⁵²

The Rosemas generally accept the Yus’ overview of the standard of review, with two exceptions.

1. This Court Directly Reviews the Evidence

The Rosemas do not agree that *Freeburg v. City of Seattle*, 71 Wn. App. 367, 371, 859 P.2d 619 (1993), stands for the proposition that the evidence in this case must be viewed by this Court “in the light most favorable to the party who prevailed in the highest forum that exercised fact-finding authority.” Not only does *Freeburg* pre-date the advent of LUPA and its standards of review, the case is not relevant to judicial review of an administrative decision where the court reviews the same written record that the administrative decision-maker reviewed, and where no testimony is presented in an adversarial setting. In such cases, there simply is no “forum that exercised fact-finding authority.”

⁵² CP 11, 1.

The relevant passage in *Freeberg* relies on language taken verbatim from *State ex. rel. Lige & Wm. B. Dickson Co. v. County of Pierce*, 65 Wn. App. 614, 618, 829 P.2d 217 (1992), and, *Dickson Co.*, in turn, relies on a passage in *Fisher Properties, Inc. v. Arden-Mayfair, Inc.* 115 Wn.2d 364, 369, 798 P.2d 799 (1990).

In all three cases, either a trial court or a hearing examiner weighed the evidence in an adjudicatory hearing. In contrast, DPD's Interpretation was an administrative decision written by a planner who was reviewing the same written record that is before this court, and doing so without the benefit of an adversarial, adjudicatory process. A planner writing a decision based on a written record is not "a forum that exercised fact-finding authority," and the Yus provide no authority or policy reason for extending *Freeburg* to judicial review of such an administrative decision.

2. Under the Facts of This Case, the Burdens of Proof and Persuasion are on the Yus

The Yus assert that the Rosemas bear the burden of proof. The burden does not matter in this case, given the undisputed evidence

about the Nelsons' use of the subject property during the eighteen years in which they lived there, but the Rosemas disagree with the Yus' assertion.

SMC 23.42.102 states:

. . . Any residential development in a residential, commercial or downtown zone that would not be permitted under current Land Use Code regulations, but which existed prior to July 24, 1957, *and has not been discontinued* as set forth by Section 23.42.104, is recognized as a nonconforming use. . .

The code thus makes lack of discontinuance part of what must be proved to establish a nonconforming use. The referenced section of the code, 23.42.104, is the code section that says, in subsection B.2, that a nonconforming use is "considered discontinued" when "the structure or a portion of a structure is not being *used* for the use allowed by the most recent permit . . ." (Emphasis added). Thus if the Yus, as new owners, want to establish the existence of a nonconforming duplex use on the subject property, they must demonstrate that the subject property was not used as a single-family residence during the eighteen years of the Nelsons' ownership.

The evidence of *use* is all to the contrary. Mr. Nelson's declaration states that the property was used as the Nelsons' single-family home during these eighteen years;⁵³ Mr. Rosema's declaration corroborates this testimony over the last ten years of the Nelsons' ownership;⁵⁴ the Nelsons notified the Assessor in 2001 that they had returned the property to single-family use;⁵⁵ the Nelsons listed the property for sale as a single-family residence;⁵⁶ and the Nelsons notified the Yus in writing before their purchase that there was no nonconforming use on the subject property.⁵⁷ Pursuant to SMC 23.42.102, the burden was on the Yus to overcome these facts with contrary evidence of *use*. There is no such evidence.

⁵³ DR 00058.

⁵⁴ DR 00081.

⁵⁵ DR 00036.

⁵⁶ DR 00058 and 00081.

⁵⁷ DR 00100.

B. A Nonconforming Duplex Use in a Single-Family Zone is Discontinued After 12 Months of Non-Use Even if No Changes are Made to the Duplex Structure

Under the City's code, a *use* is not a *structure*; a use is the "purpose" for which a structure is occupied, maintained, etc.:

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

SMC 23.84A.040. A "nonconforming use" is defined in this same code section:

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

A "structure" is defined in SMC 23.84A.036, not as a use, but as a thing:

"Structure" means anything constructed or erected on the ground or any improvement built up or composed of parts joined together in some definite manner and affixed to the ground, including fences, walls and signs, but not including poles, flowerbed frames and such minor incidental improvements.

A "building" of course, is a structure, as the Code succinctly states in the definition in SMC 23.84A.004:

"Building." See "Structure."

The Code no longer contains a separate definition of “nonconforming structure,” but the definition is subsumed within the definition of “nonconforming to development standards” in SMC 23.84A.026 (emphasis added):

"Nonconforming to development standards" means a *structure*, site or development *that met applicable development standards* at the time it was built or established, *but that does not now conform* to one or more of the applicable development standards. Development standards include, but are not limited to height, setbacks, lot coverage, lot area, number and location of parking spaces, open space, density, screening and landscaping, lighting, maximum size of nonresidential uses, maximum size of non-industrial use, view corridors, sidewalk width, amenity features, street-level use requirements, street facade requirements, and floor area ratios.

SMC 23.84A.008 defines “duplex” as a type of structure (emphasis added):

“Duplex” means a single *structure* containing only two dwelling units, neither of which is an accessory dwelling unit authorized under Section 23.44.041.

To the extent that one is talking about use, however, a duplex can be a multifamily *use* as well as a structure, just as “single-family” can refer to either a dwelling unit or a use. The following

two definitions are from the definition of “residential use” in SMC

23.84A.032:

12. “Multifamily residential use” means that portion of a structure containing two or more dwelling units, excluding single family residences and accessory dwelling units.

* * *

20. “Single-family residence” means a residential use in a detached structure having a permanent foundation. The structure may also contain an accessory dwelling unit where expressly authorized pursuant to this title. . . .

Thus one can have a duplex structure or a duplex use, and the City’s Code applies very different rules to nonconforming structures than it does to nonconforming uses, as the following paragraphs discuss.

Chapter 23.42 SMC comprises the City’s regulations for nonconforming uses and structures, which are addressed in different sections of this chapter. A structure that is “nonconforming to development standards” need not be brought into compliance with the code, and its right to exist as a

nonconforming structure does not lapse based on how the structure is used or not used:

A. A structure nonconforming to development standards may be maintained, renovated, repaired or structurally altered but may not be expanded or extended in any manner that increases the extent of nonconformity or creates additional nonconformity .

* * *

B. A structure nonconforming to development standards and occupied by or accessory to a residential use may be rebuilt or replaced but may not be expanded or extended in any manner than increases the extent of nonconformity unless specifically permitted by this code.

SMC 23.42.112. In other words, a nonconforming structure in residential use can be maintained indefinitely (and even rebuilt if destroyed), because the structure's status as legally nonconforming to development standards does not lapse because of discontinuance or change of use. A nonconforming *use*, on the other hand, can be maintained only so long as it is not "discontinued" for more than 12 months:

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

23.42.104.B. In addition, the code specifically addresses, in two separate sections, the difference between uses and structures when a nonconforming use in a single-family zone is changed to a conforming single-family use:

A. In any zone, a nonconforming use may be converted to any conforming use if all development standards are met.

B. *In single-family zones, a nonconforming use may be converted to a single-family dwelling unit, even if all development standards are not met. . . .*

SMC 23.42.108 (emphasis added). This fundamental difference in treatment between structures and uses also is recognized in the Single-Family Residential Chapter of the Code, particularly in SMC 23.44.008:

SMC 23.44.008 Development standards for
uses permitted outright

* * *

F. Except for a detached accessory dwelling unit, *any structure occupied by a permitted use other than single-family residential use may be converted to single-family residential use even if the structure does not conform to the development standards for single-family structures. . . .*

Both SMC 23.42.108 and SMC 23.44.008 expressly state what is necessarily implied in SMC 23.42.104: that a nonconforming

use can be discontinued simply by not using “the structure or a portion of a structure . . . for the use allowed by the most recent permit . . .” A nonconforming use (in this case, duplex use) can be converted to a conforming single-family use even if the physical structure is not changed to be a single-family structure.

The Code thus says in multiple ways and multiple places that the Nelsons did not have to make *any* changes to the subject property in order to discontinue the nonconforming duplex use: they simply had to stop using it as a duplex for longer than 12 consecutive months.

C. The Nelsons Did Not Have to Vacate Their House for a Year in Order to Discontinue the Duplex Use

On page 21 of their brief the Yus assert that subsection B.3 of SMC 23.42.104 is more specific to multi-family uses than subsection B.2, and because the Nelsons did not vacate their house for 12 months they could not discontinue the duplex use.⁵⁸ This argument ignores SMC 23.42.108.B and 23.44.008.F, discussed above, which are much more specific than SMC 23.42.104.B.3 to

the issue in this case, which is whether a nonconforming duplex structure must be remodeled to conform to the development standards for single-family houses before the nonconforming duplex use of that structure can be discontinued and a conforming single-family use established. The code sections that the Yus ignore state that *no* changes need be made to a duplex structure in order for its owner to change its use to single-family use.

The Yus' argument, moreover, ignores the fact that subsection B.3 of SMC 23.42.108.B is one of three independent and alternative ways in which a use can be discontinued:

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

⁵⁸ Corrected Appellants' Opening Brief, 21.

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.

Subsection B.1 (obtain a permit to change the use) does not apply in this case, because the Nelsons did not request a permit to change the use of their house to single-family use. They did not do so, because City inspectors erroneously told them that they would need to remove the second electrical junction box before the City would recognize the house as a single-family residence.⁵⁹ No one needs a use permit to use a house as a single-family residence in a single-family zone, however, so it was entirely reasonable (contrary to the assertion on page 24 of the Yus' corrected brief) for the Nelsons not to apply for a permit to authorize them to do what they could do without the permit: live in their house.

Subsection B.3, the section relied upon by the Yus, does not apply because no portion of the subject property was vacant. As the declarations of both Mr. Nelson and Mr. Rosema state, the

Nelsons used the entire house as their single-family residence, and Mr. Nelson specifically stated that “we removed internal partitions that had been previously installed.” The basement area where the second duplex unit was previously located was not vacant, it was simply used as part of the house.

The last sentence of subsection B.3 protects an owner of a nonconforming multi-family structure from unintentionally losing his or her nonconforming use rights because of the vacancy of one or more units. The vacancy of individual units is a normal part of the use of multi-family structures, and the Code protects an owner from the unintentional loss of nonconforming rights by recognizing this fact. The Nelsons, however, intentionally chose to discontinue their nonconforming duplex use, and they did so by using the entire house as their residence for 18 years, which means that subsection B.2 applies: the nonconforming use was discontinued because the Nelsons did not use any part of their house as a duplex.

The Yus argue near the bottom of page 20 of their brief that

⁵⁹ DR 00058.

If the Rosema's (sic) reading were correct, every nonconforming multifamily structure would be deemed either to have lost its nonconforming status in its entirety or with respect to select units each time each unit was "not being used for the use allowed by the most recent permit."

This argument confuses vacancy, addressed by the Code in subsection B.3, with cessation of use, which is addressed in subsection B.2. In order for the owner of a nonconforming multifamily structure to discontinue the nonconforming multifamily use of that structure under subsection B.2 of SMC 23.42.104, the owner would have to actually cease the multi-family use: for example, by changing the multi-family use to office or hotel use, or by having no use in the building for a year. The vacancy of individual units would be irrelevant because vacancy of units is not cessation of multi-family use, it is a normal part of that use. Instead of leaving a duplex unit vacant, the Nelsons changed the use of the entire structure from duplex use to single-family use, as they demonstrated by their actions, and as they told the Assessor, the Rosemas, and the Yus before the Yus' purchase. No

portion of the subject property was vacant, and subsection B.3 has no applicability to the facts of this case.

D. The Existence of an “ADU” is Further Evidence that the Nelsons Used the Building as a Single-Family Residence.

Beginning on page 28 of their brief, the Yus purport to find support for their argument in the fact that the Assessor in 2001, when noting the discontinuance of the duplex use, also noted the existence of an “ADU,” which presumably stands for “accessory dwelling unit.”⁶⁰ The City’s Code refutes the Yus’ attempt to find support in this fact. SMC 23.84A.008 specifically defines a duplex structure to *exclude* a structure with an accessory dwelling unit:

“Duplex” means a single structure containing only two dwelling units, neither of which is an accessory dwelling unit authorized under Section 23.44.041.

Similarly, the Code defines an “accessory dwelling unit” as a *single-family use* in a *single-family structure*:

1. “Accessory dwelling unit” means a residential use in an additional room or set of rooms located within an owner-occupied single family residence or within an accessory structure on the same lot as an owner-occupied single-family residence . . .

⁶⁰ DR 00036.

Thus to the extent this notation in the Assessor's records regarding an "ADU" has any relevance, the presence of an ADU during the Nelsons' ownership confirms that the subject property was being used as a single-family residence, not as a duplex.

E. Mr. Nelson's Declaration is Internally Consistent

The Yus argue, beginning on page 26 of their corrected brief, that Mr. Nelson's declaration contains "internal conflict between the pre-prepared portions and Mr. Nelson's handwritten statements." This assertion depends upon the Yus' mischaracterizations of the declaration.

First, the Yus attempt to make much of the fact that Mr. Nelson crossed out the word "duplex" and wrote in the word "triplex." Based on this fact, the Yus assert that "Mr. Nelson never made any internal or external physical modifications to remove any aspect of the duplex." This assertion simply ignores the language at issue (emphasis added):

During the 18 years that we lived at 5211 21st Avenue NE, we made modifications to the house that were intended to physically convert it from the triplex it had been to our single family home. *For example, we removed internal partitions that had*

been previously installed. *We removed the second external entrance . . .*⁶¹

Second, the Yus assert that there is a contradiction between the typed language “We removed the second external entrance” and this handwritten sentence: “Also, the separate entrance to the basement has been left intact.” Since Mr. Nelson obviously knew how to cross out language he did not agree with, there is no reason to interpret these two sentences as contradictory. Single-family houses have at least two entrances; the previous unlawful triplex appears to have had a separate entrance for each of the two additional units, just as we know each of the additional units once had its own kitchen.⁶² Since the plans show that three entrances remain,⁶³ by saying he removed the “second external entrance” Mr. Nelson obviously was saying he removed the second additional entrance, and one of those additional entrances remains.

Third, the Yus assert a contradiction between the first and third of these three sentences:

⁶¹ DR 00058.

⁶² DR 00144 refers to a third kitchen that had to be removed.

We removed the second external entrance and eliminated the second address. We only used 5211 as our address while we lived there. The City records has (sic) the address of 5215 which was the second address on the house when we purchased it.

When these three sentences are read together, there is no conflict. Mr. Nelson is simply saying that he and his wife did not use the second address that was on the building when they moved in, but that this second address is reflected in the City's records.

The asserted contradictions do not exist, and they are asserted contradictions about the condition of the *structure*, not about its *use*. Mr. Nelson was never equivocal or contradictory about use: he says that he and his wife purchased the subject property "in 1991 with the intent of using the house as a single-family residence," and "We owned and occupied the house as a single-family home until July, 2009 when we sold it."

F. The Yus' Fail to Address the Basis for the Superior Court's Decision Regarding Parking

In their appeal of the superior court's decision regarding parking on the subject property, the Yus once again do not cite or

⁶³ DR 00084.

discuss the sections of the code that were the basis for the superior court's decision, and this decision did no more than tell the City to enforce the plain language of its code.

The superior court's decision cites SMC 23.44.016.C.3, which prohibits the parking of more than three vehicles outdoors on a lot in a single-family zone, and SMC 23.44.016.D, which prohibits parking in required front and side yards. The Yus' plans depict five outdoor parking spaces in the front and side yards.⁶⁴ In section 5 of its Order the superior court stated:

DPD shall limit the number of outdoor parking spaces on the subject property to three, and shall prohibit these three parking spaces from being located in the required front yard and side yards, except to the extent that the current owners can establish that one or more such parking spaces were legally established by prior owners.

The Yus in their appeal do not mention or discuss either code section cited by the court. Instead they engage in a discussion of the number of parking spaces that would be required if the duplex use had not been discontinued. This discussion is irrelevant because, for all the reasons discuss above, the Nelsons long ago

replaced the duplex use with single-family use. Even if one assumes, *arguendo*, that five parking spaces are permitted, they would not be permitted outdoors in the required front and side yards, where they are today. The Yus' parking spaces are prohibited by the code sections cited by the superior court and not discussed by the Yus in their brief.

G. The Rosemas Request that this Court Award Compensatory Damages, Including Attorney Fees, under RAP 18.9

The Rosemas request that this court award them compensatory damages, including attorney fees, under RAP 18.9:

The appellate court on its own initiative or on motion of a party may order a party or counsel . . . who . . . files a frivolous appeal . . . to pay terms or compensatory damages to any other party who has been harmed by the delay or the failure to comply or to pay sanctions to the court.

The Rosemas are entitled to compensatory damages because the Yus fail to address the basis of the trial court's decision; because the Yus are able to present “debatable issues upon which reasonable minds might differ” only by ignoring relevant code

⁶⁴ DR 00084.

provisions; because the Rosemas are harmed financially by having to respond to a frivolous appeal; and because the Rosemas are denied the peaceful enjoyment of their property by having to live next to the unlawful duplex use during the pendency of this frivolous appeal.

The rules of appellate procedure permit an award of attorney fees to a prevailing respondent in a frivolous appeal. *Mahoney v. A.N. Shinpoch*, 107 Wn.2d 679, 691, 732 P.2d 510 (1987). In determining whether an appeal is frivolous, the court should consider:

(1) that the civil appellant has a right to appeal under RAP 2.2; (2) that all doubts as to whether the appeal is frivolous should be resolved in favor of the appellant; (3) the record should be considered as a whole; (4) that an appeal that is affirmed simply because the arguments are rejected is not frivolous; and (5) that an appeal is frivolous if there are no debatable issues upon which reasonable minds might differ, and it is so totally devoid of merit that there is no reasonable possibility of reversal.

Pub. Employees Mut. Ins. Co. v. Rash, 48 Wn. App. 701, 740 P.2d 270 (1987).

One way in which an appeal is frivolous is when an appellant “fails to address the basis of the trial court’s decision.” *Mahoney v. A.N. Shinpoch*, 107 Wn.2d at 692 (Emphasis added). Similarly:

An appeal is frivolous when there are no debatable issues on which reasonable minds would differ, when the appeal is so devoid of merit that there was no reasonable possibility of reversal, *or when the appellant fails to address the basis of the trial court’s decision.*”

Matheson v. Gregoire, 139 Wn. App. 624, 639, 161 P.3d 486 (2007), *review denied*, 163 Wn.2d 1020, 180 P.3d 1292 (2008) (Emphasis added).

In *Mahoney*, a trial court received briefing on several disputed statutes, of which one was the Administrative Procedures Act (“APA”). The court ruled against the State Department of Social and Health Service (“DSHS”), finding that DSHS must abide by the statutory requirements of the APA. Although DSHS provided briefing on other relevant provisions in the APA, the Supreme Court found DSHS’s appeal to be frivolous and awarded attorney fees because “DSHS failed to address the basis of the trial court’s

decision”, that is, the relevant provisions of the APA. *Mahoney v. A.N. Shinpoch*, 107 Wn.2d at 692.

Although the Yus have a right to an appeal, they do not have the right to ignore the bases of the Superior Court’s decision: SMC 23.42.108 and SMC 23.44.008 regarding nonconforming uses, and SMC 23.44.016.C.3 and D regarding outdoor parking spaces.⁶⁵ Just as DSHS’s appeal was frivolous because it failed to address relevant provisions of the APA, *Mahoney* at 692, the Yus’ appeal is frivolous because it fails to address the relevant provisions of the Seattle Municipal Code.

Alternatively, this court can award attorney fees if the Yus fail to present a “debatable issue.” Only by selectively ignoring code provisions are the Yus able to arguably craft “debatable issues upon which reasonable minds might differ.” *Pub. Employees Mut. Ins. Co. v. Rash*, 48 Wn. App. at 40.

Washington Appellate Courts have repeatedly awarded attorney fees for appeals that fail to present adequate legal

⁶⁵ See, CP 11, 3-4

authority to create “debatable issues upon which reasonable minds might differ.” See e.g., *Yurtis v. Phipps*, 143 Wn. App. 680, 697, 181 P.3d 849 (2008); *Fidelity Mort. Co. v. Seattle Times Co.*, 131 Wn. App. 462, 473-74, 128 P.3d 621 (2005); *Andrus v. State, Dept. of Transp.*, 128 Wn. App. 895, 900-01, 117 P.3d 1152 (2005); *Pain Diagnostics and Rehabilitation Associates, P.S. v. Brockman*, 97 Wn. App. 691, 700-01, 988 P.2d 972 (1999); *Kearney v. Kearney*, 95 Wn. App. 405, 974 P.2d 872 (1999), review denied, 138 Wn.2d 1022, 989 P.2d 1137 (1999).

The Rosemas request that this matter be remanded to the superior court with directions to determine the amount of compensatory damages, including attorneys fees, owed to the Rosemas.

IV. CONCLUSION

The Rosemas moved to their house in 1998, when the Nelsons were using the subject property as their single-family home. Mr. Nelson told Mr. Rosema the subject property *formerly* had been a

duplex, and only the Nelsons lived there for the next 11 years.⁶⁶

The Rosemas were shocked to discover in 2009 that the subject property was being converted back into the duplex that Mr. Nelson said it formerly had been. The Rosemas asked DPD to explain how this was possible, and DPD issued an Interpretation saying it was possible because the Nelsons did not remove all the physical improvements to the building that had made it suitable for duplex use.

The Rosemas appealed this decision to the superior court, citing the provisions of the code that say *no* changes need be made to a duplex *structure* in order to change the *use* of that structure to single-family use. The superior court, relying on these code provisions, reversed DPD. The City accepted the superior court's interpretation of its code and did not appeal. The City is bound by the superior court's decision, and by not appealing it necessarily has agreed to apply the Code as interpreted by the superior court in future cases.

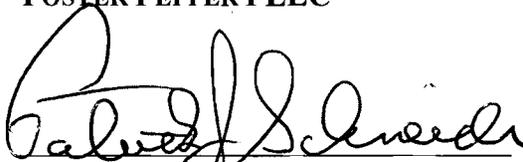
⁶⁶ DR 00081.

The Yus, who did not participate in the superior court proceedings, now appeal and make the same argument that DPD made in its Interpretation – that the condition of the structure determines the use. This argument can only be made by ignoring the many distinctions in the City’s Code between uses and structures, the differences between subsections B.2 and B.3 of SMC 23.42.108, and, in particular, SMC 23.42.108.B and 23.44.008.F, each of which independently refutes the Yus’ argument. The Yus failed to even address these two code provisions in their brief, even though the superior court cited them as the basis for its decision, just as the Yus failed to address the code sections relied upon by the superior court for its decision regarding the Yus’ unlawful parking spaces.

The Rosemas ask not only that the appeal be denied, but also that they be awarded compensatory damages pursuant to RAP 18.9, including their attorney fees for having to respond to this frivolous appeal and their damages for having to endure the unlawful duplex use during the pendency of this appeal.

RESPECTFULLY SUBMITTED this 21st day of October, 2010.

FOSTER PEPPER PLLC

A handwritten signature in black ink, appearing to read "Patrick J. Schneider". The signature is written in a cursive style with a horizontal line underneath the name.

Patrick J. Schneider, WSBA #11957

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