

No. 68819-7-I

TYKO JOHNSON,

Appellant,

vs.

CITY OF SEATTLE DEPARTMENT OF
PLANNING AND DEVELOPMENT,

Respondent.

CITY OF SEATTLE'S RESPONSE BRIEF

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I. INTRODUCTION

Individuals cited for violating City code that claim they have a nonconforming use are required by code to apply to the Department of Planning and Development (“Department”), who will determine if the use is a legal nonconforming use. The requirement that a nonconforming use be established by applying to the Department is a reasonable exercise of the City’s police power.

Tyko Johnson (“Johnson”), cited by the City three times for parking more than three vehicles on his property, was told as a result of his first Hearing Examiner (“Examiner”) citation appeal that he needed to submit a nonconforming use application to the Department. In his second Examiner citation appeal, Johnson agreed to file the application, but failed to apply until after his third Examiner citation appeal. After Johnson applied, the Department determined he had a legal nonconforming use to park five vehicles on his property.

Notwithstanding that Johnson established his nonconforming use, the Court should uphold the Examiner’s decisions because Johnson had not applied to the Department to establish his nonconforming use before the citations were issued or the Examiner heard the appeals.

Besides upholding the Examiner’s decisions, this Court should uphold the trial court’s decision that Johnson does not have a 42 U.S.C.

1983 (“§ 1983”) due process claim when issuing citations does not establish a protected property interest until a court determines a violation exists. And Johnson had due process to present his argument that he was not required to establish his nonconforming use by applying to the Department before the Examiner, superior court, and this Court.

II. ISSUES

City code requires nonconforming uses be established by applying to the Department. Only after all three citations were issued and the third Examiner appeal, did Johnson apply to establish his nonconforming use. Did the Examiner err by upholding the citations when Johnson kept more than three vehicles on his property and had not established the use by applying to the Department before the citations were issued?

Citations do not implicate a due process interest until a court determines a violation exists. Johnson appealed his citations to the Examiner, to superior court, and to this Court. Does Johnson have a § 1983 procedural due process claim when Johnson availed himself of due process to challenge the citations and a court determined a violation exists?

III. STATEMENT OF THE CASE

A. The Department issues three citations that the Examiner upholds.

1. *The first citation*

Johnson owns a house in West Seattle.¹ In June and July 2010, the Department issued Johnson warning letters for storing inoperable vehicles and more than three vehicles on his property.² In September 2010, the Department issued a \$150 citation that Johnson appealed to the Examiner.³

A month later, the Examiner held the first citation appeal where the City presented testimony on the existence of the violation.⁴ The testimony of Terrance Johnson, Tyko Johnson's son, on parking more than three vehicles on his father's property was limited to an unsupported assertion:

There *may be* an issue of legal nonconformance if prior to this ordinance more than three vehicles were allowed for the occasional time that I park my truck at his house along with his vehicles."⁵

¹ Clerk's Papers (CP) at 156, Findings of Fact 1.

² CP 607; CP 610; SMC 23.44.016.C.3 (no more than three vehicles may be kept outdoors on any lot); SMC 23.84.020 (junk storage includes inoperable vehicles).

³ CP 313; CP 157, Findings of Fact 6.

⁴ CP 119-126 (Verbatim Report of Proceedings).

⁵ CP 127 (emphasis added).

Terrance Johnson did not provide evidence supporting a nonconforming use as he claims in his opening brief before this Court.⁶

In her November 2010 decision, the Examiner found and concluded that the Seattle Municipal Code (“SMC”) requires a nonconforming use be established by applying to the Department:

SMC 23.42.102 states the method by which a principal or accessory use of property may be established as legally nonconforming.⁷

...
SMC [Seattle Municipal Code] 23.42.102 prescribes the process for determining whether a use of property is legally nonconforming to present Land Use Code requirements. That determination is made by the Department, and not the Hearing Examiner.⁸

The Examiner upheld the \$150 citation,⁹ finding the evidence supported more than three vehicles were kept on the property and the vehicles were inoperable.¹⁰

In late November 2010, after the 10-day motion for reconsideration period established by the Examiner’s rules lapsed,¹¹ Johnson submitted a motion for reconsideration.¹² The Examiner denied the untimely motion.¹³

⁶ Opening Brief of Appellant (“Opening Brief”) at 10 (Johnson claims he presented evidence of a nonconforming use during the first two Examiner hearings).

⁷ CP 158, Findings of Fact 12.

⁸ CP 158, Conclusion 4.

⁹ CP 156-59.

¹⁰ CP 158-59, Conclusions 5 and 6.

¹¹ CP 574 (Hearing Examiner Rule 3.20(b) provides that motions for reconsideration “must be filed no later than 10 days after the date of the

2. *The second citation*

In December 2010, the Department inspected Johnson's property and saw no change in the number of vehicles.¹⁴ After further inspections between January and June 2011,¹⁵ the Department issued a second citation for \$500.¹⁶ Johnson appealed the citation to the Examiner.¹⁷

During the second hearing, the Examiner told Johnson he had not shown he had a nonconforming use, and he had to file an application with the Department to establish the use:

First is I didn't believe that you had proved that you had a nonconforming use as a defense to the citation. And secondly I said there is also a process by which you can prove a nonconforming use and it is an application process through DPD [the Department].¹⁸

Johnson acknowledged this and said he would establish the use by applying to the Department:

Okay. Well, now that you have clarified that, we will go through any process that the [D]epartment of [P]lanning says it has.¹⁹

Hearing Examiner's decision"). See http://www.seattle.gov/examiner/docs/RulesofPracticeandProcedure_080112.pdf (use Google search with link).

¹² CP 577-579.

¹³ CP 574.

¹⁴ CP 9, Findings of Fact 3.

¹⁵ CP 156-57, Findings of Facts 3, 5, and 7; CP 9, Findings of Facts 3 and 6.

¹⁶ SMC 23.91.016 (first citation a \$150 penalty; subsequent citations for the same violation a \$500 penalty).

¹⁷ CP 314; CP 9, Findings of Fact 5.

¹⁸ CP 65-66.

¹⁹ CP 66.

The Examiner left the record open to allow Johnson to file a response to the Department's motion for summary judgment.²⁰

Johnson responded that he kept "four or five Cars, Boats, Trailers and/or motor homes on my property."²¹ None of the documents attached to Johnson's response demonstrated he kept more than three vehicles on his property.²² And Johnson did not apply and provide any information to the Department as the code requires.²³

The Examiner upheld the second citation because Johnson was collaterally estopped as a result of the Examiner's first citation decision.²⁴

3. *The third citation*

In February 2011, the Department issued Johnson a third citation for \$500 for keeping more than three vehicles on the property,²⁵ and Johnson again appealed to the Examiner.²⁶ On March 6, 2011, the

²⁰ CP 633.

²¹ CP 640.

²² CP 646-761 (Documents attached to Johnson's February 3, 2011 response to Department's motion for summary judgment); CP 665 (motor home and travel trailer parked in rear yard in photo dated 1998); CP 56; CP 60 (Johnson submits a 1995 aerial photograph in his untimely motion for reconsideration to the Examiner's third decision showing two cars in the driveway and three in the rear yard); CP-SD 14 (Examiner's third citation decision dated April 14, 2011); CP 334 (motion for reconsideration dated April 16, 2011—two days beyond the 10-day Examiner motion for reconsideration period).

²³ SMC 24.44.102.A; SMC 23.44.102.C; SMC 23.42.102.D; SMC 23.42.102.E.

²⁴ CP 8-12, Findings of Fact 3, 4, 5, 6, and 7.

²⁵ CP 315.

²⁶ Clerk's Papers Secondary Designation (CP-SD) 14.

Department wrote Johnson and told him he needed to apply to the Department to establish a nonconforming use for the record.²⁷

Then, on March 25, 2011, the City moved for summary judgment on the third citation.²⁸ Johnson failed to timely respond to the motion.²⁹

On April 4, 2011, the Examiner upheld the citation on the basis of collateral estoppel.³⁰ In her decision the Examiner stated that Johnson had not applied to the Department to establish his nonconforming use.³¹

Johnson then moved for reconsideration on April 16, 2011.³² The Examiner denied the motion because it was filed more than 10 days after the Examiner's decision, and failed to show grounds for reconsideration.³³

B. Johnson files a LUPA petition challenging each Examiner decision.

In December 2010, Johnson filed his first Land Use Petition Act (LUPA) petition appealing the Examiner's first citation decision.³⁴ In February 2011, Johnson filed his second petition appealing the Examiner's

²⁷ CP 379.

²⁸ CP-SD 14.

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ CP-SD 19 (citing Hearing Examiner Rule 3.20). *See* http://www.seattle.gov/examiner/docs/RulesofPracticeandProcedure_080112.pdf (use Google search with link).

³⁴ CP 151-155.

second decision.³⁵ And in April 2011, Johnson filed his third petition appealing the Examiner's third decision.³⁶

C. After filing his third LUPA petition, Johnson files his nonconforming use application with the Department.

After Johnson filed his third petition appealing the Examiner's third decision,³⁷ Johnson applied with the Department to establish a nonconforming use to park more than three vehicles on his property.³⁸

Sixty-eight days after Johnson filed his application with the Department;³⁹ the City determined on July 18, 2011 that Johnson had a nonconforming use to park five vehicles on his property.⁴⁰

D. The trial court upholds the first two citations and remands the third citation for a mitigation hearing, and dismisses Johnson's § 1983 claims.

Besides presenting the trial court's ruling on the merits of the Examiner's decisions and the dismissal of Johnson's § 1983 claims, the other motions that occurred in superior court are discussed below.

1. *Johnson's motion to consolidate the first two petitions was granted.*

³⁵ CP 1-12; CP 63-85

³⁶ CP-SD 1-23.

³⁷ CP-SD 1-23 (third LUPA appeal filed on April 11, 2011); CP 322 (nonconforming use applied for on May 11, 2011).

³⁸ CP 322.

³⁹ CP 322 (nonconforming use applied for on May 11, 2011); CP 400-401 (in a July 18, 2011 letter, a Department Senior Land Use Planner approved the nonconforming use to park five vehicles on the property).

⁴⁰ CP 400-401.

Johnson moved to consolidate the first two petitions.⁴¹ The court determined on its own initiative that the two petitions should follow the first petition's case schedule.⁴² The City did not, as Johnson claims in his opening brief,⁴³ obtain the consolidated order without giving him notice. Instead, it was *Johnson* who moved to consolidate.⁴⁴

2. *The City's motion to dismiss damage claims associated with the first two petitions was granted, and Johnson's motion to continue the motion to dismiss was denied.*

The City initially moved to dismiss Johnson's RCW 64.40 and § 1983 damage claims associated with the first two Petitions on February 11, 2011.⁴⁵ The City subsequently noted the motion for March 11, 2011 after the first two petitions were consolidated.

Johnson's response to the City's motion to dismiss contained one substantive sentence:

The writ review process may be the only means to determine the legality and enforceability including due process of the City's ordinance against me.⁴⁶

⁴¹ CP 146-147.

⁴² CP 149-150 ("These two matters shall be heard according to the LUPA schedule set for Cause No. 10-2-44876-4 [cause number hand-written by the court], and shall be heard by the Honorable Suzanne Barnett.").

⁴³ Opening Brief at 14 ("Without any notice to him, however, the City secured an order of consolidation signed by the Honorable Laura Inveen on February 22, 2011 . . .").

⁴⁴ CP 146-147.

⁴⁵ CP 513-523 (motion filed March 11, 2011).

⁴⁶ CP 217.

Although Johnson stated in his response that “I believe the evidence in the record, photographic and un-rebutted testimonial will clearly show an established Legal Non-Conforming use, and that my Due Process rights of Notice, and an opportunity to Respond were violated”,⁴⁷ Johnson offered no authority or argument to support this statement, and Johnson did not address a § 1983 claim.⁴⁸

Besides responding to the City’s motion to dismiss, Johnson moved to continue the March 11, 2011 hearing.⁴⁹ The City responded with three points:

- In Johnson’s February 11, 2011 motion to continue the hearing date, the only rationale offered was he needed time to find “help and/or substitute Terrance Johnson if possible”;⁵⁰
- On February 15, 2011, the City sent Johnson notice of the March 11 motion to dismiss. Johnson did not respond to that notice and claim he had a conflicting medical appointment;⁵¹ and
- The March 11, 2011 hearing date followed the case consolidation and the previously-entered scheduling order.⁵²

⁴⁷ *Id.*

⁴⁸ CP 216-217.

⁴⁹ CP 200-201.

⁵⁰ CP 873-876; CP 551.

⁵¹ CP 877-879; CP 551.

⁵² CP 551.

In his motion to continue reply brief, Johnson cited *In re Disciplinary Proceeding of Sanai* (“*Sanai*”) for the first time as authority for the argument that his motion to continue should be granted.⁵³

Johnson failed to appear at the March 11 hearing and the trial court entered orders granting the City’s motion to dismiss Johnson’s damages claims associated with the first two petitions, and denying Johnson’s motion to continue.⁵⁴

3. *Johnson’s motion to reconsider the orders granting the City’s motion to dismiss damage claims and denying his motion to continue was denied.*

In March 2011, Johnson moved to reconsider the order granting the City’s motion to dismiss damages claims and denying his motion to continue. In his motion Johnson argued:

- He had a § 1983 *substantive due process* claim;⁵⁵
- He had a void-for-vagueness claim based on what constitutes “inoperable vehicles” under the code;⁵⁶ and
- *Sanai* required the court grant Johnson’s motion to reconsider the decision denying his motion to continue.⁵⁷

⁵³ CP 225 (citing *In re Disciplinary Proceeding of Sanai*, 177 Wn.2d 743, 302 P.3d 864 (2013)).

⁵⁴ CP 238-239 (Order Denying Petitioner’s Motion for Continuation); CP 240-242 (City’s Motion to Dismiss Johnson’s Damages Claims and Writ Requests; and City’s Motion to Prohibit [Terrance Johnson’s] Unauthorized Practice of Law).

⁵⁵ CP 253-254.

⁵⁶ CP 255.

Johnson did not discuss a § 1983 procedural due process claim in his motion for reconsideration opening brief.⁵⁸

The City responded by distinguishing *Sanai*,⁵⁹ arguing Johnson had not identified a CR 59 basis to set aside the orders,⁶⁰ and arguing a *substantive due process* § 1983 argument cannot be raised for the first time in a motion for reconsideration.⁶¹

In his reply brief, Johnson argued that he was denied “due process” entitling him to a § 1983 claim.⁶² Johnson did not, however, state or argue a *procedural* due process claim.⁶³

The court denied the motion.⁶⁴

⁵⁷ CP 251-252 (citing *In re Disciplinary Proceeding Against Sanai*, 167 Wn.2d 740, 255 P.3d 203 (2009)).

⁵⁸ CP 245-256.

⁵⁹ CP 558-559.

⁶⁰ CP 559.

⁶¹ CP 559-560, Footnote 13 (Johnson’s *substantive* due process § 1983 claim and void-for-vagueness claim raised for first time in motion for reconsideration); CP 559-560, Footnote 15 (citing *Wilcox v. Lexington Eye Institute*, 130 Wn.App. 234, 241, 122 P.3d 729, 732 (2005), and *JDFJ Corp. v. Int’l Raceway, Inc.*, 97 Wn.App. 1, 7, 970 P.2d 343 (1999)) (CR 59 does not permit new legal theories that could have been raised before entry of an adverse decision).

⁶² CP 264.

⁶³ *Id.*

⁶⁴ CP 269-270.

4. *After a hearing on the merits, the court upheld the first two citations and remanded the third citation for a mitigation hearing.*

The court upheld the Examiner's first citation decision because Johnson had not established a nonconforming use to park more than three vehicles on his property by applying to the Department.⁶⁵ The Court also ruled the Examiner erred when she determined the vehicles were inoperable because the vehicles were not licensed.⁶⁶

With the second citation, the court upheld the Examiner's decision because Johnson had not established the nonconforming use by applying to the Department.⁶⁷ The court also ruled that collateral estoppel did not apply to the Examiner's second decision when establishing a nonconforming use was not litigated in the first Examiner hearing.⁶⁸ The court said this was harmless error because Johnson had not applied to the Department to establish his nonconforming use.⁶⁹

Then with the third citation, the court said Johnson "had, or was soon to receive, a permit to continue" his nonconforming use and remanded the citation for a penalty mitigation hearing.⁷⁰ The court also

⁶⁵ CP 427, Conclusion of Law 11.

⁶⁶ CP 427, Conclusion of Law 10.

⁶⁷ CP 428-429, Conclusion of Law 19.

⁶⁸ CP 428.

⁶⁹ CP 428-429.

⁷⁰ CP 431, Conclusions of Law 31 and 33.

determined that collateral estoppel did not apply to the third Examiner decision.⁷¹

5. *Johnson's motion to reconsider the order upholding the first two citations and remanding the third was denied.*

In March 2012, Johnson moved to reconsider the court's decision on the merits.⁷² Then in April 2012, Johnson filed a supplemental memorandum supporting his motion for reconsideration.

The court denied the motion.⁷³

6. *Johnson's motion to vacate the orders granting the City's motion to dismiss damage claims and denying his motion to continue was denied.*

Over a year after the court granted the City's motion to dismiss the damages claims associated with the first two citations,⁷⁴ Johnson moved to vacate the orders denying his motion to continue and the City's motion to dismiss the damages claims.⁷⁵

⁷¹ CP 431, Conclusion of Law 29.

⁷² CP 433-445.

⁷³ CP 505-507.

⁷⁴ CP 240-242 (order granting City's motion to dismiss Johnson's damages claims associated with the first two petitions entered on March 11, 2011); CP 448 (Johnson's motion to vacate the order granting the City's motion to dismiss Johnson's damages claims associates with the first two petitions entered on March 28, 2012).

⁷⁵ CP 448-459.

Johnson claimed the order dismissing Johnson's damages claims was in error because the City did not address Johnson's procedural due process claims associated with the first two petitions.⁷⁶

The City responded arguing Johnson failed to meet the "extraordinary circumstances" that constituted "irregularities extraneous to the proceeding" standard,⁷⁷ he failed to raise a procedural due process argument when responding to the City's motion to dismiss the damages claim *and* in his motion for reconsideration, and it was too late in a motion to vacate to raise a procedural due process argument for the first time.⁷⁸

The court denied the motion.⁷⁹

7. *The City's motion to dismiss the § 1983 damages claim associated with the third petition was granted.*

The City then filed a motion to dismiss the § 1983 claim associated with the third citation in April 2012.⁸⁰ The City argued that Johnson's procedural due process rights were not violated when receiving citations

⁷⁶ CP 453-455.

⁷⁷ CP 869 (citing CR 60(b)(11)).

⁷⁸ CP 870, Footnote 7 (citing *Bogle & Gates PLLC v. Holly Mountain Res.*, 108 Wn.App. 557, 32 P.3d 1002 (2001); *In re Marriage of Williams*, 84 Wn.App. 263, 927 P. 2d 679 (1996); *New Meadows Holding Co. v. Wash. Water Power Co.*, 102 Wn.2d 495, 687 P.2d 212 (1984)).

⁷⁹ CP 469-470.

⁸⁰ CP-SD 296-305.

does not establish a protected property interest, and Johnson had an opportunity to challenge the citations.⁸¹

Johnson replied that the City violated his procedural due process rights because it did not provide him an opportunity to argue before the Examiner the existence of his nonconforming use.⁸²

The trial court granted the City's motion.⁸³

IV. ARGUMENT

A. **The Examiner did not err when she determined the code required Johnson establish his nonconforming use by applying to the Department.**

City code provides one way to establish a nonconforming use—
apply to the Department:

A. Any use that does not conform to current zoning regulations, but conformed to applicable zoning regulations at any time and has not been discontinued as set forth in Section 23.42.104 is recognized as a nonconforming use or development. . . . *A recognized nonconforming use shall be established according to the provisions of subsections B through D of this section.*

C. *A use or development which did not obtain a permit may be established if the Director reviews and approves an application to establish the nonconforming use or development for the record.*

D. *For a use or development to be established pursuant to subsection C above,* the applicant must demonstrate that

⁸¹ CP-SD 299-300.

⁸² CP-SD 224-231.

⁸³ CP-SD 278-279.

the use or development would have been permitted under the regulations in effect when the use began, or, for a residential use or development, that the use or development existed prior to July 24, 1957 and has remained in continuous existence since that date.

E. Nonconforming uses commenced after July 24, 1957 and not discontinued (Section 23.42.104) ***are also subject to approval through the process of establishing use for the record, if not established by permit.***⁸⁴

These subsections require that all nonconforming uses be established by applying to the Department.

Consistent with the code requirement, the City adopted a Director’s Rule that addresses establishing nonconforming uses when a zoning violation complaint has been received:

The Land Use Code requires all uses of land be established by Permit. (See Sections 23.40.002 and 23.76.006). ***Sometimes a use has been ongoing for a certain period of time but has never been legally established by permit. An attempt to seek a permit for such an ongoing use may arise when a complaint of an illegal use has been received by the Housing and Zoning Enforcement Division (H/Z) .***
...⁸⁵

This Director’s Rule parallels Client Assistance Memo 217 (“CAM 217”) that assists the public when applying to establish a nonconforming use with the Department:

⁸⁴ SMC 23.42.102.A; SMC 23.42.102.C; SMC 23.42.102.D; SMC 23.42.102.E (emphasis added).

⁸⁵ Director’s Rule 17-93, Establishing for the Record of Uses Not Established by Permit. (emphasis added) See <http://www.seattle.gov/dpd/codes/dr/DR1993-17.pdf> (use Google search with link); SMC 23.42.102.C. (nonconforming use established by applying to the Department).

The Land Use Code requires that all uses of land be established by permit.

...

This CAM further explains what a nonconforming use is, and when a nonconforming use can become recognized as legal through the DPD permit process.

...

*Sometimes a use has been ongoing for a certain period of time but has never been legally established by permit.*⁸⁶

Collectively, the code, Director's Rule, and CAM 217 establish that when a code violation is identified and the violation recipient claims a nonconforming use, the nonconforming use must be established by the Department. This follows the broader structure of the City's zoning code that requires all uses be established by permit.⁸⁷

Johnson argues that CAM 217 demonstrates that establishing a nonconforming use by applying to the Department is an optional process.⁸⁸ CAM 217 states that a "nonconforming use can be recognized as legal through the DPD [Department] process."⁸⁹ When reading CAM 217 by itself, and in conjunction with the code and Director's Rule,⁹⁰ the

⁸⁶ CP-SD 238-239.

⁸⁷ SMC 22.40.002; SMC 23.76.006; Director's Rule 17-93. *See* <http://www.seattle.gov/dpd/codes/dr/DR1993-17.pdf> (use Google search with link).

⁸⁸ Opening Brief at 38-39.

⁸⁹ CAM 217.

⁹⁰ SMC 23.42.102.A; SMC 23.42.102.C; SMC 23.42.102.D; SMC 23.42.102.E; Director's Rule 17-93. *See* <http://www.seattle.gov/dpd/codes/dr/DR1993-17.pdf> (use Google search with link).

CAM must be read as describing a process that must be followed—apply to the Department to establish a nonconforming use.

The City code requirement that individuals that have a nonconforming use must establish the use by applying to the Department is supported by *Des Moines v. Gray*.⁹¹ In this case, the City of Des Moines enacted an ordinance requiring mobile home parks submit a site plan in order to operate a nonconforming mobile home park at existing levels, and obtain or renew a City business license.⁹² The ordinance provided that if a site plan was not submitted, additional mobile homes could not be brought into the park or mobile homes that were removed from the park could not be replaced.⁹³ After the ordinance was adopted, the park owner alleged the ordinance terminated his nonconforming use.⁹⁴ The Court of Appeals recognized the ordinance as a valid exercise of the city's police power, and determined the ordinance did not deprive Gray of a fundamental attribute of ownership.⁹⁵

The City of Seattle's code that requires a nonconforming use be established by submitting documentation of the use to the Department is fundamentally no different than the Des Moines code that requires a plan

⁹¹ *City of Des Moines v. Gray Businesses*, 130 Wn.App. 600, 124 P.3d 324 (2006).

⁹² *Id.* at 604-605.

⁹³ *Id.* at 605.

⁹⁴ *Id.* at 607.

⁹⁵ *Id.* at 611-613.

be submitted in order to fully continue to operate a nonconforming mobile home park.⁹⁶ Both are a valid exercise of the police power to regulate nonconforming uses and to establish a nonconforming use by applying to the respective department.

Citing *Rosema v. City of Seattle* for authority that the City cannot require a nonconforming use be established by applying to the Department, Johnson states a “formal DPD [Department] “interpretation” was requested by neighbors; no reference to any permit.”⁹⁷

Rosema addressed whether a house in a single-family zone was a nonconforming duplex.⁹⁸ To legally establish the nonconforming duplex, the decision states the property owner applied for a permit to “[**e**]stablish **use for the record** as a duplex.”⁹⁹ Nonconforming uses are “established for the record” by the same code provision that requires Johnson apply to the Department to establish his nonconforming use.¹⁰⁰ It is immaterial that

⁹⁶ *Id.* at 611 (nonconforming uses are subject to later-enacted police power regulations) (citing *Goldblatt v. Town of Hempstead, N.Y.*, 369 U.S. 590, 82 S.Ct. 987, 8 L.Ed.2d 130 (1962) (later-enacted ordinance regulating dredging and pit excavations a valid exercise of the town’s police power); *Manufactured Housing*, 142 Wn.2d 347, 369, 13 P.3d 183 (2000); *Rhod-A-Zalea & 35th, Inc. v. Snohomish County*, 136 Wn.2d 1, 7, 959 P.2d 1024 (1998)).

⁹⁷ Opening Brief at 38 (citing *Rosema v. City of Seattle*, 166 Wn.App. 293, 297, 269 P.3d 393 (2012)).

⁹⁸ *Rosema* at 296.

⁹⁹ *Id.* at 296 (emphasis added).

¹⁰⁰ SMC 23.42.102.C (“A use or development which did not obtain a permit may be established if the Director reviews and approves an application to establish the nonconforming use or development for the record.”).

the neighbors in *Rosema* sought a “formal interpretation of the SMC” under a code provision that allows individuals to seek a Department determination of the code’s application to a permit—here Rosema’s application to the Department to establish the nonconforming duplex.¹⁰¹ *Rosema* supports the Examiner’s determination that nonconforming uses are established by applying to the Department.

Johnson cites *McMillian v. King County* and *Rosema v. City of Seattle*, and argues that common law creates a vested right to the nonconforming use and a permit is not required to establish the use.¹⁰² Neither case addresses whether a jurisdiction can require a nonconforming use claimant to apply to a department to establish a nonconforming use.

Johnson then turns to the City code definition of nonconforming use and the code provision that requires nonconforming uses be established by applying to the Department, to support his argument that the City could not require him to establish his nonconforming use.¹⁰³ Johnson cites one sentence of the code that addresses establishing the nonconforming use—the sentence not bolded below—but omits the

¹⁰¹ *Rosema* at 297; SMC 23.88.020 (a code interpretation may be sought to obtain the Department’s determination on the application of code to a permit application).

¹⁰² Opening Brief at 36 (citing *McMillian v. King County*, 161 Wn.App. 581, 591, 255 P.2d 739 (2001); *Rosema v. City of Seattle*, 166 Wn.App. 293, 299, 269 P.2d 393 (2012)).

¹⁰³ Opening Brief at 37 (citing SMC 23.84A.040; SMC 23.42.102.A).

sentences that say all nonconforming uses *shall* be established by applying to the Department:

A. Any use that does not conform to current zoning regulations, but conformed to applicable zoning regulations at any time and has not been discontinued as set forth in Section 23.42.104 is recognized as a nonconforming use or development. . . . **A recognized nonconforming use shall be established according to the provisions of subsections B through D of this section.**

. . . .
C. **A use or development which did not obtain a permit may be established if the Director reviews and approves an application to establish the nonconforming use or development for the record.**¹⁰⁴

The definition of a nonconforming use must be read in the context of the code that states nonconforming uses *shall* be established by applying to the Department,¹⁰⁵ and the Director's Rule that interprets and applies the code to require zoning violations be established by applying to the Department.¹⁰⁶ Further, the Examiner's determination that Johnson

¹⁰⁴ SMC 23.42.102.A; SMC 23.42.102.C (emphasis added).

¹⁰⁵ SMC 23.42.102.A; SMC 23.42.102.C; SMC 23.42.102.D; SMC 23.42.102.E; *In re Estate of Kerr*, 134 Wn.2d 328, 336, 949 P.2d 810 (1998) ("The purpose of reading statutory provisions in pari materia with related provisions is to determine the legislative intent underlying the entire statutory scheme and read the provisions as constituting a unified whole, to the end that a harmonious, total statutory scheme evolves which maintains the integrity of the respective statutes."); *ITT Rayonier, Inc. v. Dalman*, 122 Wn.2d 801, 807, 863 P.2d 64 (1993).

¹⁰⁶ Director's Rule 17-93, Establishing for the Record of Uses Not Established by Permit. See <http://www.seattle.gov/dpd/codes/dr/DR1993-17.pdf> (use Google search with link).

must apply to the Department is consistent with the code and Director's Rule, and must be given deference.¹⁰⁷

Johnson argues that in *Jefferson County v. Lakeside*, “[t]he court held that the use was deemed to exist legally so the owner had the right to continue it without any requirement of a permit.”¹⁰⁸ The issue in *Jefferson County* was whether Lakeside operated the asphalt plant before a code provision requiring a conditional use permit for the plant became effective.¹⁰⁹ The court ruled the conditional use permit requirement became effective in 1991, and because Lakeside established a nonconforming use in 1990, the use was not subject to the permit requirement. The court remanded the case to determine if Lakeside abandoned the use.¹¹⁰

Jefferson County did not address whether the County could require Lakeside to apply to the County to establish its nonconforming use

¹⁰⁷ RCW 36.70C.130(b) (deference due to the construction of law by a local jurisdiction with expertise); *See, City of Federal Way v. Town & Country Real Estate, LLC, et al.*, 161 Wn.App. 17, 38, 252 P.3d 382 (2011) (citing *Lanzce G. Douglass, Inc. v. City of Spokane Valley*, 154 Wn.App. 408, 225 P.3d 448, *rev. denied*, 169 Wn.2d 1014, 236 P.3d 895 (2010); *City of Medina v. T-Mobile USA, Inc.*, 123 Wn.App. 19, 24, 95 P.3d 377 (2004)). *See also Mall, Inc. v. City of Seattle*, 108 Wn.2d 369, 377-78, 739 P.2d 668 (1987); *Citizens for a Safe Neighborhood v. City of Seattle*, 67 Wn.App. 436, 440, 836 P.2d 235 (1992); *Eastlake Community Council v. City of Seattle*, 64 Wn.App. 273, 282, 823 P.2d 1132 (1992).

¹⁰⁸ Opening Brief at 36 (citing *Jefferson County v. Lakeside*, 106 Wn.App. 380, 23 P.3d 541 (2001)).

¹⁰⁹ *Jefferson County v. Lakeside*, 106 Wn.App. 380, 383, 23 P.3d 542 (2001).

¹¹⁰ *Id.* at 389.

because a requirement like that does not exist in the County's code.¹¹¹ And the conditional use permit requirement would not apply to the asphalt plant unless the code clearly intended it apply—and it did not.¹¹² In contrast, the City has plainly stated that all nonconforming uses are established for the record by applying to the Department.¹¹³

Citing *In re Cross*, Johnson states the law he claims should guide this Court:

This Court must strive to construe City ordinances in accordance with common sense and so as to preserve their constitutionality and not in a manner that would render them absurd or result in the destruction of vested rights.¹¹⁴

In re Cross addressed revoking an involuntarily committed individual's less-restrictive outpatient treatment.¹¹⁵ The case had nothing to do with vested rights.¹¹⁶ *In re Cross* is inapplicable.

¹¹¹ Jefferson County Code 18.20.260 (code does not require nonconforming uses be established by applying to the County). See <http://www.codepublishing.com/wa/jeffersoncounty/html/JeffersonCounty18/JeffersonCounty1820.html> (use Google search with link).

¹¹² *Kitsap Alliance of Property Owners v. Central Puget Sound Growth Management Hearings Bd.*, 160 Wn.App. 250, 259, 255 P.3d 696, 701 (2011) (citing *Howell v. Spokane & Inland Empire Blood Bank*, 114 Wash.2d 42, 47, 785 P.2d 815 (1990) (new legislation, including amendments to existing law is given prospective application unless there is clear intent to apply the law retroactively)).

¹¹³ SMC 23.42.102.A; SMC 23.42.102.C; SMC 23.42.102.D; SMC 23.42.102.E.

¹¹⁴ Opening Brief at 37 (citing *In re Cross*, 99 Wn.2d 373, 382-383, 662 P.2d 828 (1983)).

¹¹⁵ *In re Cross*, 99 Wn.2d 373, 375, 662 P.2d 828 (1983).

¹¹⁶ *Id.* at 834-835.

Johnson also argues the code requiring nonconforming uses be established means the owner must “prove” they have a legal nonconforming use.¹¹⁷ The City agrees Johnson was required to “prove” the existence of his nonconforming use by applying to the Department.

Finally, Johnson argues that requiring him to apply to the Department to establish his nonconforming use “would plainly fall afoul of [Johnson’s] vested rights.”¹¹⁸ In *Des Moines v. Gray*, however, the court determined that the requirement that Gray submit a site plan to fully operate his mobile home park or obtain a business license did not deprive Gray of a fundamental attribute of ownership.¹¹⁹ Similarly, the City’s code requirement that Johnson apply to the Department did not deprive him of a fundamental attribute of ownership.

B. Johnson had due process to argue he was not required to apply to the Department; and the Examiner’s decisions are supported by substantial evidence.

City code allows an appeal to the Examiner after a citation is issued.¹²⁰ And a party seeking review of an Examiner’s decision may file a LUPA petition,¹²¹ and then may appeal the decision to the Court of

¹¹⁷ Opening Brief at 39 (citing SMC 23.42.102.C).

¹¹⁸ Opening Brief at 38-39.

¹¹⁹ *Des Moines* at 611-613.

¹²⁰ SMC 23.91.006.

¹²¹ RCW 36.70C.

Appeals.¹²² Johnson cannot successfully claim he has been deprived of procedural due process,¹²³ when he availed himself of this appeal process where each forum considered his argument that he did not need to apply to the Department to establish his nonconforming use. The fact that the Examiner and superior court disagree with Johnson does not mean he did not have due process.

Johnson argues the Examiner's hearings where he was directed to apply to the Department to establish his nonconforming use are analogous to the Department of Licensing's failure to provide the statutorily-required driver's license pre-revocation hearing.¹²⁴ This is not a case where a required hearing was not provided. *Devine* is inapplicable.

Even though Johnson did not apply to the Department until after the Examiner hearings,¹²⁵ the lack of evidence supporting a nonconforming use that he presented to the Examiner is notable:

¹²² Rules of Appellate Procedure (RAP) 2.2.

¹²³ Opening Brief at 31-33 (citing *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 70 S.Ct. 652 (1950); *Matthews v. Eldridge*, 424 U.S. 319, 333, 96 S.Ct. 893 (1976) (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552, 85 S.Ct. 1187(1965); *Post v. City of Tacoma*, 167 Wn.2d 300, 217 P.3d 1179 (2009)).

¹²⁴ Opening Brief at 33 (citing *Devine v. Dept. of Licensing*, 126 Wn.App. 941, 110 P.3d 237 (2005)).

¹²⁵ CP-SD 14 (on April 4, 2011 the Examiner granted the Department's summary judgment motion and stated in her decision that '[t]he Appellant has not applied for or received any permit from DPD since the time of the previous Hearing Examiner decisions that would establish this parking as a legally

- In the first citation hearing, Johnson provided no evidence as to the nonconforming use other than asserting he had one;¹²⁶
- In the second citation hearing, Johnson failed to provide evidence he historically kept more than three vehicles on his property;¹²⁷ and
- In the third citation hearing, the evidence Johnson offered was in an untimely motion for reconsideration that was, therefore, not properly before the Examiner.¹²⁸

So not only did Johnson fail to apply to the Department, he failed to provide evidence of a nonconforming use to the Examiner. While true that Johnson established his nonconforming use after applying to the Department;¹²⁹ he did not establish before the Examiner his nonconforming use as of January 1957 as he states in his opening brief,¹³⁰ when the oldest photograph before the Examiner showed two vehicles in

nonconforming use.”); CP 322 (on May 11, 2011, Johnson applies to establish his nonconforming use for the record).

¹²⁶ CP 127; CP 131.

¹²⁷ CP 646-761 (documents attached to Johnson’s February 3, 2011 response to Department’s motion for summary judgment); CP 665 (motor home and travel trailer in rear yard in photo dated 1998); CP 56; CP 60 (Johnson submits a 1995 aerial photograph in his untimely motion for reconsideration to the Examiner’s third decision showing two cars in the driveway and three in the rear yard); CP-SD 14 (Examiner’s third citation decision dated April 14, 2011); CP 334 (motion for reconsideration dated April 16, 2011—two days beyond the 10-day Examiner motion for reconsideration period).

¹²⁸ CP 330-345.

¹²⁹ CP 400-401.

¹³⁰ Opening Brief at 20.

his rear yard in 1998, far later than the July 24, 1957 date the code requires that Johnson show he had established a nonconforming use.¹³¹

The Examiner's decisions are supported by substantial evidence.

C. The Examiner had jurisdiction to determine Johnson was required to apply to the Department to establish his nonconforming use.

Johnson argues the Examiner did not have jurisdiction to determine his claim he had a legal nonconforming use and engaged in an unlawful procedure.¹³² The position that the Examiner could not determine if Johnson had a legal conforming use supports the City's argument that Johnson was required to apply to the Department to establish a nonconforming use.¹³³ And there was nothing unlawful with the Examiner applying the code,¹³⁴ and telling Johnson, repeatedly,¹³⁵ he was required to apply to the Department.

¹³¹ CP 665 (motor home and travel trailer in rear yard in photo dated 1998); SMC 23.42.102.D (residential nonconforming use application must demonstrate use existed before July 24, 1957 and has remained in continuous use); CP 56; CP 60 (Johnson submits a 1995 aerial photograph in his untimely motion for reconsideration to the Examiner's third decision showing two cars in the driveway and three in the rear yard); CP-SD 14 (Examiner's third citation decision dated April 14, 2011); CP 334 (motion for reconsideration dated April 16, 2011—two days beyond the 10-day Examiner motion for reconsideration period).

¹³² Opening Brief at 34 (citing RCW 36.70C.130(1)(a)).

¹³³ SMC 23.42.010.C ("A use or development which did not obtain a permit may be established if the Director reviews and approves an application to establish the nonconforming use or development for the record.").

¹³⁴ SMC 23.91.012 (Examiner shall hold a hearing if the citation recipient requests a hearing); Hearing Examiner Rule 3.18(c)(3) ([Examiner decisions shall include] "[l]egal and factual conclusions based on specific provisions of

In a similar argument, Johnson states the Examiner's first citation decision is not supported by substantial evidence because the Examiner did not have authority to determine if a nonconforming use existed.¹³⁶ The Examiner has the authority to determine if Johnson kept more than three vehicles on the property without establishing the use by applying to the Department, and to determine if City code required Johnson to apply to the Department to establish his nonconforming use.¹³⁷ And the Examiner appropriately determined that a violation existed when more than three vehicles were parked on the property and Johnson had not established his nonconforming use.¹³⁸

Next, Johnson again argues he was deprived of procedural due process because he did not have the opportunity to present his defense that he had a nonconforming use.¹³⁹ Johnson was not denied due process when

law and findings of fact.”). *See* http://www.seattle.gov/examiner/docs/RulesofPracticeandProcedure_080112.pdf (use Google search with link).

¹³⁵ CP 158 (first citation decision); CP 66 (second citation hearing); CP-SD 14 (second citation decision); CP-SD 19 (third citation decision).

¹³⁶ Opening Brief at 34 (citing RCW 36.70C.130(1)(c)).

¹³⁷ SMC 23.91.002.A.3 (violations for parking more than three vehicles as provided in SMC 23.44.016 are enforced through the citation process.); SMC 23.91.012 (Examiner shall hold a hearing if the citation recipient requests a hearing); Hearing Examiner Rule 3.18(c)(3) ([Examiner decisions shall include] “[l]egal and factual conclusions based on specific provisions of law and findings of fact.”).

¹³⁸ CP 120-125; CP 605; CP 609; CP 613; CP 70-72; CP 764, CP 767

¹³⁹ Opening Brief at 34 (citing United States Constitution, Fifth and Fourteenth Amendments; RCW 36.70C.130(1)(f)).

he had multiple opportunities to make his arguments, and the Examiner did not err when she followed City code and told Johnson he needed to establish his nonconforming use by applying to the Department.

D. The trial court did not err when it dismissed Johnson's § 1983 claim associated with the third petition.

To establish a § 1983 cause of action, a plaintiff must prove the defendant's conduct deprived the plaintiff of their federal statutory or constitutional rights, and the defendant acted under color of state law.¹⁴⁰ For the City to have violated procedural due process rights, Johnson must have a protected property interest. But the citations Johnson received do not establish a protected property interest until a court determines a violation exists.

In *Scott v. Seattle*,¹⁴¹ the United States Western District Court of Washington, citing Division I of the Washington State Court of Appeals, held that a notice of violation (NOV) does not establish a protected property interest until a court determines a violation exists:

[T]he mere issuance and filing of the NOV ***is not the type of encumbrance that constitutes a significant property interest giving rise to procedural due process.*** Instead the final NOV was simply notice to the interested parties that a code violation existed. As the City points out, plaintiffs here cannot be deprived of a property interest until ***a court***

¹⁴⁰ *Robinson v. City of Seattle*, 119 Wash.2d 34, 58, 830 P.2d 318, 332 (1992).

¹⁴¹ *Scott v. City of Seattle*, 99 F.Supp.2d 1263, 1268 (1999) (internal citations omitted) (emphasis added) (citing *Cranwell v. Seattle*, 77 Wn.App. 90, 890 P.2d 491 (1995)).

has heard their case and determined that a violation occurred; no encumbrance to their property occurred when the NOV or Order issued, therefore, there was no deprivation of a substantial property right.

The court in *Scott* also recognized the NOV recipient had the right to file a petition challenging the notice of violation and through LUPA had adequate due process to raise defenses.¹⁴²

Here, issuing the citation like a notice of violation does not constitute a significant property interest giving rise procedural due process. The citation form itself indicates that if citation is appealed it does not become final.¹⁴³ As recognized by *Scott*, Johnson has not been deprived of a protected property interest until a court determines a violation exists. And Johnson received due process through the Examiner appeals, the LUPA review process, and before this Court.

Johnson cites *Post v. Tacoma* to support his argument that “[a] citizen’s interest in not being forced to pay fines is unquestionably a property interest that is entitled to procedural due process protection” and the City “forced Mr. Johnson to pay for a permit application and related expenses.”¹⁴⁴ *Post* determined that Tacoma’s imposition of continuing civil

¹⁴² *Scott* at 1270.

¹⁴³ CP 826 (citation that is appealed does not have a final effect).

¹⁴⁴ Opening Brief at 41 (citing *Post v. City of Tacoma*, 167 Wn.2d. 300, 313, 217 P.3d 1179 (2009)).

penalties without providing Post any opportunity to challenge the penalties violated due process.¹⁴⁵

Requiring that Johnson pay permit processing fees necessary to establish his nonconforming use does not impose civil penalties without due process as in *Post*. And Johnson told the Examiner “we will go through any process that the [D]epartment of [P]lanning says it has.”¹⁴⁶ Johnson then applied to establish his use, and City code requires Johnson pay for the time it took the City to review his application.¹⁴⁷ *Post* is inapplicable.

Citing *McCullough v. Maryland*, Johnson argues the City “imposed fines upon Mr. Johnson without consideration of his offered complete defense to its charge of unlawful land use.”¹⁴⁸ *McCullough v. Maryland* held that a state cannot constitutionally tax or pass a law to control or impede a Federal bank’s operations.¹⁴⁹ *McCullough v. Maryland* is also inapplicable.

Johnson then cites *Norton v. Town of Islip* and quotes from the case that the due process clause “creates an independent right to notice and hearing in the context of state deprivations of property without respect to the

¹⁴⁵ *Post* at 315.

¹⁴⁶ CP 66.

¹⁴⁷ SMC 22.900A.030 (“no permit shall be issued . . . until the corresponding fees prescribed by this subtitle have been paid”).

¹⁴⁸ Opening Brief at 41 (citing *McCullough v. Maryland*, 17 U.S. 316, 431, 4 L.Ed. 579, 4 Wheat. 316 (1819)).

¹⁴⁹ *McCullough* at 437.

underlying merits of a case.”¹⁵⁰ In *Norton*, the town revoked Norton’s legal nonconforming duplex use by placing on the town’s copy of a certificate of occupancy a notation that the nonconforming use was revoked for nonuse exceeding one year. The town included this notation on its copy of the certificate of occupancy after the town issued Norton his copy of the certificate without the notation.¹⁵¹ Based on this, the court ruled that Norton’s due process rights had been violated when the Town failed to give Norton notice it revoked his nonconforming use.¹⁵²

The City did not revoke Johnson’s nonconforming use without notice. Instead, it required him to establish the use as the code requires, and then recognized the nonconforming use. *Norton* is inapplicable.

Johnson then argues the City did not allow him to “rebut the DPD [Department] evidence and establish that the cited violation(s) did not occur.”¹⁵³ Had Johnson establish his nonconforming use by applying to the Department, he could have established a defense to the citations. He did that, however, only after the third citation was upheld by the Examiner.¹⁵⁴

¹⁵⁰ Opening Brief at 42 (citing *Norton v. Town of Islip*, 239 F.Supp.2d 264, 271-272 (E.D.N.Y. 2003)).

¹⁵¹ *Norton* at 268.

¹⁵² *Norton* at 273.

¹⁵³ Opening Brief at 42 (citing SMC 23.91.012).

¹⁵⁴ CP-SD 14 (On April 4, 2011, the Examiner granted the Department’s summary judgment motion and stated in the decision that “[t]he Appellant has not applied for or received any permit from DPD since the time of the previous Hearing Examiner decisions that would establish this parking as a

Next, Johnson argues the citation appeal process—the Examiner, LUPA petitions, and now this appeal¹⁵⁵—does not give him the same due process that a statutory citation enforcement process,¹⁵⁶ or municipal court enforcement process would give him.¹⁵⁷ The statute allows local jurisdictions to enforce civil infractions according to its own system established by ordinance,¹⁵⁸ and the Examiner/LUPA appeal process is not meaningfully different than a municipal court/RALJ appeal process *Post* cited as an acceptable alternative to the statutory citation process.¹⁵⁹

Finally, Johnson was not “denied a forum that could act” as he claims.¹⁶⁰ The Examiner applied code that required him to apply to the Department to establish his nonconforming use. And Johnson has had multiple forums to argue he was not required to establish his nonconforming use—before the Examiner, superior court and this Court.

legally nonconforming use.”); CP 322 (on May 11, 2011, Johnson applies to establish his nonconforming use for the record).

¹⁵⁵ SMC 23.91.012.

¹⁵⁶ Opening Brief at 43 (citing RCW 7.80.010(1); *Post* at 1185).

¹⁵⁷ Opening Brief at 43 (citing RCW 35.20.010(1); RCW 35.20.030).

¹⁵⁸ *Post* at 311 (citing RCW 7.80.010(5)).

¹⁵⁹ *Post* at 315, Footnote 12.

¹⁶⁰ Opening Brief at 44.

E. The trial court did not err by granting the City’s motion to dismiss Johnson’s damages claims associated with the first two petitions.

The City moved to dismiss Johnson’s damage claims associated with the first two petitions,¹⁶¹ addressing Johnson’s RCW 64.40 and § 1983 damages claims in its motion.¹⁶²

In response, Johnson said “[t]he writ review process may be the only means to determine the legality and enforceability including due process of the City’s ordinance against me,”¹⁶³ and “I believe the evidence in the record, photographic and un-rebutted testimonial will clearly show an established Legal Non-Conforming use and that my Due Process rights of Notice, and an opportunity to respond were violated.”¹⁶⁴ Johnson did not raise a procedural due process claim or present authority to support the statements he made in his response.¹⁶⁵

After the court dismissed the damages claim, Johnson through his counsel filed his motion for reconsideration. In his opening brief, Johnson did not raise a procedural due process argument, but instead addressed a

¹⁶¹ CP 513-23 (City’s motion filed February 11, 2011).

¹⁶² CP 517 (City addressed Johnson’s RCW 64.40 claim); CP 518-519 (City addressed Johnson’s § 1983 claim).

¹⁶³ CP 217.

¹⁶⁴ CP 217.

¹⁶⁵ CP 216-217.

substantive due process argument,¹⁶⁶ and then addressed a “due process” argument in his reply brief.¹⁶⁷

In his opening brief before this Court, Johnson states the City did not address Johnson’s procedural due process claim in its motion to dismiss.¹⁶⁸ The City addressed a substantive due process claim in its motion to dismiss,¹⁶⁹ and Johnson responded to the City’s substantive due process argument in his motion for reconsideration.¹⁷⁰

Johnson raised a procedural due process argument for the first time in his motion to vacate.¹⁷¹ If Johnson believed he had stated a procedural due process claim in the first two petitions, it was not evident to Johnson until he raised the argument in his motion to vacate—15 months after he

¹⁶⁶ CP 253 (Johnson argued in his motion for reconsideration opening brief that he had a substantive due process right claim).

¹⁶⁷ CP 264 (Johnson argued in his motion for reconsideration reply brief that the City denied his “due process rights” and did not argue his *procedural* due process rights were denied).

¹⁶⁸ Opening Brief at 45 (“The City asked the trial judge to dismiss the 1983 claims based on argumentative assertions about facts and, still worse, did not even address the procedural due process aspect of the claims.”) (emphasis in original).

¹⁶⁹ CP 518 (“First, a land use decision denies due process rights only if it is invidious or irrational, which Johnson cannot demonstrate. Further, Johnson has the burden to allege facts that the action is arbitrary and capricious. Johnson has not and cannot allege facts showing that the Examiner’s decision was arbitrary and capricious. Accordingly, Johnson has no due process claim to support a 1983 claim.”).

¹⁷⁰ CP 253 (Johnson argues *substantive* due process rights); CP 264 (Johnson argues “due process” rights).

¹⁷¹ CP 453-454.

filed his first petition.¹⁷² By then it was too late for Johnson to argue he had a procedural due process claim that should not have been dismissed.¹⁷³

Beyond Johnson's failure to timely raise a procedural due process argument with the first two citations, issuing citations does not establish a due process claim until a court has determined that a violation occurred.¹⁷⁴

The court should consider this when affirming that Johnson cannot maintain a procedural due process claim associated with any citation.¹⁷⁵

Johnson had due process when he appealed the citations to the Examiner, superior court, and this Court.

F. The trial court did not abuse its discretion when it denied Johnson's motion to continue.

In its response to Johnson's motion to continue, the City argued that a month before the March 11, 2011 hearing date, Johnson did not mention his medical appointment when he filed his motion to continue the hearing. The rationale offered was he needed to find someone, other than

¹⁷² CP 151 (first LUPA petition filed December 27, 2010); CP 453 (Johnson raises substantive due process argument in his motion to vacate filed on March 28, 2012).

¹⁷³ CP 870, Footnote 7 (citing *Bogle & Gates PLLC v. Holly Mountain Res.*, 108 Wn.App. 557, 32 P.3d 1002 (2001); *In re Marriage of Williams*, 84 Wn.App. 263, 927 P. 2d 679 (1996); *New Meadows Holding Co. v. Wash. Water Power Co.*, 102 Wn.2d 495, 687 P.2d 212 (1984)).

¹⁷⁴ CP-SD 299-300 (citing *Scott v. City of Seattle*, 99 F.Supp.2d 1263, 1268 (1999); *Cranwell v. Seattle*, 77 Wn.App. 90, 890 P.2d 491 (1995)).

¹⁷⁵ Opening Brief at 45 (Johnson requests the Court consider the procedural due process arguments associated with the third petition when determining whether the trial court erred when it dismissed Johnson's damages claims associated with the first two petitions).

his son, to brief and argue the cases.¹⁷⁶ The City also argued that on February 15, 2011, when the City noted the March 11 hearing, that Johnson did not respond and claim he had a medical appointment.¹⁷⁷ It wasn't until March 3 that Johnson claimed he had a conflicting medical appointment.¹⁷⁸ Johnson's after-the-motion-to-dismiss-was-set medical appointment was insufficient to continue the hearing.

In his motion to continue reply brief Johnson argued for the first time,¹⁷⁹ as he argues now,¹⁸⁰ that *Sanai* is a basis on which Johnson's motion to continue should have been granted.¹⁸¹

Sanai addressed whether it was appropriate for a hearing officer to deny an attorney's request to continue a disbarment hearing for medical reasons.¹⁸² In overturning the denial of the motion to continue, the *Sanai* court relied on case law holding that an individual's right to practice law cannot be taken away without notice and an opportunity to be heard.¹⁸³

¹⁷⁶ CP 873-876; CP 551.

¹⁷⁷ CP 551.

¹⁷⁸ CP 201.

¹⁷⁹ CP 225.

¹⁸⁰ Opening Brief at 46.

¹⁸¹ CP 251; Opening Brief at 46 (citing *In re Disciplinary Proceeding of Sanai*, 167 Wn.2d 740, 225 P.3d 203 (2009)).

¹⁸² *In re Disciplinary Proceeding of Sanai*, 167 Wn.2d 744-747, 255 P.3d 203 (2009).

¹⁸³ *Id.* at 748 (citing *In re Discipline of Metzenbaum*, 22 Wn.2d 75, 79, 154 P.2d 602 (1944)).

Unlike *Sanai* where the attorney had no opportunity to defend losing his law license, Johnson filed and argued the following when challenging the citations:

- Opening and reply briefs opposing the City setting the March 11, 2011 hearing for the City's motion to dismiss damages claims associated with the first two petitions;¹⁸⁴
- A response brief opposing the City's motion to dismiss damages claims damages claims associated with the first two petitions;¹⁸⁵
- Opening and reply briefs in his motion to reconsider the court's denial of his motion to continue the March 11 hearing;¹⁸⁶
- Opening and reply briefs in his motion to vacate the order dismissing the damages claims associated with the first two petitions;¹⁸⁷
- A response brief and oral argument opposing the City's motion to dismiss the § 1983 damages claims associated with the third petition;¹⁸⁸ and
- Opening and reply briefs and oral argument on the merits addressing whether the Examiner erred in upholding the citations.¹⁸⁹

¹⁸⁴ CP 200-202; CP 223-226.

¹⁸⁵ CP 216-217.

¹⁸⁶ CP 245-256; CP 261-265.

¹⁸⁷ CP448-459; CP 465-468.

¹⁸⁸ CP-SD 211-235.

¹⁸⁹ CP-SD 92-105; CP-SD 108-121.

This case is not like *Sanai*.

G. The trial court did not abuse its discretion by denying Johnson’s motion to reconsider and motion to vacate the dismissal of the damages claims associated with the first two petitions.

1. *The court did not abuse its discretion when it denied Johnson’s motion for reconsideration.*

The trial court appropriately granted the City’s motion to dismiss the damages claims associated with the first two petitions, and denied Mr. Johnson’s motion to continue the City’s motion to dismiss.

Johnson claims in his opening brief before this Court that the trial court’s decision was irregular because the City had “apparently agreed to a later case schedule,” Johnson had a medical appointment, and his § 1983 claim was not amenable to dismissal.¹⁹⁰

Judge Inveen on her own initiative determined that the first two petitions should follow the first LUPA petition case schedule.¹⁹¹ As to Johnson’s conflicting medical appointment, the trial court appropriately concluded that Johnson should attend the March 11 hearing date he chose to not appear at.

¹⁹⁰ Opening Brief at 47.

¹⁹¹ CP 149-150 (“These two matters shall be heard according to the LUPA schedule set for Cause No. 10-2-44876-4 [cause number hand-written into the order by the court], and shall be heard by the Honorable Suzanne Barnett.”).

As to the dismissal of the § 1983 claim, the City argued why the claim should be dismissed.¹⁹² In his response brief Johnson failed to offer any argument or authority why the § 1983 claim should not be dismissed.¹⁹³ Johnson then had a second chance to argue why he was entitled to § 1983 damages associated with his third petition that was also rejected.¹⁹⁴

Johnson's arguments were not responsive to CR 59 and the trial court did not abuse its discretion when it denied the motion for reconsideration.

2. *The court did not abuse its discretion when it denied Johnson's motion to vacate.*

To vacate a judgment, Johnson had to demonstrate that the trial court's dismissal of his § 1983 claim associated with the first two citations involved "extraordinary circumstances" that constituted "irregularities extraneous to the proceeding."¹⁹⁵ For support, Johnson cites *Caouette v.*

¹⁹² CP 518.

¹⁹³ CP 216-217.

¹⁹⁴ CP-SD 296-305 (City's Summary Judgment Motion Dismissing 1983 Claim); CP-SD 211-235 (Plaintiff's Opposition of Motion for Summary Judgment Re: § 1983 Claim); CP-SD 379-383 (City's Reply: Motion to Dismiss § 1983 Claim); CP-SD 278-279 (Order Granting City's Motion to Dismiss).

¹⁹⁵ *State v. Ward*, 125 Wn.App. 374, 379, 104 P.3d 751 (2005).

*Martinez*¹⁹⁶ and *Seven Elves, Inc. v. Eskenazi*;¹⁹⁷ cases where default judgments were vacated.

The trial court did not enter a default judgment. Instead, before entering the judgment dismissing Johnson's § 1983 claims, Johnson filed a response brief that did not address the City's motion to dismiss his §1983 claim.¹⁹⁸ Then Johnson moved for reconsideration where he argued a substantive due process violation in his opening brief,¹⁹⁹ and a "due process" violation in his reply brief.²⁰⁰

Johnson's argument that the City's motion to dismiss did not address a procedural due process claim cannot stand in light of Johnson's failure to raise a § 1983 *procedural* due process argument until he filed a motion to vacate.²⁰¹

¹⁹⁶ Opening Brief at 48 (citing *Caouette v. Martinez*, 71 Wn.App. 69, 78-79, 856 P.2d 725 (1993)).

¹⁹⁷ Opening Brief at 47-48 (citing *Seven Elves, Inc. v. Eskenazi*, 635 F.2d 396, 403 (1981)).

¹⁹⁸ CP 216-217.

¹⁹⁹ CP 253 (Johnson raised a substantive due process claim in his motion for reconsideration opening brief: "With regard to his claim for damages for violation of substantive due process rights under 42 U.S.C. 1983, Tyko Johnson has pled a claim upon which relief may be granted in accordance with authorities on which the City purported to rely in its motion to dismiss").

²⁰⁰ CP 264 (Johnson argued "the City had denied him his due process rights, entitlement [sic] him to pursue a 1983 claim").

²⁰¹ CP 870, Footnote 7 (citing *Bogle & Gates PLLC v. Holly Mountain Res.*, 108 Wn.App. 557, 32 P.3d 1002 (2001); *In re Marriage of Williams*, 84 Wn.App. 263, 927 P. 2d 679 (1996); *New Meadows Holding Co. v. Wash. Water Power Co.*, 102 Wn.2d 495, 687 P.2d 212 (1984)).

Finally, Johnson argues that “the City did not even request dismissal of the 1983 claim in the Cause No. 11-2-15560-9SEA [the third petition]” when the City moved to dismiss the damages claims associated with the first two petitions.²⁰² The City did not address the § 1983 damages claim associated with the third petition because it was not consolidated with the first two petitions.²⁰³ And when all three petitions were briefed on the merits, the City reserved the third petition § 1983 claim for later disposition.²⁰⁴

H. Johnson is not entitled to attorney fees under 42 U.S.C. 1988 or RAP 14.2 and 14.3.

Under 42 U.S.C. 1988(b), in an action to enforce § 1983, the Court “in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney’s fee as part of the costs.”²⁰⁵ Johnson should not prevail on § 1983 due process claim and should not be awarded attorney’s fees under § 1988.

²⁰² Opening Brief at 45.

²⁰³ CP 146-147 (Johnson moves to consolidate first two petitions); CP 149-150 (Judge Inveen enters order consolidating first two petitions).

²⁰⁴ CP 294 (City reserves Johnson’s § 1983 claim associated with the third petition for subsequent disposition by the court); CP-SD 108-121 (in Petitioner’s Reply Trial Memorandum, Johnson does not object to City reserving Johnson’s § 1983 claim associated with the third petition for subsequent disposition).

²⁰⁵ 42 U.S.C. 1988.

Attorney's fees and costs in LUPA matters are, however, addressed by statute.²⁰⁶ The statute permits the recovery of attorney's fees and costs only if "[t]he prevailing party on appeal was the prevailing party or substantially prevailing party in all prior judicial proceedings."²⁰⁷ Because attorney's fees and costs associated with LUPA petitions are addressed by statute, Johnson is not entitled to attorney's fees or costs under the Rules of Appellate Procedure as he claims.²⁰⁸ And because Johnson did not prevail in superior court he is not entitled to attorney's fees or costs.²⁰⁹

I. The City requests its attorney's fees and costs.

If the Court upholds the Examiner's decisions, the City requests the Court award the City its attorney's fees and costs under RCW 4.84.370. Alternatively, if the Court affirms the trial court's decision affirming the first two citations and remanding the third citation to the Examiner for a mitigation hearing, the City again requests its attorney's fees and costs as the prevailing party.

²⁰⁶ RCW 4.84.370.

²⁰⁷ RCW 4.84.370(1)(b).

²⁰⁸ Opening Brief at 49.

²⁰⁹ RCW 4.84.370.

V. CONCLUSION

The Examiner correctly determined that because Johnson had parked more than three vehicles on his property and had not applied to the Department to establish his nonconforming use when the citations were issued, the citations should be upheld. The Examiner's decision that Johnson needed to apply to the Department to establish a nonconforming use is consistent with the plain language of the code;²¹⁰ Director's Rule 17-93;²¹¹ Client Assistance Memo 217;²¹² *Des Moines v. Gray*;²¹³ and as cited by Johnson,²¹⁴ *Rosema v. Seattle* where the property owner established the nonconforming use for the record as the code requires.²¹⁵

Further, the trial court did not err in dismissing Johnson's § 1983 due process claims when: Johnson did not timely raise a due process claim when briefing the City's motion to dismiss Johnson's damages

²¹⁰ SMC 23.42.104(C) ("A use or development which did not obtain a permit may be established if the Director reviews and approves an application to establish the nonconforming use or development for the record.").

²¹¹ Director's Rule 17-93 (need to establish the use for the record arises as a result of a zoning violation). *See* <http://www.seattle.gov/dpd/codes/dr/DR1993-17.pdf> (use Google search with link).

²¹² CAM 217 ("This CAM further explains what a nonconforming use is, and when a nonconforming use can become recognized as legal through the DPD permit process.").

²¹³ *City of Des Moines v. Gray Businesses*, 130 Wn.App. 600, 124 P.3d 324 (2006).

²¹⁴ Opening Brief at 38 (citing *Rosema v. City of Seattle*, 166 Wn.App. 293, 297, 269 P.3d 393 (2012)).

²¹⁵ *Rosema* at 296.

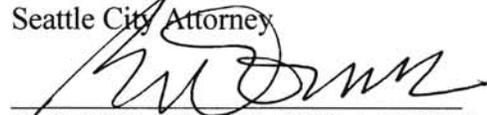
claims associated with the first two citations; citations do not implicate due process until a court determines a violation exists; and Johnson has had access to multiple forums to argue that he is not required to establish his nonconforming use by applying to the Department.

The City respectfully requests the Court uphold the Examiner's decision on the basis that the citations were appropriately issued when Johnson was parking more than three vehicles on his property and he had not established a nonconforming use by applying to the Department when the citations were issued. Finally, the City requests the Court uphold the motions the trial court ruled on.

DATED this 18th day of November, 2013.

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CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that, on this day, I sent a copy of the **City of Seattle's Response Brief** via messenger to:

Charles R. Horner
Law Office of Charles R. Horner, PLLC
1001 Fourth Avenue, Suite 3200
Seattle, WA 98154

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

DATED this 18th day of November, 2013.

Rosie Lee Hailey
ROSIE LEE HAILEY

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COUNTY OF KING
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