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BEFORE THE HEARING EXAMINER
CITY OF SEATTLE

In the Matter of the Appeal of:)	Hearing Examiner File:
LISA PARRIOTT, AND FRIENDS OF THE SILENT GIANT)	MUP-16-019; MUP-16-020
from a decision by the Director, Department of Construction and Inspections)	Department Reference: 3024037
)	APPELLANT PARRIOTT'S BRIEF REGARDING DECISION TYPE

Appellant Parriott submits this brief in response to the Prehearing Order of the Hearing Examiner, entered November 2, 2016. The order sets a deadline of November 10, 2016 for appellants to file briefs addressing the question of whether their appeals seek review of a Type II issue, which is within the jurisdiction of the Hearing Examiner, or a Type I issue, which can only come before the Hearing Examiner by way of appeal from a code interpretation.

**HISTORIC LOT EXCEPTIONS UNDER 3,200 FEET
RECEIVE TYPE II SPECIAL EXCEPTION REVIEW**

The Seattle land use code mandates Type II special exception review for lots under 3,200 square feet that invoke the Historic Lot Exception. SMC 23.44.010(B)(3). The legal question now before the Hearing Examiner is whether this Type II review encompasses the Department's decision to approve the entire project, or alternatively, only those portions of the project relating

1 to the criteria for window size and lot depth. For the following three reasons, Appellant believes
2 the most accurate reading of the land use code is that the Type II review encompasses the entire
3 project:

4 1) The plain language of the code calls for Type II review of the entire project;

5 2) The legislative materials placed before the Seattle City Council when this section of
6 the code was drafted call for Type II review of the entire project;
7

8 3) Other sections of the code do invoke Type II review for only limited, criteria-specific
9 portions of projects, and these other code sections are written very differently than the section for
10 Historic Lot Exceptions.

11 I. PLAIN LANGUAGE OF THE CODE

12
13 “Special exception review for lots less than 3,200 square feet in area. A **special**
14 **exception Type II review** as provided for in Section 23.76.004 [Hearing
15 Examiner review] is required for separate development of any lot with an area
16 less than 3,200 square feet that qualifies for any lot area exception in subsection
17 23.44.010.B.1 [Historic Lot Exception and others]. The **special exception**
18 **application** shall be subject to the following provisions:
19

20 a. [criteria on lot depth]

21 b. [criteria on windows]

22 c. [criteria on windows]”

23 SMC 23.44.010(B)(3) (emphasis added).
24

25 The section above calls for two things. In the first two sentences, it calls for Type II
26 special exception **review** of sub-3,200 Historic Lots. In the third sentence, it calls for certain
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1 criteria to be added to the **application** for a special exception. The third sentence is not a
2 limitation on the first two sentences; it is an addition to the first two sentences.

3 The first two sentences establish the scope of review, and they state that the lot itself shall
4 be the subject of the review. The third sentence then adds additional criteria that an applicant on
5 such a lot must meet in order to protect neighbors' privacy. The third sentence relates to the
6 applicant's actions, not the reviewer's actions. The reviewer's actions are outlined in the first two
7 sentences, which say that the reviewer must look at the entire lot.
8

9 It is a canon of construction to read statutes as a unified whole,¹ and to give the words
10 their ordinary meaning whenever possible.² Reading this entire section of the land use code as a
11 whole, without adopting any strained interpretations, what it says is this: The Hearing Examiner
12 has the jurisdiction to review the approval of a project when the project is both a Historic Lot
13 Exception and occurring on the unusually small lot size of less than 3,200 feet. In addition to
14 being subject to this whole-project review by the Hearing Examiner, the project applicant may
15 also be required by the Department to resize his windows and lot depth.
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18 This sensible reading comports with both the plain text of the code and with public
19 policy. A Historic Lot Exception is already by definition an exception, and a lot of less than
20 3,200 feet is an exceptionally small lot. For these "exceptions on top of exceptions," the City
21 Council has called for a stricter review process than decisions about lot size normally receive.
22 An exception layered on top of an exception ceases to be the kind of non-discretionary,
23 straightforward decision that the City Council defines as a Type I. It is instead a special,
24 exceptional, discretionary decision that the City Council defines as a Type II.
25

26 _____
27 ¹ *Ralph v. State Dept. of Natural Resources*, 182 Wn.2d 242, 248 (2014) ("We must interpret a statute as a
28 whole...").

² *Segura v. Cabrera*, 184 Wn.2d 587, 593 (2015) ("We look to the statute's plain and ordinary meaning...").

1 The Department and Applicant would read this code section differently, with the
2 applicant's window and lot-size criteria acting as limitations on the Hearing Examiner's scope
3 of review. That is simply not what the code section says. The code section says the Hearing
4 Examiner has broader than usual jurisdiction over this particular type of lot. The additional
5 criteria are factors the applicant must take into consideration, not constraints on the Hearing
6 Examiner's jurisdiction.
7

8 II. LEGISLATIVE MATERIALS

9 The Department and Applicant read additional words into the land use code that are not
10 present. This not only contravenes the code's plain language, it also defies the intention of the
11 City Council when the Council drafted the section on sub-3,200 Type II review in 2014.
12

13 On December 19, 2013, Andy McKim of the Department presented to the City Council
14 the "Director's Report: Recommended Amendments for Small Lots in SF [Single Family]
15 Zones." That document is attached to this brief as Attachment 1 – Seattle City Clerk's File
16 313652.³ The Director's Report was intended to guide the Council in responding to public
17 outrage over the development of undersized lots in neighborhoods using loopholes in the
18 Historic Lot Exception. It is permissible to use this document to determine the City Council's
19 intent.⁴
20

21 On page 4 of the Director's Report, Mr. McKim wrote that the proposed final Council
22 ordinance would establish a hard floor of 2,500 feet for Historic Lots; no lot could be smaller
23 than that area. For Historic Lots larger than 2,500 but smaller than 3,200 feet, Mr. McKim
24 wrote:
25

26 _____
27 ³ The Director's Report is available directly from the City online at: http://clerk.seattle.gov/~CFs/CF_313652.pdf.

28 ⁴ *Brown v. City of Yakima*, 116 Wn.2d 556, 562 (1991) ("Recourse to the Final Legislative Report as an aid in determining intent has been sanctioned.")

1 “Additional restrictions would apply for developments on lots less than 3,200
2 square feet in area. Developing lots under 3,200 s.f. **would require a special**
3 **exception review, a Type II** approval requiring public notice and an opportunity
4 **for appeal to the Hearing Examiner.** Additional structure height and depth
5 restrictions would also apply to lots under 3,200 s.f.” (Emphasis added)”
6

7 The Director’s Report makes clear that the plain language of the code section means
8 exactly what it says: Lots under 3,200 feet are subject to Type II review. They are appealable
9 directly to the Hearing Examiner. The language relating to window size and lot depth is an
10 addition to this review, not a limitation on this review. The Director’s Report says that the
11 structure and lot restrictions will **also** apply to the project, meaning that the restrictions are an
12 addition to the Hearing Examiner’s Type II review, not a limitation on it.
13

14 Mr. McKim, the author of the Director’s Report, is a member of the team representing
15 the Department in this matter. He may argue the report he wrote was intended to be read
16 differently than above. Mr. McKim’s intent in writing the Director’s Report, however, is not
17 what matters. What matters is what the document actually said to the Council members, not
18 what its author wishes it said.⁵ The Hearing Examiner must determine what the Council thought
19 it was doing when it passed the ordinance, not what Mr. McKim thought the Council was doing.
20

21 The legislative materials that were before the City Council leave no room for doubt: The
22 Council was attempting to address citizens’ concerns about development. It did so by making
23

24 ⁵ “One cannot rely on affidavits or comments of individual legislators to establish legislative intent. What may have
25 been the intent of an individual legislator may not have been the intent of the legislative body that passed the Act.”
26 *Johnson v. Continental West, Inc.*, 99 Wn.2d 555, 560–561 (1983). (The Court then went on to use the Final
27 Legislative Report without any affiant’s explanation.) If it is not permissible to use the post-hoc comments of a
28 legislator to determine legislative intent, it is still less permissible to use the post-hoc comments of a drafter of the
Final Legislative Report to determine legislative intent. *Johnson* permits the use of legislative history materials
themselves, but not any statements by drafters. *Id.* at 561.

1 certain types of Historic Lot development subject to a more rigorous scope of review than the
2 usual Type I rubber stamp. It wrote SMC 23.44.010(B)(3) specifically to effectuate that goal.

3 **III. COMPARISONS WITH OTHER SPECIAL EXCEPTIONS**

4 There is no blanket definition of the term “special exception” anywhere in the land use
5 code. In construing the meaning of this term as it applies to sub-3,200 Historic Lots, it may be
6 helpful to compare the term as it appears in the Historic Lot Exception with the way it appears in
7 other sections of the code. “The plain meaning of a statute may be discerned from all that the
8 Legislature has said in the statute and related statutes which disclose legislative intent about the
9 provision in question.”⁶

10
11 When the term “special exception” appears in other sections of the code, it does so in a
12 way that explicitly restricts the Hearing Examiner’s Type II scope of review to only the criteria
13 of the special exception, not the project as a whole. This restrictive usage is very different from
14 the broader way the term is used in the Historic Lot Exception on sub-3,200-foot lots. If the City
15 Council had wanted to restrict the Hearing Examiner’s jurisdiction to only the criteria on
16 window-size and lot-depth, it could have drafted the section on sub-3,200-foot lots to resemble
17 these other, more restrictive special exceptions, quoted below:
18

19 From the land use code on Airport Height Overlay Districts:

20
21 “The Director may permit a structure to exceed the limits of the Airport Height
22 Overlay District as a special exception pursuant to Chapter 23.76, Procedures for
23 Master Use Permits and Council Land Use Decisions. **Such an exception shall**
24

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⁶ *Central Puget Sound Regional Transit Authority v. Airport Investment Company*, 186 Wn.2d 336 (2016).
28

1 **only be permitted if the Director finds that all of the following conditions**
2 **exist:** [A list of four criteria follows.]” SMC 23.64.010 (emphasis added).

3 From the code on signs:

4 “**The Director may authorize exceptions** to the regulations for the size, number,
5 type, height and depth of projection of on-premises signs in neighborhood
6 commercial, commercial, downtown office core, downtown retail core, downtown
7 mixed commercial, areas of Pike Market Mixed not located in a Historic District,
8 and downtown harborfront zones **as a special exception** pursuant to Chapter
9 23.76, Procedures for Master Use Permit and Council Land Use Decisions, except
10 that no special exception may be authorized for a sign using video display
11 methods. **When one or more of the conditions in subsection 23.55.040.A have**
12 **been met, the characteristics described in subsection 23.55.040.B shall be**
13 **used to evaluate the merits of the proposal.** [a long list of characteristics
14 follows]” SMC 23.55.050 (emphasis added)
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18 From the Industrial Development Standards on building size:

19 “If a building meets all of the conditions in subsection 23.50.027.F.2, then
20 pursuant to the procedures in Chapter 23.76, the Director may grant a special
21 exception to the size limits in Table A for 23.50.027 for one or more uses in that
22 building and any other buildings on the lot, **based upon the criteria in**
23 **subsection 23.50.027.F.3.** [a list of criteria follows.]” SMC 23.50.027 (emphasis
24 added).
25

26 From the land use code on hospital size:
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1 “In each sector except the NW Sector, medical services are limited to no more
2 than 15,000 square feet of gross floor area per business establishment, except that
3 as a special exception pursuant to Chapter 23.76 the Director may permit a single
4 business establishment containing medical services uses up to 25,000 square feet
5 of gross floor area, **based on consideration of the following factors:** [a list of
6 two factors follows.]” SMC 23.75.095 (emphasis added).
7

8 Still other examples of special examples appear in other sections of the code, but it is not
9 necessary to list them all to establish the point. The point is, in each of these sections, a special
10 exception is identified and then criteria are specifically listed that the Director may use in order
11 to evaluate whether or not to grant the special exception.
12

13 Contrast these sections to the Historic Lot Exception section at issue in this matter: “A
14 **special exception Type II review** as provided for in Section 23.76.004 [Hearing Examiner
15 review] is required for separate development **of any lot** with an area less than 3,200 square feet
16 that qualifies for any lot area exception in subsection 23.44.010.B.1.”
17

18 The other code sections all clearly state that the special exception is a decision for the
19 Director to make based on specific, enumerated criteria. In such cases, the Hearing Examiner’s
20 review is limited only to those criteria. The Historic Lot Exception section, by contrast, first
21 establishes Type II review by the Hearing Examiner for the entire lot, and *only then* goes on to
22 list additional criteria the applicant must provide to the Director for the Director’s consideration.
23 This is very different wording than the wording of the other sections’ special exceptions. It is a
24 much broader scope of review.
25

26 The City Council has proven in the numerous above-quoted sections that it knows how to
27 draft an ordinance that clearly limits the Hearing Examiner’s scope of review to certain special
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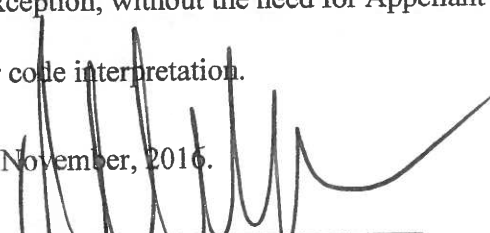
1 criteria. If it had wanted to limit the Hearing Examiner's review of sub-3,200 Historic Lot
2 Exceptions to only the window-size and lot-depth criteria, it could have written the Historic Lot
3 Exception section to resemble the other sections that only invoke criteria-specific review of
4 special exceptions. The fact that the City Council wrote the sub-3,200 Historic Lot Exception
5 differently than other special exceptions is an indication that it thought of these lots differently
6 and wanted them reviewed differently.
7

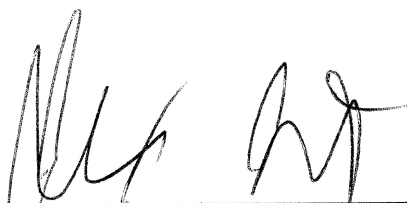
8 **CONCLUSION**

9 Between the plain text of the code, which calls for lot-wide Type II review; the
10 legislative history materials, which also call for lot-wide Type II review and make it explicit
11 that the window-size and lot-depth are additions, not limitations, to that review; and the
12 examples of the other special exceptions from elsewhere in the code that demonstrate the City
13 Council's ability to restrict scope of review when so desired, it is clear that SMC
14 23.44.010(B)(3) grants the Hearing Examiner jurisdiction to consider Historic Lot Exceptions
15 on lots under 3,200 square feet.
16

17 Appellant asks the Hearing Examiner to issue an order to the effect that she retains
18 jurisdiction over this case as a Type II special exception, without the need for Appellant to
19 appeal a time-consuming, multi-thousand-dollar code interpretation.
20

21 Respectfully submitted this 10 day of November, 2016.


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CERTIFICATE OF SERVICE

I certify that on this date, I electronically filed a copy of this APPELLANT PARRIOTT'S BRIEF REGARDING DECISION TYPE with the Seattle Hearing Examiner using its e-filing system.

I also certify that on this date, a copy of the same document was sent to the following parties listed below via email:

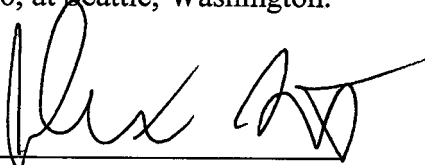
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DATED this 10th day of November, 2016, at Seattle, Washington.



Alex Sidles