Reference #: 3024037

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Appeal Details

Address: 3038 39th Avenue SW, Seattle,

Decision Elements: Special Exception; historic lot exception;

Interest: Seattle Green Spaces Coalition is a Washington State nonprofit organization dedicated to protecting open space. We will be specifically and perceptibly harmed by the proposed action. Allowing development on a substandard lot will contribute to increased traffic, congestion, add to crowding, result in the loss of an exceptional tree, and adversely affect the environment through lack of open space. People who attend our meetings will experience adverse effects. The loss of open space and tree canopy is very injurious. Elaine Ike, Co-Chair and member of SGSC's Board of Directors, lives one block from 3036 39th Ave SW. She will be specifically and perceptibly harmed by the proposed action as she views the exceptional tree from her home, enjoys bird life which inhabits the site, enjoys fresh air from the tree, and enjoys the open space the site provides. Allowing building on the site will cause direct harm by eliminating these open space benefits. Allowing the building of a two story home with attached two car garage on this very small lot is not in keeping with the zoning of a Single Family 5000 zone neighborhood. Neighborhoods are experiencing a great deal of traffic, noise and congestion as our city grows. It is imperative that we balance growth with green space. This is an issue of public health. It is for these reasons that the City Council adopted the SF 5000 limitations and has limited the historic lot exception. To grant a Master Use Permit under the historic lot exception (SMC 23.44.010(B)(3) based on an unsupported inference of the intent of an individual based on the building permit for an adjacent lot, filed over 86 years ago does not do justice to our zoning laws and appellate process. SDCI's application of the Historic Lot Exception to this MUP constituted legal error and is a Type II land use decision that is directly appealable to the Hearing Examiner. We incorporate by reference the attached brief.

Objections: SDCI improperly analyzed and decided upon a Master Use Permit applying the historic lot exception, a Type II land use decision. SDCI's finding of a historic lot exception is not supported by the facts. A separate building site was never established by the public records for this side yard. We incorporate by reference the attached brief.

Desired Relief: We ask the Hearing Examiner to reverse the MUP and to make a finding that the historic lot exception does not apply to the side yard. For purposes of further appeal, we ask for a determination that the historic lot exception is a Type II land use decision is reviewable de novo by the Hearing Examiner. Further we request a determination that the issue is ripe for review and a code interpretation is not a prerequisite to appeal. We ask for a stay on any action on the site, including removal of vegetation, pending any and all appeals.

Contacts

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Appeal

Appellant: Seattle Green Spaces Coalition

Project #: 3024037

Address: 3036 39th Ave SW

I. Introduction

Seattle Green Spaces Coalition submits this appeal to the decision of Seattle Department of Construction and Inspections to allow building on a side yard located at 3036 39th Ave SW. The side yard is less than the required 5,000 square feet in a Single Family 5,000 zone.

Seattle Green Spaces Coalition appeals because SDCI misapplied the historic lot exception, inferring "intent" even though intent is not one of the statutory factors.

II. Standing

Under Washington law, a petitioner has standing if he or she alleges an injury in fact, that the petitioner will be specifically and perceptibly harmed by the proposed action. A nonprofit group has standing if one of its members has standing. East Gig Harbor Imp. Ass'n v. Pierce Cty, 106 Wn.2d 707, 710, 724 P.2d 1009 (1986).

Seattle Green Spaces Coalition is a Washington State nonprofit organization. We have standing because we will be specifically and perceptibly harmed by the proposed action. Our organization meets several times per month in the vicinity of 3036 39th Ave SW. Allowing development on a substandard lot in this area will cause increased traffic, parking congestion, add to crowding in the neighborhood, result in the loss of an exceptional tree, and adversely affect the environment through lack of open space. We often enjoy and remark upon the sight of the exceptional Ponderosa Pine at our meetings. People who attend our meetings will experience adverse effects. At a time of increasing density in our neighborhoods, the loss of open space and tree canopy is very injurious.

Elaine Ike, Co-Chair and member of SGSC's Board of Directors, lives one block from 3036 39th Ave SW. She will be specifically and perceptibly harmed by the proposed action as she views the exceptional tree from her home, enjoys bird life which inhabits the site, enjoys fresh air from the tree, and enjoys the open space the site provides. Allowing building on the site will cause direct harm by eliminating these open space benefits.

III. Issue Presented

Did the Land Use Planner err in rendering a decision on the Master Use Permit (MUP) application where none of the three criteria for the historical lot exception were met?

IV. Facts

Background to Changes in the Historic Lot Exception

Seattle has been experiencing a building boom for several years. Developers have been hunting out backyards and side yards to building new homes. Developers take advantage of an exception known as the "historic lot exception" to obtain building permits on backyards and side yards.

In 2012, the Seattle City Council restricted the historic lot exception by removing property tax segregation as a basis for identifying a separate buildable lot.

In face of growing public outrage to building on small yards, in 2014, the City Council further tightened the historic lot exception, and required notice to community members to allow them to comment and to appeal.[1] Ordinance 124475 contained a provision allowing for **Special Exception Type II** review for permits under the historic lot exception:

> Special exception review for lots less than 3,200 square feet in area. A special exception Type II review as provided for in Section 23.76.004 is required for separate development of any lot with an area less than 3,200 square feet that qualifies for any lot area exception in subsection 23.44.010.B.1.

Developer Seeks to Build on a Parcel Under 3200 Sq. Ft.

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[1] As reported in the *Seattle Times* on May 19, 2014, "Under the new rules, no development will be permitted on lots smaller than 2,500 square feet. Many historic records can no longer be used to qualify a small lot as buildable. And neighbors will be provided notice and the right to appeal to a city hearing examiner any construction requests on lots smaller than 3,200 square feet."

On November 12, 2015, developer Cliff Low purchased a house with a side yard in a single-family neighborhood for approximately $505,000 from longtime owner George E. Manil.

We refer to and incorporate by reference herein, the City of Seattle land use documents and historical records relating to the property. The site was originally platted in 1906. In July 1930, then owner Robert Coulthard applied for a building permit for a family home at 3038 39th Ave SW. He did not apply for a permit to build on the side yard. The property went through multiple ownership. At no time between 1930 to 2015, did any of the owners seek a building permit for the side yard.

For decades, the side yard has been used as a play area for neighborhood children. We will introduce witnesses to testify to the historic use of the side yard where many children have grown up. Right in the middle of the side yard, taking up most of the yard, is an exceptional Ponderosa Pine tree, estimated at over 90 years old. As it has grown over generations, the pine tree has long been a landmark of the neighborhood. We will introduce a video about nesting birds and other attributes of the tree and side yard.

The year 2016, when Cliff Low sought a building permit, is the first time that anyone ever sought a building permit for the side yard. Less than a week after he bought the property, Cliff Low requested a determination from SDCI that the property contained 2 separate building lots. Mr. Low sought to apply the special exception for a historic lot because the side yard does not meet minimum square footage to be a separate building site.

The City determined that the side yard qualifies as a separate legal building site under exceptions to the minimum lot area requirement set forth in the historic lot exception of the Seattle Municipal Code (SMC 23.44.010.B.1). (Opinion letter dated January 5, 2016, under project 3022995.)

SDCI Determined that the Side Yard is a Legal Building Site, Based on an Inference of a 1930s Owner's Expectation of Potential Intent to Build at an Unspecified, Later Date.

David G. Graves, Senior Land Use Planner, provided a determination about the side yard in a Legal Building Site Letter (Project No. 3022995) ("LBS Letter"), dated January 5, 2016. He applied the facts and analyzed the three alternative bases for the Historic Lot Exception.

Mr. Graves reported that there is **no deed** before 1957 establishing the side yard as a separate building site. (LBS Letter, p. 2.)

Mr. Graves determined that the side yard "**does not qualify for the Historic Lot Exception on the basis of platting,**" because it is only a portion of the original platted parcels. (LBS Letter, p. 2.)

With respect to building permits, Mr. Graves analyzed Robert Coulthard's 1930 building permit for the house site and the absence of a building permit for the side yard. Mr. Graves stated that "there is **no indication that any building permits were issued for Lot B [the side yard**]", although there was a building permit for the house on the house site. (LBS Letter, P. 2).

Despite no platting, no deed and no building permit for the side yard, Mr. Graves concluded that the side yard "does meet the requirements of the Historic Lot Exception and qualifies as a separate legal building site." (LBS Letter, page 2.)

Mr. Graves figured that because Robert Coulthard had applied for a permit to build his house, **"it can be reasonably inferred that Mr. Coulthard had an expectation that the remainder of the property, not called out in Permit No. 29439, could later be separately developed."** (LBS Letter, p, 2,)

In his analysis, Mr. Graves considered how the two parcels had been in common ownership since at least 1930, that Mr. Coulthard had sold off property adjacent to the two parcels, but had retained the house site and side yard for himself (*perhaps because he wanted an extra big yard?*) and that when the parcels were conveyed again in 1931, 1937, 1942, and 1965, no deed showed conveyance of the side yard independent of the other contiguous property.

Public Notice was Provided to Give the Community an Opportunity to be Heard and to Appeal

On or about May 26, 2016, SDCI posted notice on the property, consistent with the 2014 adopted Ordinance giving people an opportunity to be heard and to appeal:

> Comments may be submitted through: 06/08/2016 The following approvals are required: Special Exception to allow a new single family dwelling unit on a lot less than 3,200 sq. ft.

Over 70 comments were submitted to SDCI about the proposed building on this small site. News outlets have reported on the effects of the proposed building on the neighborhood. (Westside Weekly, West Seattle Blog, and various blogs).

One Seattle resident's comments resonate with the neighborhood:

> While Seattle needs to support density growth, that should certainly be balanced with ecological concerns. This tree houses an owl, yearly hibernating ladybugs, and eagles circle it searching for crows eggs, just to mention some of the wildlife

> and habitats involved. It is part of the urban forest which makes Seattle such a green and lovely space to want to live in.
>
> Moreover, this majestic tree is a legacy we have been given and should pass on to generations to come.
>
> Numerous studies have shown the importance of trees from reduced pressure on water processing plants, to offsetting the effects of carbon dioxide and reducing greenhouse effect; and trees affect the mood and community pride of residents.
>
> While city code allows for this tree to be cut down for development, I feel it is a shame to lose this towering tree and all the habitat it provides. Is there anything we neighbors can do?

On October 6, 2016, Seattle DCI Land Use Planner Crystal Torres granted a Special Exception Decision on the Master Use Permit. Her **Analysis and Decision** states, in pertinent part:

> "The Land Use Code provides a Special exception review process for lots less than 3,200 square feet in area (SMC 23.44.010.B.3). **A special exception Type II review as provided for in Section 23.76.004 is required for separate development of any lot with an area less than 3,200 square feet that qualifies for any lot area exception in subsection 23.44.010.B.1."** (Emphasis added.)

V. Reasons for Reversal

The Master Use Permit Should Be Denied Because It Was Based on an Erroneous Analysis and Decision.

Seattle Municipal Code 23.44.010 sets out the minimum lot size for a single-family home. In areas zoned Single Family 5,000, the minimum lot size is 5,000 square feet. SMC 23.44.010A.

Only a few very limited exceptions allow a developer to build on a lot less than 5,0000 square feet. One of these exceptions, known as the historic lot exception, is set forth Seattle Municipal Code 23.44.010 (B)(1)(d), which states in pertinent part:

> Exceptions to minimum lot area requirements. The following exceptions to minimum lot area requirements are allowed, subject to the requirements in subsection 23.44.010.B.2, and further subject to the requirements in subsection 23.44.010.B.3 for any lot less than 3,200 square feet in area:

> …. d. "The Historic Lot Exception." The historic lot exception may be applied to allow separate development of lots already in existence if the lot has an area of at least 2,500 square feet, and was **established as a separate building site in the public records of the county or City prior to July 24, 1957, by deed, platting, or building permit.** (Emphasis added.)

The historic lot exception applies only if the lot was established as a separate building site in the public records of the county or City prior to July 24, 1957 either by

DEED or PLATTING or BUILDING PERMIT

The historical lot exception applies where a separate building site existed in the public records by 1957 by deed, platting or building permit. The historic lot exception applies only if one of following questions is answered "Yes."

1. Was there a deed establishing the side yard as a separate building site?

2. Was there platting, which established the side yard as a separate building site?

3. Was there a building permit establishing the side yard as a separate building site?

It is uncontested that that there was no deed or platting establishing the side yard as a separate building site in 1957.

Thus the sole question should have been whether there had been a building permit for the side yard, which established it as a separate building site in the public records.

The fact that in 1930 Robert Coulthard obtained a building permit for his house on the house site did not create a separate building site on the side yard. The only way Mr. Coulthard could have established a separate building site in the public records would have been to apply for and obtain a building permit. This did not happen.

In 2016, 86 years after Mr. Coulthard decided not to obtain a building permit for the side yard, Cliff Low bought the house and side yard. From personal experience he already knew about the strict limitations of the historic use exception.

Four years previously, Mr. Low had tried to sell the western part of a lot zoned Single Family 5,000 to a developer to build under the historic use exception. The

builder, Daniel Duffus of Soleil Development LLC, had obtained from Mr. Low the right to purchase the 3,300 square foot western portion "contingent on the Subject Property being the subject of a building permit." However, SDCI determined that the historic use exception did not apply even though there had been a permit for building on the east portion of lot 7. (In re Property at 3807 East Jefferson Street, DPD Interpretation No. 12-002 (DPD Project No. 3013360)(Feb. 28, 2013)[2] The Court of Appeals agreed that the historic use exception did not apply to Mr. Low's property because **there was no separate building permit for the subject site**:

> "The issue is whether the property was "*established*" as a '*separate building site*' in the public records. The historic records which have been presented by the parties, and which are not disputed, do not show that the west half of Lot 7 was ever the subject of a separate building permit, or that it was ever owned separately from all of the abutting properties."
>
> (Emphasis in original.)

Duffus v. City of Seattle, No. 71294-2-I (Wa. App., Div. 1. Feb. 23, 2015)(unpub. at. 4)

Similarly, in R/L Associates, Inc. v. City of Seattle, 61 Wn. App. 670 (Div. 1. 1991), the Court of Appeals held that the historic use exception did not apply even though there had been a separate deed for the subject lot. The Court distinguished a "separate site" (which the deed established) from a "separate **building** site" as required by the statutory language. The fact that there was a separate site did not establish that the site was established in the public records as a separate building site. ("[D]eeds do not demonstrate whether either conveyance was made for the express purpose of establishing a "separate building site."' Id. at 674.) Under the same reasoning, the fact that Mr. Coulthard had obtained a building permit for the house site does not establish a separate building site in the public record for the side yard.

In this case, the SDCI planner erred by inferring that since Mr. Coulthard never filed a building permit for the side yard, and had not included the side yard in the building permit for his house site, Mr. Coulthard must have intended to develop the side yard at a later time. Without any factual basis, SDCI erroneously concluded that the side lot must have been maintained in its current configuration for the purpose of future development as a separate building site.

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[2] As a party in interest, Clifford Low is collaterally estopped from asserting the historic use exception applies on the basis of a building permit for a contiguous property. Hilltop Terrace Homeowners Assn v. Island County, 126 Wn.2d 22, 31, 891 P.2d 29 (1995).

There is no justification for SDCI's conclusion, as there are myriad other reasons why Robert Coulthard may have chosen not to build on the side yard, but instead to keep it for a side yard. He may have simply wanted a place to grow a beautiful pine tree. He may have planned to erect a shop or additional garage. Further, Mr. Coulthard actually built his house with the deck and stairs partially into the side yard which suggests that he did not intend to sell the side yard for separate development.

The speculation that Mr. Coulthard might have wanted to build on the side yard at a future date is unsupported by the evidence and is not a sufficient basis for the historic lot exception. Exceptions must be strictly construed and an applicant seeking to fit into a statutory exception has the burden of establishing the exception. See Isla Verde Intern. Holdings, Inc. v. City of Camas, 146 Wn.2d 740, 759, 49 P.3d 867 (2002).

Further, there are strong public policy reasons to construe the historic lot exception narrowly. Foremost, the Seattle City Council has indicated its desire the limit the exception. Second, in light of the pressures of density and loss to the tree canopy, there are significant public policy reasons not to deviate from the 5,000 square foot minimum lot size requirement in SF 5000 zones.

The standard of review of a decision to apply the historic lot exception is *de novo*. There is no deference given to Director's decisions made on special exceptions, such as the historic lot exception. SMC 23.76.022 (6)(7), SMC 23.44.010.B.3. Under a *de novo* examination of the facts, there is not sufficient evidence to conclude that a separate building site for the side yard had been established in the public records prior to 1957.

This Appeal is Ripe for Review without a Payment for a Code Interpretation.

Land use decisions are classified into five categories. Type I and II decisions are made by the Director and are consolidated in Master Use Permits. Type I decisions are decisions made by the Director that are not appealable to the Hearing Examiner. Type II decisions are discretionary decisions made by the Director that are subject to an administrative open record appeal to the Hearing Examiner. SMC 23.76.004.

A historic lot exception is a "special exception" under SMC 23.44.010.B.3. As a special exception, it is a Type II decision and subject to review by the Hearing Examiner. SMC 23.76.006.C(2)(d), 23.76.022. Whether an exception to the minimum lot size should be permitted under the historic lot exception is a determination which necessarily merits the attention of the administrative process. See R/L Associates, supra. (Historic lot exception is a Type II decision.)

On or about May 26, 2016, SDCI posted notice on the property, consistent with the 2014 adopted Ordinance giving people an opportunity to be heard and to appeal:

> Comments may be submitted through: 06/08/2016 The following approvals are required: **Special Exception to allow a new single family dwelling unit on a lot less than 3,200 sq. ft.**

(Emphasis added.)

In response to the notice, neighbors made comment and are seeking review by the hearing examiner.

As set forth in SMC 23.76.022, Type I decisions are subject to review through a land use code interpretation. In contrast, Type II decisions are directly appealable to the hearing examiner. Type II special exception decisions do not require code interpretations as a prerequisite to appeal to the hearing examiner. SMC 23.76.022.

It would violate state law to require neighbors or a nonprofit community organization to pay the high cost of a code interpretation as a prerequisite for appealing a historic lot special exception. Revised Code of Washington ("RCW") 82.05.050 regulates fees which may be imposed in connection with development. Subject to identified statutory exceptions RCW 82.02.020 forbids a local authority from imposing any fee, either direct or indirect, on construction development activities except for collecting reasonable fees **from an applicant** for a permit or other governmental approval to cover the cost of processing applications, inspecting and reviewing plans, or preparing certain statements.
RCW 82.02.020 requires strict compliance with its terms. Trimen Dev. Co. v. King County, 124 Wn.2d 261, 270, 877 P.2d187 (1994); R/L Associates, Inc. v. City of Seattle, 113 Wn.2d 402, 409, 780 P.2d 838 (1989).

Requiring neighbors or a nonprofit community organization to pay the high cost of a code interpretation would increase the cost of an appeal from the statutory fee of $85 to over $3,000. This raises access to justice and equity concerns. Such a fee would be a prohibited under the Washington State Constitution and the fifth and fourteenth amendments of the United States Constitution. See Village of Willowbrook v. Loech, 528 U.S. 562, 564, 120 S. Ct. 1073 (2000); Scott v. City of Seattle, 99 F. Supp.2d 1263, 1271-72 (W.D.Wash.2000).

Conclusion

Seattle Green Spaces Coalition respectfully requests the Master Use Permit be denied. Allowing the building of a two story home with attached two car garage on this very small lot is not in keeping with the zoning of a Single Family 5000

zone neighborhood. Our neighborhoods are experiencing a great deal of traffic, noise and congestion as our city grows. It is imperative that we balance growth with green space. This is an issue of public health. It is for these reasons that the City Council adopted the SF 5000 limitations and has limited the historic lot exception.

To grant a Master Use Permit based on an unsupported inference of the intent of an individual based on the building permit for an adjacent lot, filed over 86 years ago does not do justice to our zoning laws and appellate process.

Submitted: October 19, 2016.

Seattle Green Spaces Coalition

By: Mary K. Fleck, Co-Chair