

**BEFORE THE HEARING EXAMINER
CITY OF SEATTLE**

In the Matter of the Appeals of

**LISA PARRIOTT, ET AL. and
SEATTLE GREEN SPACES COALITION**

from a decision issued by the Director,
Department of Construction and Inspections

Hearing Examiner Files:
MUP-16-019 & MUP-16-020

Department Reference:
3024037

**ORDER DETERMINING LAND
USE DECISION TYPE BEING
APPEALED, and ORDER OF
DISMISSAL**

Facts

In January of 2016, the Department of Construction and Inspections (“Department”) issued an opinion letter determining that property adjacent to a residence addressed as 3038 39th Avenue SW qualified as a separate legal building lot under the “historic lot exception” to the Land Use Code’s minimum lot requirements.¹ The lot is less than 3,200 square feet in area. The Department’s letter was represented as the “preliminary opinion of the Department” and was subject to challenge through the Land Use Code interpretation process until a building permit is issued.²

On October 6, 2016, the Department issued a decision pursuant to SMC 23.44.010.B.3, approving a special exception to allow development of the lot (“decision”). Notice of the decision was published in the City’s October 8, 2016 Land Use Information Bulletin.³ Seattle Green Spaces Coalition (“SGSC”) and Lisa Parriott and others (“Parriott”) each appealed the decision.

SGSC’s appeal, which incorporates an attached legal brief, asks the Hearing Examiner (“Examiner”) to conclude that the Department’s determination that the subject property qualified for a historic lot exception under SMC 23.44.010.B.3 was incorrect, and that the Department’s determination constituted a “Type II” land use decision that could be appealed to the Examiner.⁴ Parriott’s appeal, together with her opening brief, also argues that the Department’s application of the historic lot exception to the subject property was legal error and constituted a Type II land use decision that could be appealed directly to the Examiner. Nonetheless, recognizing that the Department considered its determination on the historic lot exception to be a Type I decision, Parriott sought a Land Use Code interpretation on the validity of the determination, in accordance with SMC 23.88.020.A.3.c.

¹ “Petitioner’s Opening Brief” (on behalf of Parriott), Exhibit A.

² *Id.* at 2.

³ Attachment to SCDI’s Response to SGSC’s Supplemental Memorandum.

⁴ SGAC’s brief states the issue presented to the Examiner as “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? SGSC Appeal Brief dated 10/19/16 at 2.

The parties agreed to further briefing on the issue of whether the decision being appealed to the Examiner is a Type I or a Type II land use decision. All briefs were timely filed., and the Examiner has reviewed them as well as all other documents in the case file.

Standard of Review

Rule 3.02(a) of the Hearing Examiner Rules of Practice and Procedure (“HER”) provides that an appeal "may be dismissed without a hearing if the Hearing Examiner determines that it fails to state a claim for which the Hearing Examiner has jurisdiction to grant relief or is without merit on its face, frivolous, or brought merely to secure delay."

Applicable Code

SMC 23.44.010 regulates lot area requirements. SMC 23.44.010.A addresses “Minimum lot area.” SMC 23.44.010.B covers exceptions to minimum lot area requirements and reads, in pertinent part, as follows:

B. 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:*

1. A lot that does not satisfy the minimum lot area requirements of its zone may be developed or redeveloped under one of the following circumstances:

...

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. The qualifying lot shall be subject to the following provisions:

...

3. 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. The special exception application shall be subject to the following provisions:*

- a. The depth of any structure on the lot shall not exceed two times the width of the lot. If a side yard easement is provided according to subsection 23.44.014.D.3, the portion of the easement within 5 feet of the structure on the lot qualifying under this provision may be treated as a part of that lot solely for the purpose of determining the lot width for purposes of complying with this subsection 23.44.010.B.2.c.
- b. Windows in a proposed principal structure facing an existing abutting lot that is developed with a house shall be placed in manner that takes into consideration the interior privacy in abutting houses, provided that this provision shall not prohibit placing a window in any room of the proposed house.
- c. In approving a special exception review, additional conditions may be imposed that address window placement to address interior privacy of existing abutting houses.

Emphasis added.

SMC 23.88.020.A explains that a “decision by the Director as to the meaning, application or intent of any development regulation in Title 23 ... as it relates to a specific property... is known as an ‘interpretation.’ An interpretation may be requested in writing by any person or may be initiated by the Director. ... *A request for an interpretation, and a subsequent appeal to the Hearing Examiner if available, are administrative remedies that must be exhausted* before judicial review of a decision subject to interpretation may be sought.” Emphasis added. SMC 23.88.020.C.3.c provides detailed information on how to seek an interpretation.

A Type II land use decision is a discretionary decision made by the Department Director and is subject to an administrative appeal before the Examiner. SMC 23.76.004.B. A decision on a special exception application is a Type II decision. SMC 23.76.006.C.2.d.

A Type I decision is a Department Director’s decision that may not be appealed to the Examiner unless a land use interpretation is first requested and appealed pursuant to SMC 23.88.020. SMC 23.76.004; Table A for 23.76.004. A determination “that a proposal complies with development standards” is a Type I decision. SMC 23.76.006.B.1.

Analysis

The courts interpret local ordinances as they do statutes.⁵ The reviewing body’s fundamental objective is to ascertain and carry out the intent of the legislative body.⁶ A statute or code section

⁵ *Sleasman v. City of Lacey*, 159 Wn.2d 639, 643, 151 P.3d 990 (2007).

⁶ *Agrilink Foods, Inc. v. Department of Revenue*, 153 Wn.2d 392, 396, 103 P.3d 1226 (2005).

is to be read as a whole, so that no clause, sentence or word is “superfluous, void or insignificant”.⁷ Where the plain language of a statute is unambiguous, and legislative intent is therefore apparent, it is to be given effect.⁸

When subsections B.1 and B.3 of SMC 23.44.010 are read together, giving effect to every clause, sentence and word, their meaning is clear, and there is no need to look to extrinsic materials.⁹ Subsection B.1 addresses exceptions to minimum lot area requirements. Nothing in this subsection mentions “special exceptions”. Subsection B.1 begins with the statement that the listed exceptions to minimum lot area, including the historic lot exception, “are allowed”. That blanket allowance is then qualified: 1) The listed exceptions to minimum lot area are allowed subject to the requirements in subsection B.2, which does not apply in this case; and 2) they are allowed “subject to the requirements in subsection B.3 for any lot less than 3,200 square feet in area.” Because the lot in question is less than 3,200 square feet, the requirements of subsection B.3 must be met.

Subsection B.3 addresses “Special exception review for lots less than 3,200 square feet in area.” It states that if a lot qualifies for one of the minimum lot area exceptions listed in subsection B.1, but has a lot area less than 3,200 square feet, then a “special exception Type II review ... is required” to develop the lot. Subsection B.3 then goes on to list the three provisions on structure depth and window placement that are to be addressed in the special exception Type II review.

The Department’s determination that the lot in question met the requirements for an exception to minimum lot area constituted a Type 1 decision. It was clearly a determination “that a proposal complies with development standards”. SMC 23.76.006.B.1. It could be appealed only through a request for a Land Use Code interpretation pursuant to SMC 23.88.020.C.3.c.

The only issue raised in SGSC’s sole appeal issue is whether the lot in question complies with the development standards for a historic lot exception under SMC 23.44.010.B.1. But SGSC did not request a Land Use Code interpretation in conjunction with its appeal. Although SGSC argues that it was not given notice that an interpretation was required, the notice of decision attached to the Department’s Response to SGSC’s Supplemental Memorandum included clear instructions on seeking an interpretation, and the attached distribution list shows that the notice was sent to several members of SGSC, including its representative in this appeal.

SGSC relies on *Kate v. Seattle*¹⁰ to argue that a code interpretation is not required to exhaust administrative remedies. SGSC acknowledges that the portion of the court’s opinion it references is dicta and, in any event, the facts of the case are distinguishable from those in this case. The court determined that the neighbors in *Kate* did not have notice of their right to seek a code interpretation, whereas in this case, SGSC did have such notice.

⁷ *Ralph v. Department of Natural Resources*, 181 Wn.2d 242, 248, 343 P.3d 342 (2014), citing *State ex rel. Baisden v. Preston*, 151 Wash. 175, 177, 275 P. 81 (1929).

⁸ *Griffin v. Thurston County*, 165 Wn.2d 50, 55, 196 P.3d 141 (2008).

⁹ SMC 23.44.010.B.2 relates to development of substandard lots containing environmentally critical areas. It does not appear from the record that it applies to the lot in question here.

¹⁰ 44 Wn. App. 754, 723 P.2d 493 (1986).


Finally, SGSC argues that the state and federal constitutions prohibit a requirement for someone to seek a code interpretation when doing so is costly. However, the Examiner has no jurisdiction over constitutional issues.¹¹ Because SGSC did not seek a code interpretation of the only issue raised in its appeal, and the issue concerns a Type I land use decision, the Examiner has no jurisdiction over SGSC's appeal. It must therefore be dismissed.

As noted, Parriott's appeal also asserts that the Department's application of the historic lot exception to the subject property was legal error and constituted a Type II land use decision. Parriott focuses on materials outside SMC 23.44.010.B, including the Department Director's report to the City Council associated with its consideration of the ordinance adopting the special exception requirement now found in SMC 23.44.010.B.3. As discussed above, SMC 23.44.010.B is clear on its face, and there is no need to consult extrinsic materials to ascertain its meaning. In any event, Parriott has not shown that the Director's report reflects the Council's intent in adopting subsection B.3, and the report language relied on¹² is consistent with the Examiner's analysis of SMC 23.44.010.B above. It simply summarizes the content of SMC 23.44.010.B.3. The Examiner would normally dismiss Parriott's appeal. However, Parriott submitted a request to the Department for an interpretation of the application of the historic lot exception in SMC 23.44.010.B.1 to the subject property, and included an appeal of the interpretation within its appeal. Therefore, the appeal will not be dismissed in total.

Decision

SGSC's appeal is **DISMISSED**. All parts of Parriott's appeal other than the appeal of the Department Director's interpretation are **DISMISSED** as a matter of law. The interpretation appeal will be heard as scheduled on January 12, 2017.

Entered this 21st day of November, 2016.


Sue A. Tanner, Hearing Examiner
Office of Hearing Examiner
P.O. Box 94729
Seattle, Washington 98124-4729
Phone: (206) 684-0521
FAX: (206) 684-0536

¹¹ *Chaussee v. Snohomish Cy.*, 38 Wn.App. 630, 635-639, 689 P.2d 1084 (1984)

¹² "Developing lots under 3,200 s.f. would require a special exception review, a Type II approval requiring public notice and providing an opportunity for an appeal to the Hearing Examiner. Additional structure height and depth restrictions would also apply to lots under 3,200 s.f. ..." Attachment to Appellant Parriott's Brief Regarding Decision Type at p. 6.

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CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on this date I sent true and correct copies of the attached **Order Determining Land Use Decision Type Being Appealed and Order of Dismissal** to each person listed below, or on the attached mailing list, in the matter of **Lisa Parriott et al. and Seattle Green Spaces Coalition** Hearing Examiner Files: **MUP-16-019 (SE) & MUP-16-020 (SE)** in the manner indicated.

Party	Method of Service
Lisa Parriott et al. c/o Peter Goldman Washington Forest Law Center pgoldman@wflc.org Alex Sidles asidles@wflc.org	<input type="checkbox"/> U.S. First Class Mail, postage prepaid <input type="checkbox"/> Inter-office Mail <input checked="" type="checkbox"/> E-mail <input type="checkbox"/> Fax <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Legal Messenger
Mary Fleck SGSC maryflecws@gmail.com	<input type="checkbox"/> U.S. First Class Mail, postage prepaid <input type="checkbox"/> Inter-office Mail <input checked="" type="checkbox"/> E-mail <input type="checkbox"/> Fax <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Legal Messenger
Sam Jacobs Helsell Fetterman sjacobs@helsell.com Heather Sims hsims@helsell.com	<input type="checkbox"/> U.S. First Class Mail, postage prepaid <input type="checkbox"/> Inter-office Mail <input checked="" type="checkbox"/> E-mail <input type="checkbox"/> Fax <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Legal Messenger
Andy McKim SDCI Andy.McKim@seattle.gov David Graves David.Graves3@seattle.gov	<input type="checkbox"/> U.S. First Class Mail, postage prepaid <input type="checkbox"/> Inter-office Mail <input checked="" type="checkbox"/> E-mail <input type="checkbox"/> Fax <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Legal Messenger

<p>Crystal Torres Crystal.Torres@seattle.gov</p>	
<p>SDCI LUIB DCI_LUIB@seattle.gov</p> <p>PRC PRC@seattle.gov</p> <p>Sue Putnam Sue.Putnam@seattle.gov</p>	<p><input type="checkbox"/> U.S. First Class Mail, postage prepaid</p> <p><input type="checkbox"/> Inter-office Mail</p> <p><input checked="" type="checkbox"/> E-mail</p> <p><input type="checkbox"/> Fax</p> <p><input type="checkbox"/> Hand Delivery</p> <p><input type="checkbox"/> Legal Messenger</p>

Dated: November 21, 2016

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Tiffany Ku
Legal Assistant