Supplemental Memorandum of Seattle Green Spaces Coalition

Appellant: Seattle Green Spaces Coalition

Project #: 3024037

Address: 3036 39th Ave SW

I. Introduction

Seattle Green Spaces Coalition submits this supplemental memorandum of law setting forth the legal basis of the Hearing Examiner's jurisdiction. This memorandum incorporates by reference the facts and arguments set forth in the Appellant's brief, the briefing submitted by co-Appellants, and the filings of record.

II. Issue Presented

Does the Hearing Examiner have jurisdiction to review Seattle Department of Construction & Inspection's permit to allow building on a lot under the historic lot exception where the appellant has not sought a land use interpretation?

This case has significant implications for the public's access to justice. At issue is whether the administrative scheme requires neighbors who are contesting the granting of a historic lot exception to pay the heavy cost of a land use interpretation as a prerequisite to appeal.

The Seattle Municipal Code does not contain a mechanism for either notice or appeal of a Preliminary Opinion Letter and there is no reported case establishing a mechanism whereby neighbors or nonprofit groups may appeal from a Preliminary Opinion Letter. Appealing from the decision to issue a building permit is the correct avenue for appeal.

III. Facts

On November 12, 2015, developer Cliff Low purchased a house in Seattle in a Single-Family 5000 zone. The house is located on a 6,333 square foot site.

A few days afterward, Mr. Low requested a Building Site Letter from Seattle Department of Construction and Inspections ("SDCI") asking whether the site contained two separate building lots.

On January 5, 2016, SDCI provided a **Building Site Letter** ("Preliminary Opinion Letter"). The Preliminary Opinion Letter set forth a "preliminary opinion" that the site meets the requirements of the historic lot exception and contains two

separate legal building sites. The Letter informed Mr. Low that the opinion was *preliminary* only. It stated:

> The position set forth in this letter represents the **preliminary opinion** of the Department. (Emphasis added.)

On May 26, 2016, SDCI posted notice on the property informing neighbors of the proposed construction. The sign informed neighbors of the comment period and told them that a Special Exception was required for construction of a single-family dwelling unit on a lot less than 3,200 square feet:

> 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.

In response, over 80 neighbors submitted public comments to SDCI, including three members of the Seattle Green Spaces Coalition Board of Directors.[1]

On October 6, 2016, Seattle DCI Land Use Planner Crystal Torres granted a **Special Exception Decision** on the Master Use Permit. It 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.

On October 6, 2016, SDCI sent a notice of the decision to certain people who had made comments, informing them of the right to appeal. It stated:

> The following appealable decisions have been made based on submitted plans:
>
> Grant - Special Exception to allow a new single-family dwelling unit on a lot less than 3,200 sq. ft.

[1] On May 31, 2006, Elaine Ike, SGSC Board Member filed a comment against the proposed development. On June 5, 2016, Mary K. Fleck, SGSC Board Member filed a comment. On June 6 and 7, SGSC Board Member Martin Westerman filed comments. These documents are part of the public record and are incorporated herein by reference.

On October 19, 2016, Seattle Green Spaces Coalition filed an Appeal with the Hearing Examiner's Office along with a request to waive the statutory $85 filing fee because SGSC, a non-profit corporation, has very limited funds. The waiver request was denied and SGSC subsequently paid the $85 fee.

On October 20, 2016, Lisa Parriott, a neighbor who had also previously commented and filed an appeal, filed a request for a Land Use Interpretation, paid the corresponding fee of $2,800 and provided a statement of financial responsibility for additional, associated costs.[2]

III. Legislative Framework

The Historic Lot Exception is an *Exception* to Permitted Uses of Right

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. Under our zoning law, single-family homes are the "permitted use" in SF 5,000 zoning. Any other type of use requires a variance or special exception.

The historic lot is an exception to the SF 5,000 zoning. It allows development on substandard lots only if it can shown that a buildable lot had been established in the public record prior to 1957, based on the filing of certain specified property records.

"Preliminary Opinion Letters" Are Not Type I Decisions

Seattle Municipal Code classifies land use decisions into five categories. Procedures for the five different categories are distinguished according to who makes the decision, the type and amount of public notice required, and whether appeal opportunities are provided. SMC 23.76.004. Land use decisions are generally categorized by type in Table A for SMC 23.76.004.

The Table classifies decisions as Type I or Type II, including the following, which are relevant to this appeal:

Type I: Permitted uses of right

Type II: Special Exceptions

[2] SGSC contends that it would be duplicative to require SGSC to pay for and request a Land Use Interpretation as a prerequisite to its appeal. Further, such an interpretation would be futile, as the Land Use Planner has already examined the public record documents in connection with SDCI's Preliminary Opinion Letter.

The Seattle Municipal Code sets up a mechanism for appeals of building permit decisions. Type I and II decisions are made by the SDCI Director and are consolidated in Master Use Permits. Type I decisions are made by the Director and are not appealable to the Hearing Examiner. They are subject to review through a land use code interpretation. In contrast, Type II decisions are directly appealable to the hearing examiner and do not require code interpretations as a prerequisite to appeal. SMC 23.76.004; 23.76.022.

"Uses permitted outright" are Type I decisions under Table A. "Special exceptions" are Type II decisions under Table A.

The Seattle Municipal Code does not refer to Preliminary Opinion Letters. It does not define Preliminary Opinion Letters. The Code does not establish a review mechanism for the appeal of a Preliminary Opinion Letter. There is nothing in the Code, which provides a mechanism for notice to neighbors of a Preliminary Opinion Letter or about how to "appeal" a Preliminary Opinion Letter.

IV. The Hearing Examiner Has Jurisdiction over Seattle Green Spaces Coalition's Appeal.

The Hearing Examiner has jurisdiction over SGSC's appeal because the law allows the public to seek redress of a violation of the zoning law. The Hearing Examiner has jurisdiction even though SGSC has not sought a land use interpretation for two reasons: (1) a historic use exception is not a use permitted of right and (2) the statutory framework does not require a land use interpretation of a Preliminary Opinion Letter as a prerequisite to challenge the issuance of a building permit.

A Historical Use Exception is not a Use Permitted Outright.

The Seattle Municipal Code permits property to be used outright for single-family homes, on a 5,000 square foot lot. All other uses are **not permitted of right** and require an exception. To allow a developer to build a home on a substandard size lot is an exception to the permitted use to build on a 5,000 square foot lot.

SDCI's Preliminary Opinion was based upon a Land Use Planner's "inference of intent." In the absence of the statutorily required public records establishing a separate building site on the northern part of the site, the Planner exercised discretion. The Planner exercised discretion to infer intent on the part of then-owner Robert Coulthard in 1930 to build upon part of the site at some unspecified time in the future. This exercise of discretion is similar to the type of discretion exercised in Type II variances and special exceptions.

For SDCI to issue a building permit on a lot less than 5,000 square feet in a single-family zone to developer Clifford Low is an act based on a discretionary

opinion and does not give rise to a use permitted of right, therefore no land use interpretation is required.

Even if The Historic Use Exception is a Permitted Use, The Hearing Examiner Has Jurisdiction Over Seattle Green Spaces Coalition's Appeal.

Even if the historic use exception were a permitted use, the Hearing Examiner has jurisdiction over SGSC's appeal because the law does not require SGSC to seek and pay for a land use interpretation as a prerequisite.

We begin with the basic premise that there must first be a decision before there can be an appeal. There is no requirement to exhaust administrative remedies without the issuance of a final, appealable order. No exhaustion requirement arises without the issuance of a final, appealable order. Valley View Indus. Park v. City of Redmond, 107 Wn.2d 621, 634 (1987) (City of Redmond's letter stating that building permit applications had lapsed and all rights were extinguished was not the equivalent of a final order.) A letter from an agency will constitute a final order if the letter clearly "fixes a legal relationship as a consummation of the administrative process." Such a letter must be so written as to be clearly understandable as a **final determination of rights**. Id.

Neighbors who contest an SDCI action cannot appeal until SDCI has made an actual decision. Until a decision is rendered, there is no notice to the public about a decision. Until a decision is rendered, there is no finality, which would give rise to an appeal. Clearly, a person cannot appeal until a decision is rendered.

Did SDCI make a decision when it issued its Preliminary Opinion Letter? Not according to the terms of the letter itself. Indeed, the letter actually stated that merely "a preliminary opinion." The letter was not a final determination. Opinion letters are designed to advise developers as to whether a site may be buildable. They are not binding. Further, there is a process for developers in the event the developer is not satisfied with the Preliminary Opinion Letter. If dissatisfied, the developer may request and pay for a Land Use Interpretation.

Because the Preliminary Opinion Letter was not a final determination, there is no requirement that Seattle Green Spaces Coalition exhaust its remedies by seeking to appeal from the Preliminary Opinion Letter.

At the point in time when SDCI issued its Preliminary Opinion Letter, there was no notice to SGSC nor was there an opportunity to appeal. The Seattle Municipal Code does not define or describe SDCI Preliminary Opinion Letters and there is no established legal framework for appealing such a Preliminary Opinion Letter. Preliminary Opinion Letters are not defined in the Code.

Not only is there no mechanism for notice or appeal of a Preliminary Opinion Letter set forth in the Code, there is also no reported case that

establishes a method whereby neighbors or nonprofit groups may appeal from a Preliminary Opinion Letter. There is no legal authority for the proposition that neighbors or non-profit community groups must seek and pay for a land use interpretation as an administrative remedy to a Preliminary Opinion Letter. There is no place in the Seattle Municipal Code requiring neighbors to pay for a legal interpretation as a prerequisite to an appeal.[3]

On October 6, 2016, SDCI announced its decision to issue a Master Use Permit. This decision was the first notice to community members who had made comments about any SDCI action on the historic lot exception request. Challenging the issuance of the Master Use Permit is the only opportunity for neighbors to seek review of whether the historic exception applies. Up to this point in time, there has been no appealable decision.

A scheme for administrative review of an agency's actions must clearly tell the public what steps must be taken to exhaust their administrative remedies. Here, neighbors were not informed by the Seattle Municipal Code or by notice from SDCI how to appeal SDCI's action of issuing a building permit based on the historic lot exception. The posted and mailed Notices referred only to the Type II Special Exception (which the Hearing Examiner indicates to relate only to the design development standards). No information was provided to Seattle Green Spaces Coalition about the need to pay for a costly land use interpretation. It would be a miscarriage of justice not to allow SGSC to be heard. The result would be unconscionable: neighbors who learn for the first time about a proposed development by seeing the posted notice would be dismissed after appealing for not having sought administrative review of a Preliminary Opinion Letter, a process which is not defined in the Seattle Municipal Code.

The Court of Appeals case, Kates v. City of Seattle, 44 Wn. App. 754, 762, 723 P.2d 493 (Div. II 1986) is instructive. The Court of Appeals discussed *in dicta* the interpretation procedure and stated that the procedure was not required for exhaustion. That case involved a group of neighbors who sued the City for

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[3] 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 the fees that 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).

issuing a building permit in violation of state subdivision statutes because the owner had failed to submit a preliminary short plat for approval. The neighbors claimed that the Director's decision that a preliminary plat was unnecessary was wrong. The City argued that the neighbors had failed to exhaust their administrative remedies contending that they should have sought an interpretation of the subdivision ordinance. The Court of Appeals disagreed, noting that neighbors had no reason or opportunity to invoke SMC 23.88.020. The land use interpretation provision was designed for developers to discover the Director's interpretation of the regulations before applying for permits or beginning construction. Neighbors had no reason to seek an interpretation, the Court concluded.

A statutory scheme must enunciate the steps necessary to exhaust administrative remedies. It must tell the public what steps to take to challenge the historic lot exception. Here there were three actions: (i) a Preliminary Opinion Letter to the developer, (ii) a posted notices on the land, and (iii) the Analysis and Decision on the MUP. None of these actions provided notice to Seattle Green Spaces Coalition of administrative remedies for how to appeal a historic lot exception.

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 first, 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).

As shown above, the regulatory framework does not require neighbors or nonprofit organizations to seek a land use interpretation prior to challenging a historic lot exception. The Hearing Examiner has jurisdiction over Seattle Green Spaces Coalition's appeal of the historic lot exception decision.

Conclusion

Over 80 neighbors, including Board Members of Seattle Green Spaces Coalition, filed comments in opposition to the proposed development.[4] At what point are

[4] Tim Adams, Ellen Barnet, Karen Barrett, April Bartholomew, Randy Bartholomew, Joan Bateman, Cole Bauersfeld, Holly Bauersfeld, Myla Bauersfeld, Athena Bautista, Mark Beaufait, Justin Bishop, Emily Buckley, Dori Cahn, Salle Certo, Stan Delles, Bonnie Drexler, Lorraine Damman, Aaron Darwin, Catherine Darwin, Chris Duncan, John Enger, Alex Fernandez, Isac Fernandez, Jennifer Fernandez, Octavio Fernandez, Mary Fleck, Kirsten Franklin-Temple, Marcia Friedman, Amy Hale, Gerald Haver, Ginny Haver, A. Anita Hildago, Suky Hutton, Elaine Ike, Lorraine Johnson, Sandi Kamuf, Hugh Kim, Nancy Lindskog, Carol Long, Kristin Love, Leigh Lennox, Sabrina Lytton, Laurie Matthews, Mitchell Mellors, Kimberly Miller, Krystal Miller, Melissa Miller, Kathleen Nelson, Hildegard Nichols, Ben Nimmons, Fran O'Connor, Amy Ojendyk, Ronald Osborne, Allison Ostrer, Steve Overman, Lisa Parriott, Wendy Personet, Todd Peterson, Ann

these comments considered? What avenue or remedy exists for these neighbors?

Developer Clifford Low contends (without any legal authority) that the only way for neighbors to appeal the historic lot exception is to request and pay for a land use interpretation. This would yield an absurd result. **Would each neighbor have to pay over $2,800 to exhaust his and her administrative remedies?** (For 80 neighbors, this would require close to $240,000!) It would be an abuse of the regulatory framework to require each neighbor to request and pay for a land use interpretation as a prerequisite to appeal. That would create a windfall to the City and an undue burden on the citizenry. It is not contemplated by the Seattle Municipal Code or the Hearing Examiner Rules.

The review framework makes no mention of a Preliminary Opinion Letter. There is no legal authority establishing any method for neighbors to appeal from a Preliminary Opinion Letter. For the foregoing reasons, we respectfully request that the Hearing Examiner accept jurisdiction of this appeal so that we may have our opportunity to be heard.

Submitted: November 10, 2016.

Seattle Green Spaces Coalition

By: Mary K. Fleck, Co-Chair

Logan Phillips, Jodie Ramey, Arlene Roth, Ron Sallsbury, Samuella Samaniego, Tony Sepanski, Inga Shigetan, Randy Shigetan, Andrea Slayton, Ken Steinberg, Laura Steinberg, Lisette Terry, Rosa Umemoto, Erin (Last name unknown), Patricia (Last name unknown), Bendersynch (Name unknown), Steitzac (Name Unknown), Carol Viger, Martin Westerman, C.D. Wickberg, Ben Wilder, Duk-joo Yu, and Zelma Zieman