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No. 70957-7-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

TOTAL OUTDOOR CORPORATION, a Washington corporation,

Appellant,

vs.

CITY OF SEATTLE DEPARTMENT OF PLANNING AND DEVELOPMENT, a municipal corporation,

Respondent.

CITY OF SEATTLE'S RESPONSE BRIEF

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I. INTRODUCTION

In early 2012, shortly after assuming the lease for the rooftop sign on the Centennial Building, Total Outdoor changed the sign. Total Outdoor removed the existing rooftop sign structure and the neon, internally-illuminated sign face. Total Outdoor then installed a new, larger sign face and taller sign structure with new light fixtures, brighter, overhead lighting.

Total Outdoor sought permits for this work only after it was complete. The City issued three land use decisions in December 2012 that concluded the removal of the old sign structure and installation of a new taller sign structure with a larger sign face constituted an unpermitted expansion of a nonconforming structure.[1] Total Outdoor appealed these decisions to Superior Court under the Land Use Petition Act (LUPA). The court denied their petitions.

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[1] The City's determinations came in the form of 3 documents: (1) a Department of Planning and Development (DPD) decision by Bill Mills on December 14, 2012, on Total Outdoor's establish use for the record application establishing the nonconforming off-premise advertising use subject to submittal of revised plans that reflect the dimensions of the sign face and sign structure shown on the 1981 permit (DPD Dec. 14, 2012 Mills Decision, Documentary Record ("DR") 00789-00796 and corresponding Clerk's Papers ("CP") 863-870); (2) an associated correction notice issued by Bill Mills (DPD Dec. 14, 2012 Mills Correction Notice, DR 00797-00798/CP 871-872); and (3) a correction notice issued by Richard Alford on December 14, 2012 on Total Outdoor's Sign/Building Permit application (DPD Dec. 14, 2012 Alford Correction Notice, DR 00799-00800/CP 873-874), all as requested by Total Outdoor, (referred herein as "City decisions").

Courts allow municipalities to tailor their limitations in regulating non-conformities. The City of Seattle elected to prohibit expansions of nonconforming structures.

Applying that law to the facts here, the City: (1) properly determined the maximum permissible size of the Centennial rooftop sign face is 440.5 square feet based on the permit history; (2) correctly concluded the height of the sign structure is limited to 30 feet as measured from the roofline of the Centennial building based on the permit history; and (3) appropriately determined Total Outdoor's installation of six new light fixtures in 2012 was subject to the current Seattle Energy Code, which authorizes no more than 816 watts of energy.

Both the City's DPD and the Superior Court reached the correct result. Because Total Outdoor again fails to meet its burden of proving the City's decisions violate any LUPA standard of review, the City respectfully asks this Court to affirm the City's decisions.

II. STATEMENT OF THE CASE

The history of this sign plays out in two phases. The first phase ran from 1925 through 1981, during which City law and the sign both evolved: City sign regulations were adopted and tightened, and the sign face was gradually reduced from more than 3,700 square feet to 440.5 square feet and the sign structure was reduced in height to 30 feet above

the building. In the second phase, starting in 2011, Total Outdoor reversed course by erecting a 1,200-square-foot sign face reaching 34 feet above the building and installing new, brighter lighting, all without first seeking a City permit.

A. The History of the 414 Stewart Street Rooftop Sign

The following is a brief summary of: (1) the permit history for this rooftop sign including dimensions and/or plans where available; and (2) the development of the City's sign regulations for rooftop signs.

In June 1925, the City issued a permit to construct a "store and loft building per plans."[2] Eight months later, the City issued a permit[3] to erect a "combination billboard and illuminated sign on roof" of the Tyee Building.[4] At that time, the Seattle Municipal Code did not regulate signs.[5] There are no plans on file for this sign because the City did not regularly retain plans for sign structures until the early 1980s.[6] A photograph taken around 1927 shows the rooftop sign, advertising Great Northern Railway.[7]

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[2] Permit No. 246521, DR 00003/CP 76.
[3] Permit No. 253324. DR 00004-00005/CP 77-78.
[4] Today, the building is known as the Centennial Building, not the Tyee Building.
[5] Seattle City Clerk's Office, Ordinance 45382. The Court can take judicial notice of the 1923 Seattle Municipal Code.
[6] For each subsequent permit discussed below, there are no plans on file unless it explicitly states as much. Similarly, the permit does not contain dimensions unless specifically stated.
[7] Photograph of Great Northern Sign, Museum of History and Industry, ca. 1927, DR 000722/CP 796.

A series of permits are issued over the course of the next fifteen years: In 1931, the City issues another permit[8] to "alter face of sign" "replace and rearrange lettering on the existing Great Northern Railway sign" "no increase in height." In January of 1937, the City issued a third permit for the sign[9] to "alter existing roof sign per plan." Several years later, in October 1941, a fourth permit [10] is issued to erect "roof sign per plan." The permit face states the sign will be "55 X 68.5 Irreg."[11] This is 3,700 square feet and is quite large. A portion of the sign can be seen in a 1962 photograph,[12] which displays the words "Empire Builder Great Northern Railroad" with Rocky the Mountain Goat located atop the lettering.

The City begins to regulate signage. In January 9, 1974, the Seattle City Council adopt Ordinance No. 102929 (effective 30 days later) which imposes a maximum height for all roof signs in the CM zone[13] (the zone where the Centennial Building is located)[14] not to exceed 30 feet

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[8] Permit No. 298202, DR 00006/CP 79.
[9] Permit No. 321584, DR 00007/CP 80.
[10] Permit No. 348125, DR 00008/ CP 81.
[11] On pages 5 of its brief, Total Outdoor superimposes the dimensions of the 1941 permit over a photograph taken in 1927. It should be noted that the 1927 Permit did not contain any dimensions nor is there a set of plans on file. It should also be noted that the 1941 permit application was to "erect a roof sign per plan"- the plans do not say what type of roof sign it was (advertising or not) or the size of the roof sign structure or face.
[12] Photograph at DR 00581/CP 655.
[13] Ordinance No. 102929, Section 15 at DR 00097/CP 170.
[14] *See* face of permit under box labeled "zoning", it states "CM"; see DR 00012/CP 85 and DR 00021/CP 94.

above the roof line or nearest parapet. Section 26 of the Ordinance imposes additional limitations on advertising signs: "the maximum area of any one sign shall be six hundred seventy-two (672) square feet with a maximum height of twenty-five (25) feet and maximum length of fifty (50) feet..."[15] Finally, Section 28 "Non-conforming signs" provides:[16]

> a nonconforming sign shall have no additions thereto, except for such minor additions as the Superintendent of Buildings may find necessary in the interest of safety or the changing of the adverting message thereon in connection with a change of ownership or tenancy of the premises, provided, that such addition or physical change does not expand the non-conforming nature of the sign.

In May of 1975, the City issued a permit (No. 01970)[17] for "alteration to exist. sign to make it conforming to exist. sign code & new copy per plan."[18] A drawing on the permit shows "Alaska Airlines" in neon on the sign face.[19] For sign size, the permit states "26' x 60'"" (1,560 sf). The Sign was inspected and approved on January 20, 1976 and the inspection notes state "photo." A photograph on file shows the Alaska Airlines sign was very similar in size to the Electronic Message Center

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[15] DR 105/CP 178, Section 26.6.
[16] DR 106/CP 179, Section 28.
[17] Permit No. 01970, DR 00012-00013/CP 85-86.
[18] *But see,* a photograph of the Alaska Airline sign with the Electronic Message Center sign located below it on the same sign structure, Seattle Dept. of Planning and Development Microfilm Records, DR 00583/CP 657 (copy is poor quality but the words "Alaska Airlines" are above the EMC, just as indicated on the permit).
[19] DR 00012-00013/CP 85-86.

sign[20] (which was 4 feet X 48 feet) which was installed directly below the words "Alaska Airlines" as it was installed on the same structure.[21]

The City continues to adopt and tighten regulations on signage. In September 25, 1975, the City Council adopts Ordinance No. 104971, effective 30 days later that prohibits rooftop advertising signs in all zones other than M, IG, and IH zones.[22] The Centennial roof sign at that time was in a CM zone, making it a nonconforming use and nonconforming structure because rooftop signs in the CM zone were prohibited.[23]

On October 31, 1975, a permit[24] was issued for eight additional circuits "for the roof sign Permit No. 01970." Under sign size, it states "6' X 56.'" Here, just 336 sf. The sign was inspected and given final approval on January 20, 1976,[25] the same day as Permit No. 1970.

In response to a citizen complaint about the new sign, the City stated in December 1975 the roof sign had been lowered to bring it into

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[20] Permit No. 5106, DR 00021-00022/ CP 94-95.
[21] DR 00250/CP 323 and repeated at DR 00583/657. The City will provide a better quality photo with its brief, attached.
[22] Ordinance No. 104971, DR 00125-136/CP 198-209.
[23] Ordinance No. 104971, Section 17A.1, DR 000134/CP 207.
[24] Permit No. 02372, DR 00014-00015/CP 87-88.
[25] Inspection log located on the back side of the face of the permit, where it states "1-20-76 [unintelligible signature] FINAL O.K."

conformance with the requirements of the new comprehensive sign Ordinance No. 102929.[26]

In an attempt to provide more stringent regulations on signage, the City Council in April 1977 adopted legislation in the Building Code that (1) limited the height of roof signs to 30 feet;[27] (2) adopted a maximum area of any off-premise sign face to 672 sq. feet;[28] and (3) adopted a maximum height of 25 feet and maximum length of 50 feet.[29] Significantly, like Ordinance 102929,[30] Section 4926 provided "A nonconforming sign shall have no additions except for minor additions for safety considerations or for the changing of the advertising message in connection with a change of ownership, provided that such addition or physical change does not expand the nonconforming nature of the sign.[31]

In July 1978, a permit was issued to erect a second sign, an "electronic message center" (EMC) sign,[32] on the existing structure as per plan.[33] The sign dimensions were just 4 feet by 48 feet (or 192 sf).

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[26] Letter from Superintendent of Buildings to D. Cutler re roof sign at 1900 4th Avenue, referring to Ord. 102929, which required the sign be no higher than 30 feet from the roofline or nearest parapet, December 18, 1975, at DR 00020/CP 93.
[27] Section 4913 of Ordinance No. 106350 which stated the height of the sign measured from the roof line or from the nearest adjacent parapet exceed thirty feet in height at DR 00166/CP 239.
[28] Section 4924 of Ordinance No. 106350, DR 00174-175 /CP 247-248.
[29] Ordinance No. 106350, DR 00175/CP 248.
[30] *See* footnote 16.
[31] Ordinance No. 106350, DR 00176/CP 249.
[32] Permit No. 5106, DR 00021-00022/CP 94-95.

Yet another change to the sign comes in 1981. The City received a letter, dated October 6, 1981, from sign installer Health Northwest stating: "our application is to install a new sign display on the existing roof structure" that also changes the use from an off-premise advertising use to an on-premise sign.[34] Ten days later, the City issued the permit, Permit No. 07949)[35] (1981 permit) that changed the use of the sign from "off-premise advertising" to "on-premise" advertising sign[36] and to "erect and maintain a single-faced neon illuminated Channelume with 5' letters on the existing structure."[37] The "Channelume" letters were to be mounted on the existing structure above the existing message center sign"[38] (EMC).

The dimensions of 1981 permit were 54'6" by 5' (or 272.5 sq. feet) and the sign was to display the "Cameras West" name and logo.[39] The face of the permit was stamped "SEPA decision- categorical exemption" which was required for permits that change the use. Photographs of the

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[33] No plans on file, *but see,* a photograph of the Alaska Airline sign with the Electronic Message Center sign located below it on the same sign structure, Seattle Dept. of Planning and Development Microfilm Records, DR 00583. *See also*, a photo of the EMC sign, located below the Cameras West sign at DR 00066/CP 139 and DR 00064/CP 137, 00065/CP 138 and 00068/CP 140.

[34] Oct. 6, 1981 DPD Letter, DR 00023/CP 96.

[35] Permit No. 07949, DR 00024-00028/CP 97-101.

[36] The City's code differentiates between an off-premise sign (or sign that advertises a good, service or product not offered on the site where the sign is located e.g. a classic "advertising" sign) and an on-premise sign (which advertises a good, product or service located on the site where the sign is located).

[37] *Id.*

[38] *Id.*

[39] *Id.*

sign in 2000,[40] 2004,[41] 2007,[42] 2008,[43] and 2011[44] are in the record. The EMC sign permitted in 1978 can also be seen in these photos.

Notably, the plans were attached to the 1981 permit.[45] The plans show the dimensions of the Cameras West sign face, the electronic message center[46] sign face, and the existing sign structure.[47] The plans show the sign structure stopped 30 feet above the roofline, not 30 feet above the nearest parapet, which is also indicated on the left hand side of the plans where it looks like a step up.[48] In addition, the area of the sign face established under this permit was 440.5 square feet: the 272.5-square-foot Cameras West sign face plus the 168-square-foot EMC sign face.[49]

The Sign remained essentially unchanged for the next three decades.[50]

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[40] King County Dept. of Assessments, DR 00824/CP 898.
[41] King County Dept. of Assessments, lower photo taken in 2004, DR 00823/CP 897.
[42] Photograph of Camera West sign, by Alison LaFever, 2007, DR 00064-00067/CP 137-140.
[43] Photograph of Camera West sign, by Joe Mabel, 2008, DR 000252/CP 325.
[44] Photographs of Camera West sign, www.flickr.com/photos/corvillegroup/5503665569, 2012, DR 000718-000719/CP 792.
[45] 1981 Plans, DR 00027-00028/CP 100-101.
[46] 3 feet 6 inches in height by 48 feet in length.
[47] *Id.*
[48] DR 0027-00028/CP 100-101.
[49] Plans for Permit No. 07949, DR 00027-28/CP 100-101.
[50] This photo shows the size of the sign structure and size face when looking northbound on 4th Avenue as it existed in 2000, provided by the King County Department of Assessments. DR 824/ CP 898. Two more photos from King County, DR 823/CP 897.

B. Total Outdoor takes over the lease for the Rooftop Sign.

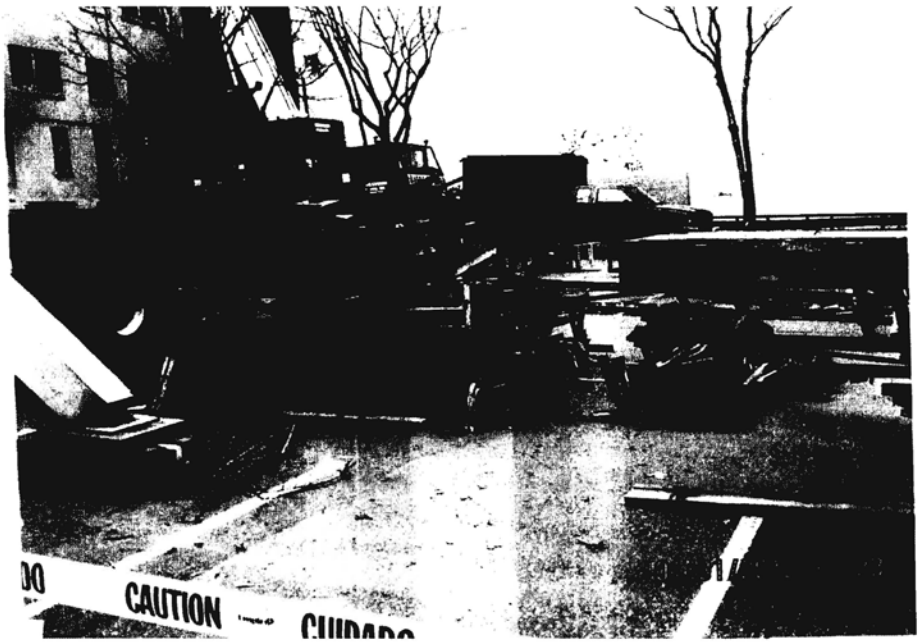
Then along came Total Outdoor.

In November 2011, the City was informed the permittee, Cameras West, no longer wished to use the roof sign and it would be replaced.[51]

On January 31, 2012, the City Sign Inspector Bob Hoyos visited the site and observed workers removing the existing sign and constructing a new sign structure on the roof.[52] He observed and photographed the removal of the existing sign face and structure. Below is a portion of the

[51] Photographs from a sign inspection report, showing new unpermitted light fixture/luminaries on the sign, November 22, 2011, DR 00208-00210/CP 281-283.
[52] *See* his sign site inspection report with photographs, January 31, 2012, DR 00270-00283/CP 343-356.

old roof sign structure as observed by Mr. Hoyos:[53]



At that time, he also observed the assembly of a new roof sign structure in its place.[54] Mr. Hoyos posted a Stop Work Order, stating the work was being done without first obtaining the necessary permits.[55]

On February 1, 2012, Mr. Hoyos visited the site again and witnessed workers installing the remainder of the new sign structure.[56] He

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[53] DR 00276/ CP 349.
[54] *See* his sign site inspection report with photographs, January 31, 2012, DR 00270-00283/CP 343-356.
[55] *Id.*
[56] Sign Site Inspection Report with photographs, February 1, 2012, DR 00286-00298/CP 359-371.

observed three new light fixtures had been installed over top of the Sign.[57] The sign face is much larger than previous Cameras West sign.[58]

Total Outdoor then appealed two letters issued by DPD in response to Total Outdoor's requests for a billboard registration number for the rooftop sign. In July 2012, pursuant to an agreement in furtherance of settlement, Total Outdoor submitted permit applications to the City to (1) establish use for the record for a nonconforming off-premise advertising use;[59] and (2) Sign/Building permit for the larger sign face and taller structure.[60] In October 2012, the City issued proposed decisions.[61]

City staff observed the rooftop sign on November 27, 2012,[62] and measured the dimensions of the Sign and structure that Total Outdoor installed. The sign face measured 20' in height from the top to the bottom of the sign face and 60' in length. The structure height measured 34 feet from the roof line (rooftop) of the building to the top of the sign and the width of the structure was 60 feet. Below is a photograph of the sign from

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[57] *Id.*
[58] Compare DR 00824/CP 898 and 00827-00828/CP 901-902 with DR 00821/CP 895.
[59] Total Outdoor's Application to establish use for the record, DR 00599-00605. Total Outdoor submitted some additional materials for the City's consideration including the declaration of Paul Schell, DR 00628-00648/CP 702-722.
[60] Total Outdoor's sign/building permit application, DR 00606-00610/CP 680-684.
[61] DR 00649-00660/CP 723-734.
[62] Sign site inspection report with photographs, November 27, 2012, DR 00723-00735/CP 797-809.

Total Outdoor's website.[63]

In December 2012, the City issued three decisions: (1) a decision on the establish use for the record application;[64] (2) an associated correction notice;[65] and (3) a correction notice on their sign/building permit.[66]

C. Procedural History

Total Outdoor appealed the City's February 3, 2012[67] and May 2, 2012 letters[68] under LUPA. Total Outdoor also appealed all three of DPD's December 14, 2012 decisions under LUPA. The matters were consolidated before the superior court[69] and it denied all of Total Outdoor's LUPA Petitions.

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[63] DR 00821/CP 895. *See also* DR 00336-337/CP 409-410 complaint with similar photograph.
[64] DPD Dec. 14, 2012 Mills Decision, DR 00789-00796/CP 863-870.
[65] DPD Dec. 14, 2012 Mills Correction Notice, DR 00797-00798/CP 871-872.
[66] DPD Dec. 14, 2012 Alford Correction Notice, DR 00799-00800 /CP 873-874.
[67] Feb. 3, 2012 Mills Letter, DR 00299-00311/CP 372-384.
[68] May 2, 2012 Laird Letter, DR 00411-00413/CP 485-487.
[69] This lawsuit was consolidated at KCSC Cause No. 12-2-06852-6-SEA.

III. ISSUES

1) Whether the two-part test for abandonment of a nonconforming use is relevant where DPD's decisions agree with Total Outdoor that the nonconforming rooftop advertising sign use can continue and Total Outdoor did not appeal that determination?

2) Where, in 2012, Total Outdoor increased the sign face from 440.5 square feet to 1200 square feet and increased the structure height from 30 to 34 feet, did DPD properly conclude that such modifications constituted an unlawful expansion of the Sign which is prohibited in the Code?

3) Where, in 2012, Total Outdoor removed the electrical components of the Sign including the internally illuminated channelume lighting and installed new fixtures that sit overtop the Sign, did the City properly limit the maximum wattage to that contained in the current (2009) Energy Code?

IV. ARGUMENT

A. Total Outdoor faces a significant burden of proof.

A court may grant relief under LUPA "only if the party seeking relief has carried the burden of establishing that one of the standards set

forth [in LUPA] has been met."[70] Total Outdoor assumes the burden of proving three difficult standards.

First, the "substantial evidence" standard is a modest, deferential test entailing a relatively low threshold of proof.[71] This standard tasks the court, viewing the evidence and all reasonable inferences in a light most favorable to the local jurisdiction, to ask merely whether the record contains "a sufficient quantity of evidence to persuade a fair-minded person of the truth or correctness of the order."[72] The record is the one prepared by DPD, the local jurisdiction's body or officer with the highest level of authority to make the final determination.[73]

Second, a finding is "clearly erroneous" only when the reviewing court is left with a definite and firm conviction a mistake has been made.[74]

Finally, although courts retain the ultimate authority to interpret legal issues de novo, the "erroneous interpretation of the law" standard

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[70] RCW 36.70C.130(1), *see also Lakeside Indus. v. Thurston County*, 119 Wn. App. 886, 83 P.3d 433, *review denied* 152 Wn.2d 1015, 101 P.3d 107 (2004).
[71] *See* RCW 36.70C.120(1)(c); *Sunderland Family Treatment Servs. v. City of Pasco*, 127 Wn.2d 782, 801 n.10, 903 P.2d 986 (1995). Although this case was decided under pre-LUPA law, the Court noted that this standard of review remained unchanged under LUPA.
[72] *City of Redmond v. Central Puget Sound Growth Mgmt. Hearings Bd.,* 136 Wn.2d 38, 46, 959 P.2d 1091 (1998).
[73] *HJS Development, Inc. v. Pierce County,* 148 Wn.2d 451, 467, 61 P.3d 1141 (2003).
[74] *See* RCW 36.70C.130(1)(d); *Wenatchee Sportsmen Ass'n v. Chelan County*, 141 Wn.2d 169, 176, 4 P.3d 123 (2000).

requires courts, where a statute is susceptible to more than one reasonable meaning, to defer to the City's interpretation of its own Code.[75]

Total Outdoor cannot meet its substantial burden of proof under these standards because the law and record support the City's decisions.

B. Total Outdoor may not expand its nonconforming structure.

1. This is a dispute about nonconforming structures, not nonconforming uses.

The difference between a use and a structure is intuitive—a local code might limit a property-owner's use to single-family residential (precluding, say, commercial and industrial uses) and structure to certain physical standards (precluding, for example, a tall house or a garage abutting a property line). A nonconforming use[76] is a use that was lawful when it was established, but that fails to comply with the restrictions imposed by later-enacted law.[77]

For example, if a property owner obtained a permit to operate an automotive repair business in a residential zone and the City Council later

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[75] *See* RCW 36.70C.130(1)(b); *City of Federal Way v. Town & Country Real Estate, LLC, et al.*, 161 Wn. App. 17, 252 P.3d 382 (2011); *Faben Point Neighbors v. City of Mercer Island*, 102 Wn. App. 775, 778, 11 P.3d 322 (2000).

[76] SMC 23.84A.040 defines a "nonconforming use" as "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."

[77] *Andrew v. King County*, 21 Wn. App. 566, 569-572, 586 P.2d 509 (1978).

prohibited automotive repair businesses in residential zones, that use becomes non-conforming.

By contrast, a structure that is nonconforming to development standards[78] is a structure that was lawful when it was constructed, but is no longer consistent with later-enacted development standards. For example, the automotive repair business might operate in a building covering most of the lot, even though current standards would require structures to be set back more from the street and property lines.

2. City law prohibits the expansion of nonconforming structures.

In *State ex. rel. Miller v. Cain,*[79] the Washington Supreme Court held that a Seattle ordinance prohibiting the enlargement of nonconforming structures was within the police power and upheld it as constitutional.[80] The Court held gas station owner "had no vested right in the perpetuation of a nonconforming use of her property as a [gas station]

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[78] SMC 23.84A.026 defines "Nonconforming to development standards" as "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."

[79] 40 Wn.2d 216, 242 P.2d 505 (1952).

[80] 40 Wn.2d at 222.

as would compel the issuance of a building permit for a new and larger nonconforming structure to make that use effective."[81]

Under the current Land Use Code of the SMC, nonconforming structures[82] may be "maintained, renovated, repaired, or structurally altered" but not "expansion or extension" of these structures in ways that would increase the extent of nonconformity or create additional nonconformity.[83] This is true for nonconforming structures destroyed by an act of nature or other causes beyond the control of the owner.[84] This same standard applies to structures that contain a nonconforming use;[85] structures may be maintained or repaired but may not be "expanded or extended."

Further, Section 23.40.002.B provides as follows:

> No use of any structure or premises shall hereafter be commenced, and no structure or part of a structure shall be erected, moved, reconstructed, extended, enlarged or

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[81] 40 Wn.2d at 222.

[82] SMC 23.42.112 entitled "Nonconformity to development standards" regulates structures that are nonconforming to development standards. For ease of reference, the City will refer to structures that are nonconforming to development standards as "nonconforming structures."

[83] SMC 23.42.112.A provides: "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" except in limited circumstances not present here.

[84] SMC 23.42.112.C.

[85] SMC 23.42.106.D.1 provides: "A nonconforming nonresidential use shall not be expanded or extended, except as follows: A structure occupied by a nonconforming nonresidential use may be maintained, repaired, renovated or structurally altered but shall not be expanded or extended except as otherwise required by law, as necessary to improve access for the elderly or disabled or as specifically permitted elsewhere in this Code."

> altered, except in conformity with the regulations specified in this title for the zone and overlay district, if any, in which it is or will be located. [Emphasis added.]

In addition, under the Seattle Building Code, provides that a nonconforming sign "shall have no additions or structural or electrical alterations thereto except for minor additions or alteration which the Building Official has determined are replaced."[86]

3. Total Outdoor may not expand a 30-year-old, nonconforming structure.

Under LUPA, where a statute is susceptible to more than one reasonable meaning, courts should defer to the City's interpretation of its Code where the Department has authority and expertise.[87]

Here, DPD properly concluded that SMC 23.42.106 and 23.42.112 applied because the sign was both a nonconforming use and nonconforming structure.[88] Mr. Mills also determined Section 23.40.002.B was relevant and concluded "when read together with the regulations of nonconforming uses and structures in Chapter 23.42, essentially says that, once a use or structure is established or constructed in conformity to the regulations of the Land Use Code, it cannot be

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[86] Section 3107.8 of the Seattle Building Code.

[87] *City of Federal Way v. Town & Country Real Estate, LLC, et al.*, 161 Wn. App. 17, 252 P.3d 382 (2011); *Faben Point Neighbors v. City of Mercer Island,* 102 Wn. App. 775, 778, 11 P.3d 322 (2000).

[88] DR 00791/CP 865.

changed in ways that are not conforming to the applicable regulations."[89] DPD concluded "these regulations provide a process for recognizing an existing use or structure as nonconforming and setting parameters for repair and replacement."[90]

DPD properly concluded that any repair or replacement of the nonconforming structure cannot be different or larger than that approved by the 1981 permit for the Cameras West and EMC sign faces.[91] Thus, even if the sign may have been 26X60 sign face at the time the sign became nonconforming, subsequent changes sought by permit resulted in a gradual reduction in the size of the sign face to that permitted in 19-440.5 square feet- that was constructed and remained for 30 years. DPD concluded that "to reason otherwise would be to remove any sense of rational structure from the zoning regulations."[92] As noted by DPD in Mr. Mills Dec. 14, 2012 decision:[93]

> For example, a building might be built under zoning that allowed a 60-foot height limit, with plans approving that height. If the applicable zoning then changed to a 40-foot height limit, and a permit was issued to remodel and alter the 60-foot building to remove two stories from that building, it would not be seriously argued that those two stories were "previously approved" and could therefore be restored any time the building owner chose to do so. The

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[89] DR 00791/CP 865.
[90] *Id.*
[91] The City's (Mills) Dec.14, 2012 letter, DR 00791/CP 865.
[92] *Id.* at DR 00793/CP 867.
[93] *Id.* at DR 00793/CP 867.

> Centennial Building sign is no different. It has been reduced in area by permit from what was once allowed under prior zoning, and its current size is dictated by the most recent permit or whatever the current Land Use Code regulations would allow on the property.

First, the record is clear that on the effective date of the Sign Ordinance that made rooftop signs nonconforming (October 24, 1975[94]), it was the Alaska Airlines sign, not Burlington Northern Sign, which was installed. In fact, in May 1975, a Sign Permit was issued[95] to change the sign from Burlington Northern to Alaska Airlines and to reduce the height of the sign to make it more conforming.[96]

a) The area of the new sign face is larger.

The City properly determined the nonconforming structure was impermissibly expanded in 2012 because the sign face tripled in size from that installed under the most recent (1981) permit. The record is clear that the permittee made the sign smaller and nonconforming over time as documented in the permit history, culminating in the most conforming permit, that from 1981, which authorized 440 square foot sign face, under

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[94] Ordinance No. 104971, DR 00125-00136/CP 198-209, effective date language of ordinance at DR 00136/CP 209.

[95] No. 1970 which states "Alteration to Exist. Sign to make it conforming to Exist. Sign Code & New Copy per plan."

[96] DR 00012-00013/CP 85-86. Total Outdoor incorrectly and repeatedly argues that the historic photographs and permits demonstrate that the sign structure was 55 feet high when it became nonconforming in October 24, 1975 at Total Outdoor's opening brief, p. 5, and again on page 23 where it states that when the sign became nonconforming, it was displaying the Burlington Northern Railroad Corp which measured 55 feet high by 68.5 feet wide, where it relies on the 1941 permit, which was superseded by the 1975 permits.

SMC 23.42.112.A and 23.40.002.B. In light of these Code provisions, Total Outdoor cannot now reach back to an older, less conforming permit to say that it is entitled to a 1200 sq. foot sign face.

Furthermore, the 1981 sign permit was not simply a lighting permit with a "change in copy" as argued by Total Outdoor. The record makes clear that the neon "Alaska Airlines" sign was removed and new 5 foot tall neon, channelume, internally illuminated letters, that ran 48 feet long and cost $20,000, were installed on the structure.[97] Once this occurred, under SMC 23.40.002.B, the sign face had been reduced in size again to be even more conforming that previously. The nonconformity cannot now expand 30+ years later, based on the argument Total Outdoor has some right to a larger sign face and structure that existed when the sign became nonconforming, even after numerous permits by the predecessor-in-interest seeking and obtaining permits for a smaller, more conforming sign and structure. If Total Outdoor's argument was carried out to its logical end, any nonconformity that existed at some point in the past could be resurrected and even expanded even if subsequent permits and construction resulted in a structure that over time became more conforming.

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[97] Permit No. 07949, DR 00024-00028/CP 97-101.

b) The new sign structure is taller.

Substantial evidence in the record shows the 2012 modifications increased the size of the sign structure. When determining if substantial evidence exists under LUPA, the court only considers whether there is substantial evidence supporting a decision and cannot engage in a balancing between evidence supporting or not supporting the decision.[98] "Substantial evidence entails a relatively low threshold of proof."[99] The Court must "view the evidence and any reasonable inferences in the light most favorable to the party that prevailed in the highest forum exercising fact finding authority."[100]

As a starting point, the record indicates the Sign structure was reduced in height to 30 feet as required by Ordinance 102929 (that became effective on Feb. 7, 1974[101]) before October 24, 1975, the date when the rooftop sign became a nonconforming structure. This reduction from 55 to 30 feet is also reflected in the December 18, 1975 letter[102] from the

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[98] *Phoenix Development, Inc. v. City of Woodinville*, 256 P.3d 1150, 1156, 256 P.3d 1150 (2011). (The court's role is not to determine whether evidence in the record supports one result or another).

[99] *Sunderland Family Treatment Servs. v. City of Pasco*, 127 Wn.2d 782, 801 n.10, 903 P.2d 986 (1995). Although this case was decided under pre-LUPA law, the Court noted that this standard of review remained unchanged under LUPA.

[100] *Isla Verde Intern. Holdings, Inc. v. City of Camas,* 99 Wn. App. 127, 134, 950 P.2d 429 (1999) (quoting *Schofield v. Spokane County*, 96 Wn. App. 581, 586, 980 P.2d 277(1999)).

[101] Ordinance 102929, DR 00081-00116/CP 154-189, in particular § 15 (b) "Roof signs", "height" at DR 0097/CP 170.

[102] Seattle Department of Buildings, a predecessor of DPD, Dec. 18, 1975 letter, DR 00020/CP 93.

City[103] which states "Under a recent sign permit the above noted sign was lowered in height to bring it into conformance with the height requirement of the new Comprehensive Sign Ordinance #102929." In a letter written in December 1975, a citizen states the Sign was recently changed to advertise Alaska Airlines "replacing the non-moving sign that had advertised Burlington Northern."[104]

Moreover, read in conjunction with the 1981 permit[105] to "erect and maintain" new sign on the "existing structure"[106] and the corresponding plans, both clearly showing the existing structure is 30 feet in height from the rooftop.[107] The only plans the City has on record for the Sign is the 1981 plans.[108] As discussed above, the 1981 permit is the most recent and the most conforming of the permits.

The 1981 permit is a "Sign Permit"[109] to "erect and maintain" a single faced "neon illuminated channelume letters" on existing structure[110]

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[103] From the Department of Construction and Land Use (DCLU), a predecessor to DPD.
[104] DR 00562/CP 636.
[105] 1981 permit to Change use to on-premise sign and install sign face that was 440 square feet, DR 00024/CP 97, and plans at DR 00027-00028/CP 100-101.
[106] DR 00024/CP 97.
[107] DR 00027-00028/CP 100-101.
[108] The City did not retain plans for most types of development until the 1970s or early 1980s.
[109] Top of the permit says "Sign Permit."
[110] DR 00024/CP 97 indicates that the permit is a "Sign Permit" (at top) and includes language that it is for an "on premise use." *See also* DR 00024/CP 97, letter from sign applicant.

as well as a permit to change the use of the sign[111] from an off-premise advertising sign to an "on-premise sign."[112] The work involved installation of 5 foot tall internally-illuminated letters and the work was valued at $20,000 and weighed 1000 pounds.[113]

The 1981 permit specifically shows measurement of the 30-foot maximum sign frame height taken from the roofline and even shows this measurement from below the line of the raised roof area near the western portion of the roof.[114] A city inspector reviewed the plans, conducted a site visit and issued a final approval for the Sign.[115]

Heath Northwest, applicant for Cameras West, indicated on the 1981 permit the new Cameras West sign would be attached to the existing sign frame- which was shown to be 30 feet high from the roofline. This permit was inspected by the City Sign Code Inspector and approved. Thus, any right that a property owner may have had to a sign structure that exceeded the height standard at one point in time is gone. In sum, the record is replete with evidence establishing the Sign structure was 30 feet in total height as measured from the roofline.

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[111] *See* DR 00024/CP 97) which states, in a different hand, "on Premise Sign" and see DR 00023/CP 96)

[112] DR 00023/CP 97 (letter from applicant) and 00024/CP 98 (permit face).

[113] It should be DR 00026/CP 99, as it is immediately after DR 00025/CP 98.

[114] Plans approved with Permit No. 07949, 1981, DR 00027/CP 100 (the roofline is identified on the plans and the height of the sign structure is measured from the roofline to the top of the sign and the height is noted at 30'-0").

[115] DR 00025/CP 98. The Sign was "finaled" on 1-22-82 as indicated by the date and notation of the inspector next to the terms "Final O.K."

Further, there is substantial evidence in the record the 2012 modifications increased the size of the sign structure to at least 34 feet in height. When Mr. Hoyos met with Total Outdoor representatives at the site in November 2012,[116] he measured the height of the sign structure to be 34' from the roofline of the Centennial Building to the top of the Sign. Total Outdoor does not dispute this fact.

Therefore, the existing sign structure, measured at least 34 feet by Mr. Hoyos, is over height and must be lowered. DPD properly concluded that to allow the structure to remain at its current height would be to allow an expansion of a non-conforming sign structure.

4. Total Outdoor's arguments lack merit.

a) Because Total Outdoor cannot convert this into a dispute over a nonconforming *use*, case law about nonconforming use is inapplicable.

Total Outdoor spends much time arguing the City cannot meet the two-part common law test for abandonment of a nonconforming use.[117] The City does not dispute the nonconforming rooftop advertising sign use nor does the City claim that use was abandoned.[118] Although the City

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[116] Sign Site Inspection Report with photographs, November 27, 2012, DR 00723-00735/ CP 797-809.
[117] Total Outdoor's opening brief, p. 23-31.
[118] Dec. 14, 2012 Mills letter, Mills correction notice and Alford correction notice, DR 00788-00798/CP 862-872 and DR 00799-00811/CP 873-885.

initially thought the nonconforming use may have been abandoned,[119] after Total Outdoor submitted permit applications,[120] provided business records,[121] and signed statements,[122] DPD concluded the off-premise advertising use was established and not abandoned.[123]

Total Outdoor's recitation of the case law addressing abandonment of a nonconforming use is inapplicable and misleading.[124] All of the cases cited by Total Outdoor, including *Rosema v. City of Seattle*, involve abandonment or discontinuance of a nonconforming use and the associated two-prong common law test for making that determination.[125] Although Total Outdoor would like to import this two-prong test to apply to structures that are nonconforming to development standards, no case cited by Total Outdoor stands for that proposition.

Total Outdoor argues that, like in *Rosema* where the lower dwelling unit continued to be "designed or arranged" as a separate unit, so too did the Centennial Building rooftop sign retain the ability to

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[119] *See* the City's (Bill Mills) Feb. 3, 2012 letter, DR 00300-00304/CP 373-377, and the City's (Bob Laird) May 2, 2012 letter, DR 00411-00413/CP 485-487.
[120] Application to Establish Use for the Record, DR 00599-00605/CP 673-679.
[121] Long term leases, DR 00631-00647/CP 705-721.
[122] Declaration of Paul Schell, DR 00648.
[123] The City's October 26, 2012 proposed decision, DR 00656-00660/CP 730-734.
[124] Total Outdoor's opening brief, pgs. 23-31.
[125] *See e.g., Rosema v. City of Seattle*, 166 Wn. App. 293, 269 P.3d 393 (2011) which provides that to prove abandonment or discontinuance, the party must show: (1) an intent to abandon; and (2) an overt act or failure to act that implies that the owner ceased to claim or retain any interest in the right to the nonconforming use test.

"accommodate larger copy."[126] This analogy misses the mark. Unlike in *Rosema* where the owner left a second kitchen for 18 years, here, the permittee reduced the sign face by permit. Any attempt to install larger copy would be an expansion of a nonconforming structure. *Van Sant v. City of Everett,* 69 Wn. App. 641, 849 P.2d 1276 (1993) and *City of University Place v. McGuire,* 144 Wn.2d 640, 30 P.3d 453 (2001), cited by Total Outdoor,[127] are similarly irrelevant because those cases involve abandonment of a nonconforming use. The two-prong abandonment of a nonconforming use test is inapplicable since the nonconforming rooftop advertising sign can continue. The two-prong common law test has not been extended to nonconforming structures.

From a practical perspective, the two-prong abandonment test should not be extended to nonconforming structures for two public policy reasons: first, the "intent" prong of the abandonment test for nonconforming uses is not needed in cases where a structure is nonconforming to a particular development standards. In the latter case, one could simply look at a structure to determine if it was a nonconforming structure.

If, for example, a home was built before the 10 foot side-yard setback was required, it would simply require a look at the structure on the

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[126] Total Outdoor's brief, p. 28.
[127] Total Outdoor's opening brief, pgs. 24-25.

lot, the permit and the development standard to determine whether it was nonconforming to the side-yard setback standard. Unlike a "use" where it may be difficult to tell if a particular use (say as an office) was abandoned and another use made in its place (say as a retail consignment store).

Second, City Council adopts and amends new development standards all of the time. If the two-prong test applies, the number of nonconforming structures would be significant. Recognizing, keeping track and evaluating nonconforming structures would be a major administrative task for DPD with very limited benefit for property owners.

b) Structures that predate the 1981 structure are irrelevant.

Total Outdoor's continued attempt to create some "rights" for the structure that existed in October 1975,[128] at the time the sign became a nonconforming structure, is without merit because subsequent voluntary changes were requested by the permittee or its agent, permitted by the City and made to the Sign that brought the structure and sign face closer to conformity. Restated, because rooftop signs were prohibited and the goal that these signs become more conforming to current code, the reduction to the sign face and structure modified what size and scale of the nonconformity, as intended.

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[128] *See e.g.,* Total Outdoor's opening brief, p. 36-37.

c) Claims of a taller 1981 structure cannot be reconciled with the record.

As noted above, there is substantial evidence in the record the 2012 modifications expanded the structure's nonconformity. Further, Total Outdoor's argument that DPD wrongly conclude the Sign's highest point was only 30 feet from the rooftop, rather than 30 feet from the 4.5 foot base or parapet[129] is without merit. It was reasonable for DPD to conclude the structure height of 30 feet should be measured from the rooftop because the plans for the 1981 permit took great care and detail to show the entire height of the nonconforming structure was 30 feet in total.[130]

Total Outdoor also argues erroneously that "DPD assumed that the base did not exist."[131] It is irrelevant the sign structure is attached to a steel metal base, and not the roof itself. There is nothing in the applicable 1981 permit or plan to suggest that the use of a base to support the sign frame was precluded, but it is clear that the plans demonstrate that the height of the entire structure is 30 feet from the roof line. Similarly, there is no basis for measuring the sign height from the parapet level at the edge of the roof, since the approved plan was so specific about measurement from the roof line itself.

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[129] Total Outdoor's brief, pgs. 33-34.
[130] DR 00027/CP 100 (where there is a 30' measurement shown on the plans from the "roofline" to the top of the sign structure.
[131] *Id.*

Moreover, Total Outdoor's argument throughout its brief that the new structure replaced "like for like"[132] and "piece by piece" and its reliance on its photographs purportedly taken on Jan. 28, 2012, just before the removal and installation does not establish that the previous structure was 34 feet in height as Total Outdoor now argues. Nothing in the photographs includes a measurement of the sign height.

Similarly, Total Outdoor's argument that sign structure as it existed just prior to the 2012 modification was "preexisting"- the City does not dispute that the structure was preexisting. Without allowing the City the opportunity to measure the height before the work occurred in early 2012, the City cannot establish definitely how tall the structure was just prior to the 2012 Total Outdoor overhaul. However, the most recent permit and associated plans on file make clear that the approved height of the "existing structure" as permitted was 30 feet.[133] This permit (07949) was inspected by the City Sign Code Inspector and approved.[134]

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[132] *See e.g.,* Total Outdoor's opening brief, p. 33-34.
[133] *See* DR 00723-724/CP 797-798 and DR 00732-00734/CP 806-808 (site report of the City's Sign and Electrical Inspector Bob Hoyos from 11/26/12 visit and associated photos).
[134] DR 00025/CP 98 (the back page of the 1981 permit that includes the date and notation from City Inspector on 1-22-82 next to note "Final O.K.")

d) Total Outdoor's "repair" theory is inconsistent with the record.

Contrary to the arguments contained throughout Total Outdoor's opening brief, Total Outdoor's modifications to the sign structure in 2012 were not simply "repairs." Mr. Hoyos documented the 2012 work as a "new installation" based on his site inspection.[135] This is consistent with Mr. Hoyos's site inspection one day later, on February 1, 2012, where he documented additional work on the sign.[136] This was also documented by a Washington State Department of Labor and Industries Inspector who visited the site that same day with Mr. Hoyos[137] and while on the rooftop with the Total Outdoor's subcontractor, Kriss Names, told Mr. Jones that:

> When I asked Kriss about the billboard installation, Kriss explained that he had removed the old billboard structure and had just finished installing the new structure. When I asked Kriss about the 3 new floodlights installed on the structure, Kriss explained that he had removed the floodlight from the old structure then took the light to 'McCoy Electric' to be rewired, and then he (Kriss) installed the refurbished lights on the new billboard "yesterday."

The record makes clear that DPD concluded that the 2012 work did not constitute "maintenance and repair." The manager of the Engineering Services Division of DPD also concluded that Total

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[135] DR 00270/CP 343 (Hoyos site inspection report from January 31, 2012), DR 00276-00277/CP 349-350 (photograph taken by Hoyos documenting large pile of old metal that was the prior sign structure).

[136] DR 00286-00291/CP 359-365 (Hoyos site inspection report from February 1, 2012 and accompanying photos).

[137] DR 00398/CP 471 (Jones report attached to Jones email at DR 00394/CP 467).

Outdoor's 2012 modifications were "clearly not 'maintenance and repair.'"[138] He would "call this something more like remove and replace" and "whether or not the 'replace' is 'in-kind' would matter."[139] He further states:[140]

> if 'in-kind' (i.e. like for like in terms of size and shape) we have in the past allowed 'existing (legal) nonconformities' to be replaced in the same size and configuration that existed prior to the replacement, though typically we require the application- prior to doing the work- to apply for the building permit and to fully document the existing (legal) non-conformity, demonstrating that the replaced structure does not expand the non-conformity in any way (while also allowing reduction in the size/shape/non-conformity.

Moreover, based on Mr. Hoyos' observations,[141] Mr. Mills observations[142] and a comparision of photos and the 1981 plans[143] make clear that the design and structural support for the back bracing of the structure was modified in 2012 and is thus not "in kind" modification.

Total Outdoor argues that DPD erred in concluding that a new and different structure has been installed because DPD "did not rely on any

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[138] DR 00507/CP 581 (Email from Andy Higgins, DPD).
[139] *Id.*
[140] *Id.*
[141] DR 00723/CP 797 where he stated "I also observed that the structural configuration at the back side of the sign had been modified" and he referred to the attached photos.
[142] Mr. Mills also notes this change in his notes from a November 27, 2012 site visit at DR 00717/CP 791, last full paragraph.
[143] Compare angles in 1981 plan (DR 00027/CP 100) and the old structure (DR 00067/CP 140) with new structure (DR 00723-00724/CP 797-799). where "the old structures as compared to the new structure make clear the top portion of the back bracing, which was previously vertical bracing, was removed and subsequently replaced with angled bracing that now runs from the top of the sign to the base." DR 00800/CP 874.

measures of the replacement metal pieces or any direct comparison between the new pieces and the 90-year old corroded pieces that has been replaced and were available for inspection." As noted above, Mr. Hoyos did measure the size of the new structure. When Mr. Hoyos met with Total Outdoor representatives at the site in November 2012,[144] he measured the height of the sign structure to be 34' from the roofline of the Centennial Building to the top of the Sign. However, "direct comparisons" were impossible because Total Outdoor had taken down the sign structure without first seeking a permit from DPD. It was only sheer luck that DPD observed a portion of the construction in progress. It would be extremely difficult for DPD to conduct a "direct comparison" based on a pile of old metal on the ground cut into smaller pieces and not configured as it was on the roof.[145] Similarly, viewing the alleged pieces of old metal after they had been removed from the rooftop and the structure was demolished would not help DPD conduct a "direct comparison."

Total Outdoor's next argument that "in the nearly 90 years since the Sign was built, it has featured advertising copy on *the same structure*

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[144] Sign Site Inspection Report with photographs, November 27, 2012, DR 00723-00735/ CP 797-809.

[145] *See* his sign site inspection report with photographs, January 31, 2012, DR 00270-00283/CP 343-356 in particular: DR 00276/ CP 349.

that exists today"[146] is also inconsistent with the record. Total Outdoor's citation to DR 759,[147] a photograph of the Sign taken in January 2012, just before the 2012 modifications. The permit history makes clear there were modifications to the Sign over the course of years including the 1937 permit[148] that authorized "alterations" to the existing roof sign, the 1941 permit[149] issued to "erect" a roof sign and the 1975 permit[150] issued for "alteration to [an] existing sign to make it conforming to existing sign code" which resulted in the sign structure being lowered in height.[151] The record does not support Total Outdoor's argument.

Finally, even if the structure just before the 2012 modifications was 34 feet tall, which is not established anywhere in the record, the most recent permit (1981 permit) only authorized a height to 30 feet from the roofline[152] and because it is the City's permit that controls the size of the

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[146] Total Outdoor's opening brief, pg. 4.
[147] This is a photo from 1/28/2012 where Total Outdoor is removing the structure and replacing it with a new structure with the exception of the base I-beam. The permit history makes clear that modifications were made to the sign and sign structure over the years and because there is no record of any plans other than those from the most recent permit in 1981, Total Outdoor has taken liberties with its argument.
[148] Permit No. 321584, DR 00007/CP 80.
[149] Permit No. 348125, DR 00008/CP 81.
[150] Permit No. 01970, DR 00012-00013/CP 85-86.
[151] Letter from Superintendent of Buildings to D. Cutler re roof sign at 1900 4th Avenue, referring to Ord. 102929, which required the sign be no higher than 30 feet from the roofline or nearest parapet, December 18, 1975, at DR 00020/CP 93.
[152] DR 97-102/ CP 97-100 (plans at DR 00027-00028/CP 100-101).

structure,[153] a height of 34 feet would be an impermissible expansion of the rooftop sign nonconformity.

e) Total Outdoor misreads City law.

Total Outdoor's claim the City erred because the Code authorizes "preservation" of nonconforming use and structures[154] attempts to isolate one code provision to the exclusion of many others. The City appropriately harmonized the provisions of SMC 23.42.106, 23.42.112, 23.40.002 to be read in light of the policy at SMC 23.42.100. SMC 23.42.100 (Nonconformity—Applicability and intent) provides:

> It is the intent of these provisions to establish a framework for dealing with nonconformity that allows most nonconformities to continue. The Code facilitates the maintenance and enhancement of nonconforming uses and developments so they may exist as an asset to their neighborhoods. The redevelopment of nonconformities to be more conforming to current code standards is a long term goal.

Total Outdoor's argument fails because this provision must be read harmoniously with the other cited code provisions.[155] While under the City's code, a nonconformity can remain, it cannot be made bigger or more nonconforming as Total Outdoor attempts to do here. Similarly, Total Outdoor's argument that the City's interpretation is in conflict with

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[153] DR 00769/CP 870.
[154] Total Outdoor's opening brief, pgs 42-43.
[155] *HJS Development v. Pierce County,* 148 Wn.2d 451, 471-472, 61 P.3d 1141 (2003)..

the absence of an 'amortization' ordinance[156] is also without merit. The City does not attempt to terminate the nonconforming rooftop sign use. Rather, the City recognized the nonconforming use.[157] Further, the City determined that Total Outdoor's recent activities constituted an unpermitted expansion of a nonconforming structure under the Code.

C. Total Outdoor may not construct new lighting in violation of the current Energy Code standards.

1. City law requires new electrical installation to comply with current Energy Code Standards.

As noted in Mr. Alford's decision, section 101.3 of the Seattle Building Code[158] indicates that the Seattle Energy Code in effect at the time of the permit application would apply.[159] Section 1132.1 of the Seattle Energy Code (SEC)[160] "Lighting and Motors" indicates that if 20% of the fixtures are new, the illumination of the sign face is subject to the lighting power allowance defined in Section 15-2B "Lighting Power Densities for Building Exteriors".[161] Table 15-2B provides that the base site allowance is 750 watts plus .15 watt/ft2 for each illuminated wall or

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[156] Total Outdoor's opening brief, p. 42.
[157] DR 00789/CP 863 and DR00799/CP 873 (second full paragraph).
[158] The provisions of the Seattle Building Code (SBC) apply to the "construction, *alteration*, moving, demolition, repair or occupancy of any building or structure within the City," requires compliance with current Seattle Energy Code (SEC).
[159] As noted in Mr. Alford's Dec. 14, 2012 Decision on appeal. DR 00800/COA 874. The Seattle Building Code that was applied to Total Outdoor's application was the 2009 Version, which can be found here: http://www.seattle.gov/DPD/cs/groups/pan/@pan/documents/web_informational/s048013.pdf
[160] All non-residential spaces must comply with Chapters 10-16. § 101.3.
[161] Table 15-2B of the Seattle Energy Code, DR 00786/CP 860 through 00787/861.

surface.[162] Here, because the last permitted sign face was 440 square feet in area, the total wattage allowed is 816 watts.[163] (The calculation is as follows= 750 base watts+ (.15w X 440)= 816 watts.)

2. Total Outdoor may not install new and different lighting without heeding the Electrical Code.

Pursuant to common law, Total Outdoor's nonconforming sign is subject to later-enacted police power regulations including the maximum permitted wattage as set forth in the current Energy Code.

In *Rhod-A-Zalea*, the Washington Supreme Court held that a grading permit provision was a reasonable later-enacted regulation adopted to protect the health, welfare and safety of the community and that a landowner who had a nonconforming peat mining operation must comply with later-enacted health, safety and welfare regulations unless such regulations would result in an immediate termination of the use.[164] The Court held that because there was no indication that complying with the regulation would jeopardize Rhod-A-Zalea's nonconforming peat mining operation, it must obtain a grading permit.[165]

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[162] *Id.*
[163] As indicated in Mr. Alford's Decision, DR 800/CP 874.
[164] *Rhod-A-Zalea & 35th, Inc. v. Snohomish County,* 136 Wn.2d 1, 9, 959 P.2d 1024 (1988), citing 1 Robert M. Anderson, American Law of Zoning § 6.01; Richard L. Settle, Washington land use and Environmental Law and Practice § 2.7(d).
[165] *Id.* at 13-14.

The City's own code is clear: when the permitted electrical fixtures were removed and new fixtures installed, an electrical permit must be obtained for the new fixtures[166] and because more than 20% of the fixtures were removed and replaced, the maximum wattage is dictated by Section15-2b of the Seattle Energy Code. These technical codes are enacted to protect the health, safety and welfare of citizens.[167] Therefore, like in *Rhod-A-Zalea,* because there is nothing in the record that indicates that a maximum wattage of 816 would terminate the nonconforming off-premise advertising sign use, Total Outdoor must comply with it.

3. Total Outdoor's arguments lack merit.

Total Outdoor alleges that because it only conducted "repairs" and "changed copy" in 2012 that it is entitled to the 51,150 watts authorized historically. As discussed above, the 2012 modifications were structural changes that increased the sign face, the sign structure and included installation of new, completely different type of lighting fixtures that hang over top of the sign.[168]

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[166] Seattle Building Code Section 3107.

[167] Section 101.5 of the SBC provides: The purpose of this code is to provide minimum standards to safeguard life or limb, health, property and public welfare by regulating and controlling the design, construction, quality of materials, occupancy, location and maintenance of all buildings and structures within the City.... The purpose of this code is to provide for and promote the health, safety and welfare of the general public. Section 101.2 of the SEC provides its goal is to achieve efficient use and conservation of energy.

[168] *See e.g.,* new fixtures (DR 206/CP 279 through DR 00210/CP 283 which documents Hoyos site inspection and photos where you can see three new light fixtures handing over top of the Sign in Nov. 2011 when Total Outdoor had just taken over the Sign); and DR

Further, Total Outdoor's argument that it is entitled to 51,150 watts of light as existed in 1975 is inconsistent with the law and inconsistent with the record. First, Total Outdoor relies on wattage from the 1978 permit to make its argument.[169] Certainly the wattage approved in 1978 was not what "vested" in 1975.[170] Moreover, when Total Outdoor removed the Cameras West internally illuminated neon signage and the electronic message center electrical components and installed new light fixtures in 2012, Total Outdoor was required to comply with the regulations that exist at the time of the application for the new Sign Permit[171]- including the current Seattle Energy Code. This regulation is applicable because, as noted above, where more than 20% of the lighting fixtures were removed and replaced, Table 15-2B applied.

Finally, Total Outdoor again attempts a narrow exclusionary reading of the Code when it argues that the City is limited to regulating

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00394-400/CP 467-473 (in particular DR 00398/CP 471 where Mr. Rand Jones, Lead Electrical Inspector for the Wa. State of Labor and Industries documented 3 new floodlights on the sign structure and the installer admitted both the billboard installation and the fixture installation and accompanying photos at DR 00399/CP 472 through DR00400/CP 473) then compare to preexisting Cameras West sign with neon internally illuminated lighting and no fixtures overhanging from the top of structure (e.g., DR 00066/CP 139 through DR 000367/CP 140).

[169] 1978 permit for the Electronic Message Center Sign is at DR 00021/COA 94 where the wattage permitted was 51,150 watts [31 units X 1650= 51,150 watts].

[170] The wattage permitted on Oct. 24, 1975 was based on the May 1975 permit for Alaska Airlines at DR 00012/COA 85 which totaled 3300 watts (1650X2= 3300 watts].

[171] Total Outdoor submitted permit applications to establish use for the record and for a Sign/Building permit for the new sign in July 2012. DR 000599-00605 (establish use) and DR 00606-00610 (Sign/Building Permit). The 2009 Seattle Building Code and 2009 Seattle Energy Code was in effect then.

lighting based exclusively on the light and glare standards of the zone.[172] Total Outdoor's attempt to artificially isolate SMC 23.42.124 is inconsistent with legislative interpretation. Ordinances are to be read as a whole in order to give meaning to and harmonize all provisions.[173] As consistent with *Rhod-A-Zalea*, the City requires not only that the exterior lighting be shielded and directed away from adjacent uses, which has not occurred,[174] but also that any new light fixtures must conform to the Energy Code. Total Outdoor failed to carry its burden to establish the City erred in concluding the maximum wattage for the new lighting fixtures installed in 2012 is 816 watts.

V. CONCLUSION

This is a case about a nonconforming structure that existed for three decades before Total Outdoor expanded and changed it. The law and facts are clear: the expansion of the sign face and structure height is not allowed and the change to the lighting is allowed only if it complies with current law.

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[172] Total Outdoor's opening brief, p. 44 citing SMC 23.42.124.
[173] *HJS Development v. Pierce County*, 148 Wn.2d 451, 471-472, 61 P.3d 1141 (2003).
[174] DR 00512/CP586 (Site inspection report prepared by Hoyos documenting light and glares in neighboring condominium units; DR 000614-000617/CP 688-692 (email between Hoyos and condominium resident and photos of light and glare in units).

Because Total Outdoor fails to carry its substantial burden under LUPA, the City respectfully asks this Court to affirm the City's land use decisions.

DATED this 10th day of March, 2014.

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Dated this 10th day of March, 2014.

Rosie Lee Hailey

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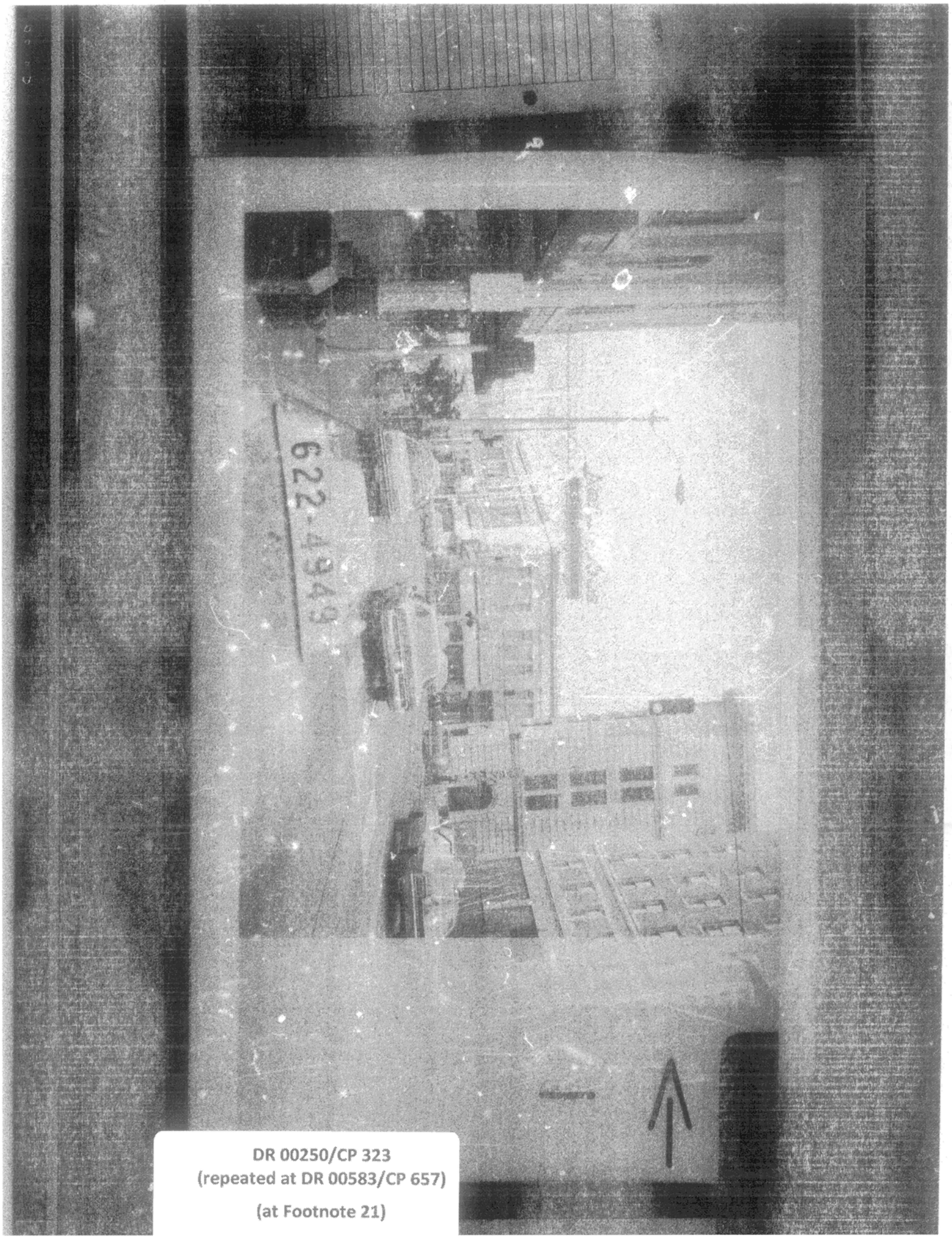

DR 00250/CP 323
(repeated at DR 00583/CP 657)

(at Footnote 21)