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The Honorable Sue A. Tanner

BEFORE THE HEARING EXAMINER
CITY OF SEATTLE

In the Matter of the Appeal of: LISA PARRIOTT, AND FRIENDS OF THE SILENT GIANT from a decision by the Director, Department of Construction and Inspections	Hearing Examiner File: MUP-16-019; MUP-16-020; S-16-007 APPELLANT PARRIOTT'S PREHEARING BRIEF

TO: Office of the Hearing Examiner;

TO: Respondent, Department of Construction and Inspections;

TO: Respondent/Applicant, Clifford Low and his counsel, Sam Jacobs, Helsell Fetterman.

INTRODUCTION

The central question in this case is a question of law. The Historic Lot Exception allows development of a substandard lot 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, by deed, platting, or **building**

permit."[1] This case will call upon the Hearing Examiner to decide what it means to "establish" a separate building site. We argue that to "establish" a fact like the existence of a separate building site requires firm, definite proof that the fact is true, not vague supposition or ambiguous evidence. The Department of Construction and Inspections ("The Department") has proffered a building permit from 1930 in an attempt to establish a separate building site in this case, but we believe this building permit is insufficiently clear to satisfy the high standard demanded by the word "establish." Accordingly, we believe that the Historic Lot Exception does not apply to the lot in this case. We ask the Hearing Examiner to overturn the Department's finding.

In addition, we believe the Department acted arbitrarily and capriciously in ignoring contrary evidence and deciding this case differently from past cases. We ask the Hearing Examiner to overturn the Department's finding on these grounds, as well.

This case will also call upon the Hearing Examiner to decide matters relating to the payment of the code interpretation fee and the fee for its defense. Argument for these matters appears after argument relating to the matters surrounding the separate building site.

FACTS

Mr. Clifford Low, the developer in this case, petitioned the Department to find a Historic Lot Exception for one of his newly acquired properties located at 3038 39th Ave. SW. The property consists of a single lot that the developer purchased in 2015. On the southern half of the lot is a house. The northern half of the lot is undeveloped and dominated by a large, old-growth ponderosa pine. The northern half of the lot is just under 3,200 square feet in area, so it would

[1] *See* SMC 23.44.010.B.1.d (emphasis added to highlight the terms relevant to this case).

only be developable if an exception to the SF 5000 zoning in this neighborhood could be found.[2] The developer asked the Department to find a Historic Lot Exception for the northern half of the lot.

The original 1906 plat for this area of Seattle demonstrates that an early Seattle developer divided land along what is now 39th Avenue SW into platted lots 25 feet wide and 95 feet long.[3] In 1913, four of these platted lots, Lots 13–16, came into the hands of one Coulthard ("the 1930 owner").[4] *See* Figure 1, below:

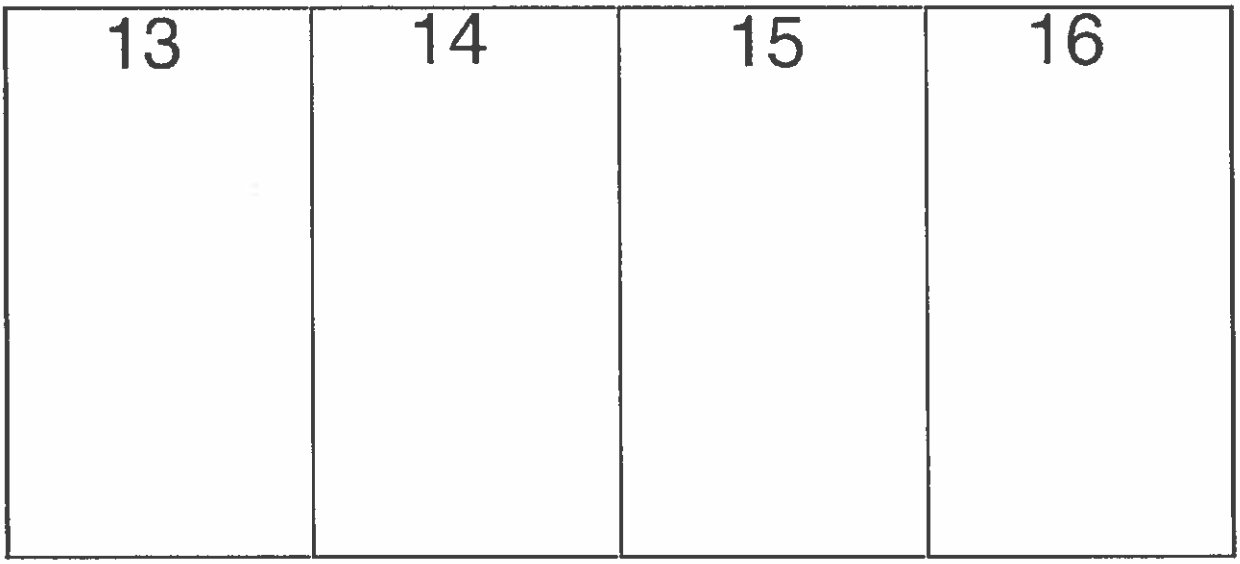

Figure 1: The four plats at issue in this case. Figure not to scale. North is to the left.

On July 19, 1930, Coulthard obtained a building permit to construct a house on the southernmost portion of the lot. The building permit described the lot as all of Lot 16 (the

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[2] *See* Plaintiff's Exhibit A, "Legal Building Site Letter," at 1.

[3] *See* Plaintiff's Exhibit C, "Legal Site Building Letter Package," at 4; *see also* Plaintiff's Exhibit A, "Legal Building Site Letter," at 1.

[4] *See* Plaintiff's Exhibit C, "Legal Site Building Letter Package," at 4.

southernmost lot) and the southern 8 1/3' of Lot 15.[5] The 1930 building permit was silent as to what was to be done with the northern portions of the property.[6] That house still stands today at 3038 39th Ave SW. It is currently owned by Mr. Low. Its porch and retaining wall encroach across the line of the 1930 building permit. *See* Figure 2, below:

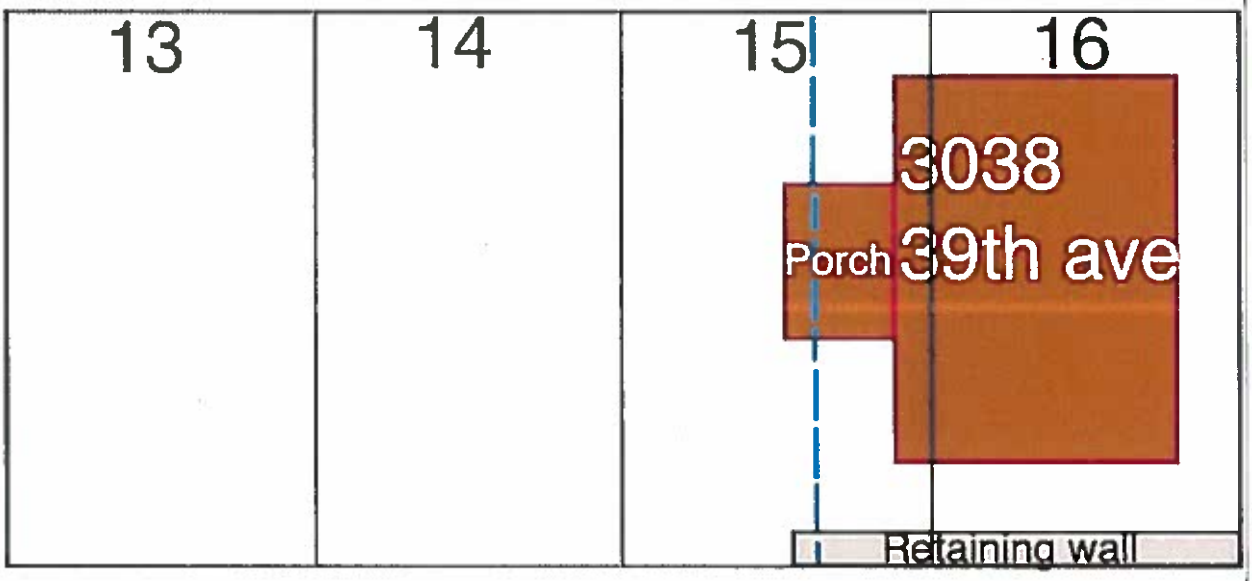

Figure 2: The blue line indicates the line described in the 1930 building permit.

On December 12, 1930, Coulthard conveyed by deed to Arkell all of Lot 13 (the northernmost lot) and 8 1/3' of Lot 14.[7] Arkell built a house there. That house still stands today at 3030 38th Ave SW. That house is not directly involved in this dispute. *See* Figure 3, below:

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[5] *See* Plaintiff's Exhibit A, "Building Site Letter," at 2.

[6] *Id.*

[7] *See* Plaintiff's Exhibit C, "*See* Legal Site Building Letter Package," at 2.

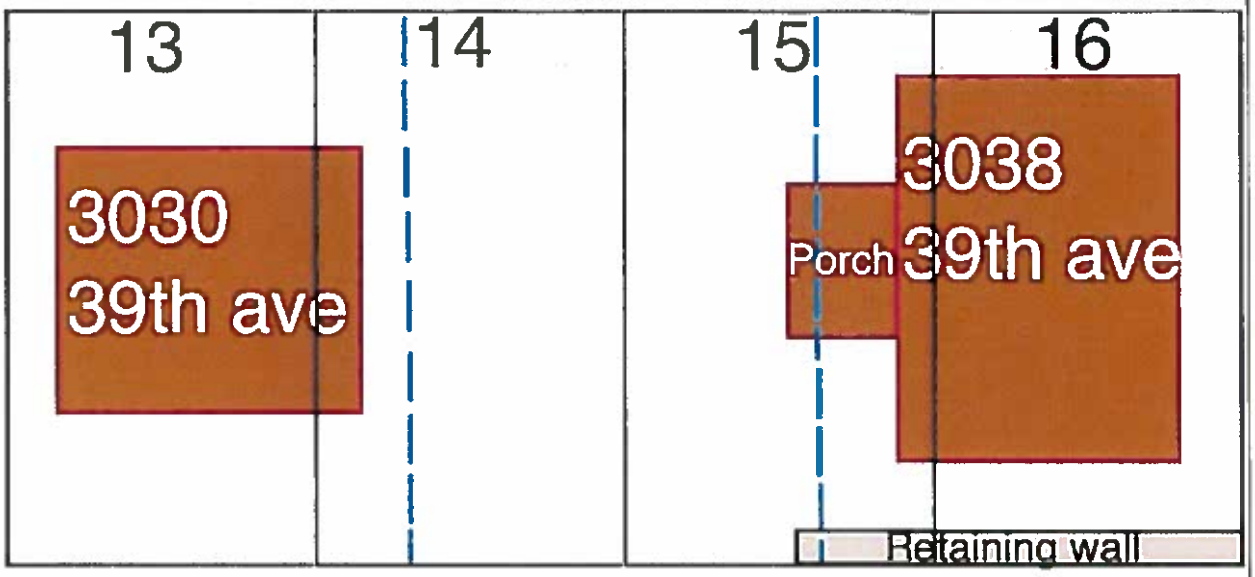

Figure 3: The left blue line indicates the line described in the deed conveying the new house.

Coulthard, the 1930 owner, was left holding the property highlighted in green below in Figure 4. He conveyed that property to Rose in 1931 as a single lot. The property then changed hands at least 10 times over the decades until now, each time being bought and sold as a single lot, with no further development taking place. Today, Mr. Low owns the lot in green:

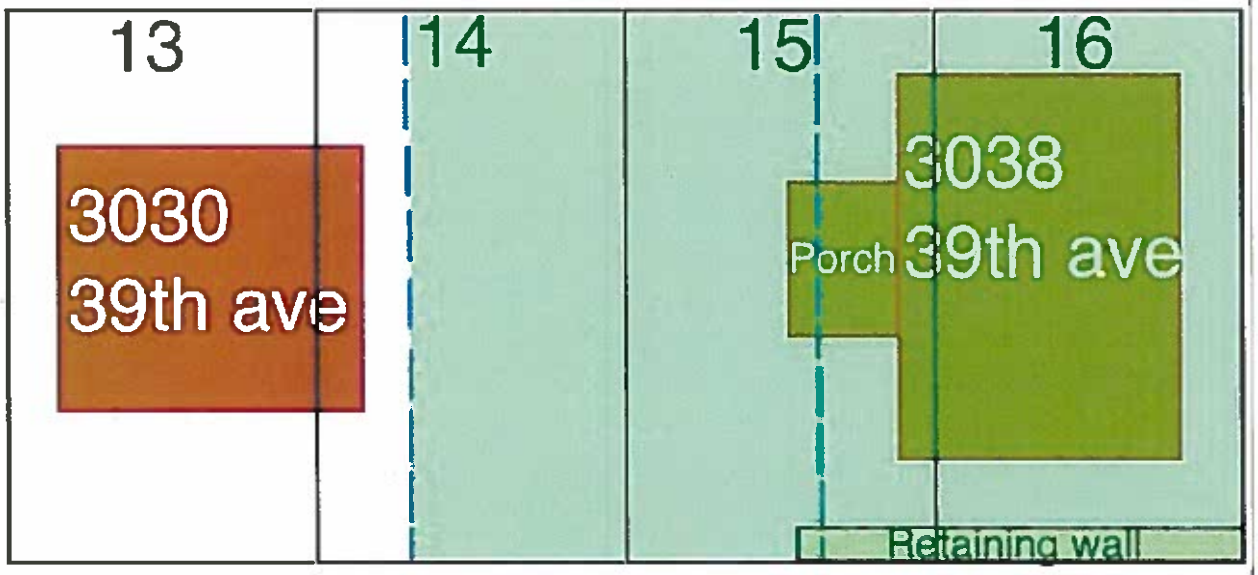

Figure 4: The lot in green has been sold at least 10 times over 85 years as a single lot.

On the basis of these facts, and upon request from Mr. Low, the Department issued a preliminary finding of a Historic Lot Exception for the northern half of Mr. Low's lot (the area between the blue lines of the green-shaded lot) on January 5, 2016.[8] The Department finalized that finding in its MUP of October 6, 2016;[9] and re-affirmed that finding in response to Appellant's appeals in the Department's code interpretation of December 9, 2016.[10]

ARGUMENT

ISSUE 1: THE DEPARTMENT MUST "ESTABLISH" A SEPARATE BUILDING SITE ON THE NORTHERN HALF OF THE PROPERTY

The Historic Lot Exception allows development of a substandard lot 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, by deed, platting, or **building permit**."[11]

In order to qualify for the Historic Lot Exception, a separate building site in the northern half of the property must be "established" in the public records. The term "establish" is not defined in the ordinance. As a question of law, the Hearing Examiner must decide what it means for a separate building site to be "established." We believe that a separate building site cannot be called "established" until any doubt as to its existence has been cleared up by unequivocal evidence in a deed, plat, or building permit. If a deed, plat, or building permit merely hints at the

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[8] *See* Plaintiff's Exhibit A, "Legal Building Site Letter."

[9] *See* Plaintiff's Exhibit B, "Notice of Decision."

[10] *See* Plaintiff's Exhibit R, "Code Interpretation 16-006."

[11] *See* SMC 23.44.010.B.1.d (emphasis added to highlight the terms relevant to this case).

existence of a separate building site without confirming its existence firmly and explicitly, then the building site is not "established" as required by the law of the Historic Lot Exception.

According to Black's Law Dictionary (10th ed. 2014), "establish" means more than merely indicate. It means "to settle, make, or fix firmly; or to prove; to convince."

Other courts have been called upon to explicate the word "establish" as it appears in various laws. These other courts have found that to "establish" a fact means to provide compelling evidence that the fact is true. Merely hinting at the existence of a fact is not enough to "establish" the fact. There must be a thoroughgoing examination of the totality of the circumstances before a fact becomes "established."

The following three cases from the US Supreme Court and the state courts of Tennessee and Kansas illustrate that when a law calls for a fact to be "established," the fact is not established until there is more than a mere scintilla of evidence in its favor. None of these cases constitute binding precedent in Washington regarding the meaning of the word "establish." Nonetheless, we urge the Hearing Examiner to adopt these courts' common-sense interpretation that "establish" means to firmly settle, not merely hint at.

A. Three Cases on the Meaning of "Establish"

The meaning of the word "establish" was the crux of the US Supreme Court case *Mullins Coal Co. v. Dep't of Labor*, 484 U.S. 135 (1987). In that case, a statute provided that coal miners were presumptively entitled to compensation for black lung if they could produce as evidence a chest X-ray that "established" the presence of pneumoconiosis in the lungs.[12] The issue in the case was whether a single chest X-ray indicating pneumoconiosis was sufficient evidence to "establish" the presumption of pneumoconiosis. There were additional X-rays that neither

[12] 484 U.S. at 141.

indicated nor contraindicated the disease; only the single positive X-ray pointed to the presence of the disease.

The Court held that the single positive X-ray was not sufficient evidence to "establish" the presence of the disease. The Court acknowledged that the single positive X-ray that indicated the disease did "constitute evidence" of the disease, but because a single X-ray is subject to multiple possible interpretations, the single X-ray by itself could not "establish" the disease.[13]

"Thus, it seems perfectly clear that it is not the X-ray in isolation that 'establishes' the presence of the disease; rather, the regulation must, at a minimum, have reference both to the X-ray itself and to other evidence that sheds light on the meaning and significance of the X-ray. Just as the ALJ must weigh conflicting interpretations of the same X-ray in order to determine whether it tends to prove or disprove the existence of pneumoconiosis, there would seem to be no reason why he must ignore all X-rays in a series except one."[14]

In the 1901 Tennessee case of *Endowment Rank of Order of K.P. v. Steele* (63 S.W. 1126), the Supreme Court of Tennessee was confronted with the question of how much evidence was needed to "establish" that an insured individual had committed suicide. The court held: "The meaning of the word 'establish,' as applied to the quantum of evidence, is to settle certainly or fix permanently what was before uncertain, doubtful, or disputed."[15] The court stated explicitly that to "establish" a fact means to prove it by more than a preponderance of evidence. The court criticized a particular jury instruction that demanded that the suicide had to be "established." The court's critique was that the law in this case demanded only the lower "preponderance" quantum

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[13] *Id.* at 147.

[14] *Id.* at 147–148.

[15] 63 S.W. at 1128.

of evidence that made a fact more likely to be true than not. To instruct the jury that the law required the fact to be "established" was an error, because "established" facts call for more evidence than mere "preponderance" facts. Demanding that the jury "establish" a suicide was instructing the jury to be more certain of the facts than the law in this case required.

Likewise, in the case of *Kansas v. Bryles*, 261 P.3d 979 (2011), the Kansas Court of Appeals held that "establish" means to prove or settle. The court ruled that the production of court records showing defendant's previous out-of-state DUI convictions was sufficient evidence to definitively prove that the defendant had a history of DUI, and the fact was therefore "established" conclusively.

All three of these cases show courts grappling with what a takes to "establish" an answer to a factual proposiiton: whether a miner has black lung, whether a man committed suicide, or whether a drunk driver has a history of drunk driving. In all three cases, the courts insisted on seeing clear, unequivocal evidence before they would consider a proposition to be established. A proposition is not established merely by making a prima facie case. It is only established once any doubt as to its veracity has been dispelled.

B. The Meaning of "Establish" in This Case

In the same way that the single X-ray in *Mullins Coal Co.* hinted but did not prove that the miner may have had a lung problem, the 1930 building permit in this case hints but does not prove that the 1930 owner may have been contemplating some future activity on the northern half of the property. But just as the single chest X-ray was not capable of establishing by itself that black lung had set in, the 1930 building permit is not capable of establishing by itself that an additional building site was created on the northern half. Hinting at a proposition is not the same thing as establishing the proposition, and the 1930 building permit merely hints.

In *Mullins Coal Co.*, if the plaintiff had produced a series of conclusive and indisputable X-rays, he would have established the presence of black lung. The single, vague chest X-ray he was able to produce was not enough. Likewise, in this case, if the Department could produce a building permit that addresses the northern half of the property, that would conclusively and indisputably establish the existence of a separate building site on the northern half. Instead, the Department has produced a building permit for the southern half of the property that does not discuss the northern half of the property at all. Under the reasoning of *Mullins Coal Co.*, the US Supreme Court would have no difficulty finding that the Department has failed to establish a separate building site on the northern half of the property.

The law of the Historic Lot Exception is not that a separate building site must be conceivable or permissible or ambiguously hinted at. The law is that a separate building site must be established. As illustrated by *Mullins Coal Co.*, *Endowment Rank of Order*, and *Bryles*, to establish a separate building site means to carry a heavy burden of proof. The Department does not establish a separate building site by demonstrating that a separate building site was merely conceivable, or that a separate building site was not disallowed, or that one possible reading of the evidence is that the 1930 owner may have contemplated a separate building site. None of these showings are adequate under the law. Instead, the Department must show that a separate building site on the northern half was firmly, unequivocally, explicitly fixed. Only then will the separate building site be established.

C. The Department May Use Only the 1930 Building Permit to Find Evidence for a Separate Building Site in the Northern Half

As it attempts to firmly, unequivocally establish a separate building site, the Department is restricted as to the types of evidence it may consider. Under the law of the Historic Lot

Exception, only plats, deeds, and building permits are permissible evidence for establishing a separate building site. In the past, other types of records, including tax records, were permissible evidence, but the law was amended specifically to exclude these other types of evidence,[16] leaving only the three types aforementioned.

The Department concedes that no plat or deed establishes a separate building site in this case.[17] In fact, the deeds in this case tend to indicate that there is no separate building site, because the 10 transfers of the property from 1930 to today all treat the property as a single building site, not two separate sites. That leaves the Department only the 1930 building permit with which to find a Historic Lot Exception. The Department's case must stand or fall on whether the building permit for the southern half has established a building site on the northern half, because the permit is the Department's sole remaining permissible type of evidence.

The Department and the developer have proffered sewer permits and sewer cards in their list of exhibits to establish a separate building site. Under the law of the Historic Lot Exception, it is impermissible to consider those records, because they are not deeds, plats, or building permits. They are irrelevant to this case and should be excluded.[18] If the Department cannot establish a separate building site using only the 1930 building permit, then it cannot establish a separate building site.

D. The 1930 Building Permit Does Not by Itself "Establish"

a Separate Building Site in the Northern Half

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[16] *See* "Appellant Parriott's Brief on Decision Type," filed November 10, 2016, at 4–6.

[17] *See* Plaintiff's Exhibit A, "Legal Building Site Letter," at 2.

[18] *See* Hearing Examiner Rule 2.17(b) ("The Examiner may exclude evidence that is irrelevant.")

As argued above, the law requires both that any evidence for a separate building site must firmly and unequivocally establish the site, and that the 1930 building permit must be used as the sole line of evidence. Therefore, for the proposed Historic Lot in this case to survive, the 1930 building permit must stand on its own to firmly and unequivocally establish a separate building site in the northern half of the property. As will be shown below, the 1930 building permit does not stand on its own to firmly and unequivocally establish a separate building site.

The 1930 building permit is a building permit for the southern half of the property, not the northern half. The permit contains a description of the lot for the house to be built at 3038 39th Ave SW, the house that still stands today on the southern half of the property. The permit describes the lot for this southern house as "All of Lot 16 and the south 8 1/3 feet of lot 15,"[19] which means the southern half of the lot. The permit is utterly silent about the fate of the remaining northern half of the lot.

The Department's code interpretation reads much into this silence, and uses the silence to find a separate building site. According to the Department's Conclusion #3: "[The owners] could just as easily have included Parcel B [meaning the northern half of the lot]…in the site description. However, a portion of the property was consciously and deliberately omitted from the site description. By calling out only Parcel A [meaning the southern half of the lot], the owners effectively carved off the remainder of the property. The only logical reason for doing this was to preserve that remainder for separate development."[20]

Each and every sentence in this Conclusion #3 is unsupported by evidence. It is not true that the 1930 owner could "just as easily" have included the northern half in his description of

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[19] *See* the 1930 Building Permit in Plaintiff's Exhibit C, "Legal Building Site Letter Package," at 7.

[20] *See* Plaintiff's Exhibit R, "SDCI Code Interpretation No. 16-006," at 3.

the lot for the southern house. If the owner had intended to install some other feature on the northern half, such as a chicken coop, greenhouse, gazebo, detached garage, swimming pool, or any such similar structure, it would make perfect sense that he would leave off mention of the northern half when describing the space to taken up by the southern house. It would not be "just as easy" for him to lump in the northern half with the southern half if he was interested in pursuing any kind of future construction.

He may also have wanted to pay taxes on a smaller buildable lot, maintaining a large, non-buildable side-yard next to the southern house in order to keep his taxes down. In fact, tax records reveal that this is precisely what previous owners of the lot have been doing for decades: paying taxes on a small house with a yard next to it, not a house with a lucrative building site next to it.[21] It is error for the Department to say without evidence that the 1930 owner could "just as easily" have written his permit application differently, when doing so might have raised his taxes.

The Department further errs in saying the northern half was "consciously and deliberately omitted." The Department states in the first sentence of Conclusion #3 that it will not attempt to "determine the subjective intent of the [1930 owner]."[22] Having committed itself not to analyze the owner's intent, the Department cannot then turn around and make declarations about the owner's conscious state of mind and supposedly deliberate course of action, especially without any evidence of that state of mind. No one can say in 2016 whether the 1930 owner's actions

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[21] *See* Plaintiff's Exhibit F, "King County Parcel Viewer Sales History for tax parcel 3009800070," at 2.

[22] *See* Plaintiff's Exhibit R, "SDCI Code Interpretation No. 16-006," at 3. The assessed tax value of the property is commensurate with a single house, not a house plus the option to build another house.

were part of some larger, "conscious and deliberate" scheme. The evidence of the permit is too scanty to support any such inference.

Further, the 1930 owner did not "effectively carve off the northern half" of the property, as the Department erroneously claims. In fact, he retained ownership of the northern half, failed to build any house on it, and then sold it together with the southern half as a single lot shortly after constructing the southern house. The 1930 owner's actions do not indicate two lots; they indicate one lot. In fact, through at least 10 changes in ownership, every subsequent owner has bought and sold this lot as a single lot. The 1930 permit was not an "effective carving off," neither on its own terms nor in light of every owner's subsequent actions.

Most erroneously, the Department says the "only logical reason" for the permit to describe the southern half so narrowly was to build a second house on the northern half. This is nonsense. There is not "only one logical reason" for writing a narrow permit; there are many. Logical reasons for describing the southern half narrowly include the tax advantages of having a smaller buildable lot and the possibility for constructing other features like the chicken coop, greenhouses, and the like discussed above. The Department was asked during the public comment period and in the plaintiff's request for code interpretation to consider these other, perfectly logical possibilities, but it declined to do so. In its code interpretation, the Department simply declares by fiat that there had to be a house and nothing else on the northern half.

E. Conclusion Regarding the Question of "Establish"

In sum, the Department's Conclusion #3 lacks substantial evidence for its claim that a Historic Lot is "established" in the northern half of the property. There is simply not enough evidence in the 1930 building permit to foreclose other possibilities for the northern half: a smaller tax parcel to lower the tax burden; a future chicken coop or other such structure; or

simply a side-yard hosting a lovely tree, which has been the property's actual use for more than eight decades and counting. On the evidence of the building permit itself, which again is the only permissible line of evidence, any of these hypothetical outcomes is just as likely as the hypothetical construction of a house. Nothing regarding a separate building site on the northern portion of the property has actually been "established" in the 1930 building permit. The permit is silent on this question. The Department's attempts to read additional facts and intentions into the 1930 building permit are erroneous, illogical, and irrelevant. The 1930 building permit simply cannot sustain the burden demanded of it: to firmly and unequivocally establish a separate building site on the northern half of the property.

ISSUE 2: THE DEPARTMENT ARBITRARILY DISREGARDED EVIDENCE AGAINST A SEPARATE BUILDING SITE IN THE NORTHERN HALF

The 1930 building permit fails to answer the question of what fate was intended for the northern half of the property. That alone is enough to doom the Department's finding of a separate building site. But in addition to failing to establish its finding, the Department has also arbitrarily ignored contrary evidence and acted capriciously in deciding this case differently from past cases.

The Department's reasoning underlying its Historic Lot Exception decision is subject to reversal if it was arbitrary and capricious. Arbitrary and capricious is the well-established standard of judicial review for the reasoning of agencies, even agencies not subject to the state's Administrative Procedure Act ("APA").[23]

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[23] *See, e.g., Saldin Securities, Inc. v. Snohomish Cty.*, 134 Wn.2d 288, 294 (1998) ("We have consistently held that any arbitrary and capricious action is subject to [judicial] review, never indicating that additional extraordinary circumstances must exist").

"Arbitrary and capricious has a well-established meaning in this state. It refers to willful and unreasoning action, taken without regard to or consideration of the facts and circumstances surrounding the action. Where there is room for two opinions, an action taken after due consideration is not arbitrary and capricious, even though a reviewing court may believe it to be erroneous."[24]

"Due consideration of all the facts and circumstances" requires a weighing of all relevant information, including any contradictory information that would tend to cut against the agency's final decision. The mere existence of contradictory information does not render an agency decision arbitrary and capricious, but the contradictory information must still be considered. Failure to consider the contradictory information renders the agency decision arbitrary and capricious.[25]

A. The Department Arbitrarily Ignored Contrary Evidence

All of the following contrary evidence was provided to the Department prior to the issuance of its code interpretation, but the Department makes no mention of it in its interpretation:

1. Tax records for the property show that the northern and southern halves of the property have been treated for tax purposes as a single lot up until 2015, when the developer purchased them and segregated them.[26] If there really were two lots for the intervening 85 years, as the Department claims, the owners should have been taxes accordingly. The property cannot be one

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[24] *Abbenhaus v. Yakima*, 89 Wn.2d 855, 858–859 (1978) (discussing the arbitrary and capricious standard of review as applied in non-APA, quasi-judicial proceedings like the Seattle Hearing Examiner).

[25] *See, e.g., Squaxin Island Tribe v. Wash. State Dept. of Ecology*, 177 Wn. App. 734, 742–743 (2013) (agencies must weigh all the factors bearing on their decisions).

[26] *See* Plaintiff's Exhibit E, "King County Parcel Viewer Property Report for tax parcel 3009800071."

lot when it is convenient for tax purposes and then two lots when it is convenient for development purposes. If the 1930 building permit had spoken so clearly to the city and the county as the Department claims it does, it should have decades ago created two lots as two tax parcels. The reason it did not create two tax parcels is because it did not create two lots.

2. For 86 years, and through numerous changes of ownership, no homeowner until now has tried to build a house on this site. If this proposed building site was ever intended to be a nest egg, it should have been hatched long before now. In fact, an enormous old-growth ponderosa pine has grown up on the northern half of the property during its decades as a side-yard. The failure to build is an indicator that the northern half is not an established building site in the minds of the people who knew the property best: its former owners.

3. The selling price of the house in 2015 was $505,000, which is typical for a small single family home in West Seattle.[27] $505,000 is much too low a price for a house plus a buildable lot for a second house. It is a much more reasonable price for a single house on a single lot.

4. The Historic Lot Exception ordinance identifies deeds as one of the three possible ways to find a Historic Lot Exception. As the Department itself acknowledges, the deeds in this case show the transfer of the lot as a single property over and over again for a period of 86 years. These numerous deeds seem to indicate the existence of a single lot. The Department does not explain why its one, unsubstantiated, permit-based inference of two lots should outweigh the much more numerous, much more substantial, deed-based inference of a single lot. It is unreasonable to allow one "silent permit" to override numerous explicit deeds. In light of the unbroken chain of deeds showing one lot, the inference from the 1930 building permit of two lots is not a reasonable inference.

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[27] *See* Plaintiff's Exhibit F, "King County Parcel Viewer Sales History for tax parcel 3009800070."

5. A porch extends across the line between the northern and southern halves of the property. A permanent, concrete retaining wall also extends across the line.[28] These features are indications that the 1930 property owner regarded the lot as a single lot, not two lots. If there were two separate lots, the owner would have been putting his porch and the retaining wall of his house into the possession of another person. It is unreasonable to think he would have done so.

By failing to consider this contrary evidence while finding the Historic Lot Exception, the Department acted arbitrarily and in violation of the law as articulated in *Saldin Securities*, *Abbenhaus*, and *Squaxin Island Tribe*. Its finding must be overturned.

B. The Department Capriciously Decided This Case Differently Than Others

In addition to ignoring contrary evidence, the Department has behaved capriciously in its reasoning. When considering previous proposed Historic Lots, the Department has found that a building permit for one portion of a property does not create a separate building site on a different portion of the property. This is the opposite of its finding in the current case. The Department should have decided this case in the same manner as in the past, and found that there is no Historic Lot in this case.

On June 19, 2015, Department staffer David Graves, a member of the Department's team in this case, issued a Legal Building Site Letter to one Thor Sunde.[29] Mr. Sunde had requested a finding of a Historic Lot Exception under circumstances very similar to the ones in this case: He had a property spanning three platted lots. Building permits for two houses had been issued, and those houses spanned two of the three plats but not the third one. The third, leftover plat was empty. Later, a deed incorporated a portion of the third, empty plat into one of the built-upon lots

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[28] *See* Plaintiff's Exhibit K, "Property Sketch by Lisa Parriott."

[29] *See* Plaintiff's Exhibit L, "Thor Sunde Legal Building Site Letter."

on one of the other plats. A small rump section of the third, empty plat was excluded from this deed. This rump section was also excluded from any of the surrounding building permits. At the end of all the transactions, the rump section stood alone—no deed, no building permit, no incorporation onto other lots. No documentation at all spoke directly to the rump section of the lot, just like no documentation speaks directly to the northern half of the lot in our current case. The deeds and building permits in Mr. Sunde's case spoke only to the lots surrounding the rump section, just like the 1930 building permit speaks only to the southern half of the lot in our current case.

In his Legal Building Site Letter, Mr. Graves informed Mr. Sunde that the rump section was not a separate building site, even though all the lots around it had been peeled off by deeds and building permits. The reason the rump section was not an "established" separate building site was because no deed or building permit specifically and explicitly defined it as a separate building site. In Mr. Graves's words: "While the available permit records suggest that Lot 19 was not included in the development site of either of the adjacent residences, there are no permits that describe Lot 19 or the South 30 feet of Lot 19 as a separate building site. Therefore, the South 30 feet of Lot 19 is not established by permit as a separate building site."

The reasoning Mr. Graves employed in the Thor Sunde matter is that a building permit only establishes a separate building site if it explicitly says so. Building permits that strip away surrounding lots one by one—leaving one final, unspoken-for patch of ground—do not establish a separate building site, because they do not speak explicitly to the existence of a separate building site. The Thor Sunde building permits were for adjacent portions of the property, not for the portion of the property Mr. Sunde proposed as a separate building site. In the absence of a building permit for that portion, the Department found there could be no separate building site.

The Department's reasoning in the Thor Sunde matter is logically sound and fully compliant with the law of the Historic Lot Exception. It is capricious of the Department to reject that reasoning without explanation in the current case. It is especially capricious of the Department to abandon the previous approach that was sound and evidence-based in favor of a new approach that is unsound and unsubstantiated by evidence.

It is a fundamental tenant of administrative law that agencies may not capriciously disregard their own precedent by deciding analogous cases in opposite ways without any explanation for the change.[30] Because the Department has done so in this case, its finding of the Historic Lot Exception must be overturned.

ISSUE 3: THE DEPARTMENT MUST REFUND

THE CODE INTERPRETATION FEE

In her request for a code interpretation, Appellant requested a refund of the $2,800 code fee. She pointed out that these fixed costs lack a rational justification, are disproportionate, and function to limit her access to the court system, all in violation of the precedent set in *Housing Authority of King Cty. v. Saylors*, 87 Wn.2d 732 (1976). The Department's code interpretation does not address this complaint, and no refund has been forthcoming.

Unlike the typical requestor of a code interpretation, usually a person or entity who seeks regulatory assurance prior to requesting a permit for a development project, Appellant seeks this code interpretation only because she must: It is a required "exhaustion of administrative

[30] *See, e.g., Lemoyne-Owen College v. NLRB*, 357 F.3d 55, 59–60 (D.C. Cir. 2004) (holding that agencies may not capriciously alter course from case to case, because such conduct destroys "predictability and intelligibility.")

remedies" step in the Hearing Examiner appeals process.[31] Thus, the Code Interpretation in this case operates on Appellant as a required fee for obtaining access to a court of law.

Access to courts is a constitutional right in Washington and required fees to access courts must have a rational justification under the rule set by the Washington Supreme Court in *Housing Authority of King Cty. v. Saylors*:

"As the United States Supreme Court said in *Ortwein v. Schwab*...the rational justification test is met if the fee is **not disproportionate** and provides some revenue to assist in **offsetting operating costs.**"[32]

Requiring the $2,800 fee in this case fails both prongs of the *Saylors* test. The fee is disproportionate and it does not assist in offsetting the Department's operating costs.

The fee is disproportionate as an access-to-court fee. Below is a sampling of fees to file a matter in a court of law or to obtain administrative review in Washington:

i) The Seattle Hearing Examiner requires only an $85 fee. SMC 3.02.125(A).

ii) Appeals from a court of limited jurisdiction require a $230 fee. RCW 36.18.020(2, 5).

iii) Filing at a Washington State Superior Court requires a $240 fee. RCW 36.18.020(2, 5).

iv) Appeals to the Washington State Court of Appeals require a $290 fee. RCW 36.18.018(2, 4).

v) Appeals to the Washington State Supreme Court require a $290 fee. *Id.*

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[31] *See* SMC 23.88.020(A).

[32] 87 Wn.2d at 739 (citing *Ortwein v. Schwab*, 410 U.S. 656 (1973) (emphasis added)).

vi) Filing a case in the U.S. District Court for the Western District of Washington requires a $400 fee. 28 U.S.C. § 1914.

vii) Appeals to the United States Court of Appeals for the Ninth Circuit require a $505 fee. 28 U.S.C. § 1913.

viii) Appeals to the Supreme Court of the United States require a $300 fee. Sup. Ct. Rule 38(a).

The $2,800 fee required by the Department as part of the judicial review process is grossly out of proportion to any of the fees listed above, especially considering that $2,800 is a minimum fee that could go up later. Unlike the owner of property who seeks clarification of a potential project, Appellant simply seeks administrative and, if necessary, judicial review of a project the City has effectively already approved, and for which the City has already invested substantial resources in concluding that the separate building site had been "established" by building permit. The Department's code interpretation gives developers firm legal ground to stand on as they plan their projects, so the fee is reasonable for them. But all the fee does for Appellant is needlessly drive up the cost of Hearing Examiner or judicial review. It would be cheaper to file an appeal in all eight jurisdictions listed above *simultaneously* than it is to file an appeal of this MUP. The fee is disproportionate to the service, making it unjustifiable under the first prong of *Saylors*.

In addition, the fee in this case is not justifiable as an offsetting of the Department's costs in this case, thus failing the second prong of *Saylors* as well. Prior to issuing the MUP and the code interpretation, the Department had already conducted a thorough search of the property's history and of the municipal code. The work normally funded by Appellant's $2,800 code interpretation fee had already been done. The code interpretation in this case was nothing more

than a restatement of the Department's earlier efforts. The Department incurred no new costs the fee could be used to offset.

Because the fee is disproportionate and does not offset costs, the fee unconstitutionally restricts Appellant's access to the courts, in violation of both the State Constitution and LUPA, both of which grant citizens reasonable access to the courts. *See Saylors*; RCW 36.70C.030.

The Department has waived code interpretation fees in the past, most notably for the "Shell No" protests. Department staffer David Graves wrote in a July 18, 2016 email to one of the Friends of the Silent Giant that the Director does have the power to waive the cost of code interpretation, but he said the Director only does so in cases that receive "national attention."

The "national attention" standard is wholly undocumented anywhere in the land use code or the Department's published procedures. It is arbitrary and capricious to extend fee waivers to groups based on unpublished and seemingly ad hoc rationales. Appellant has gained local attention in the media for this story, there is significant concern citywide with the use of Historic Lot Exceptions to bypass the building code, and she and the public deserve to have this issue heard without undue fees.

ISSUE 4: THE DEPARTMENT MUST WAIVE AND REFUND ITS COSTS OF DFEENDING THE CODE INTERPRETATION BEFORE THE HEARING EXAMINER

The normal rule under the land use code is that the requestor of a city service incurs the cost of preparing for defending that service at the Hearing Examiner at a rate of $280 per hour. *See* SMC 22.900C.010(A). This includes the requirement that the requestor of a MUP will bear the cost of that permit if it is appealed to the Hearing Examiner.

Here, as reflected by the Legal Building Site Letter and the issuance of the MUP, the Department had already made up its mind on the Historic Lot Exception prior to writing its code

interpretation. When Appellant sought to appeal the Department's decision, she was forced by law to seek a code interpretation, but she is not really appealing the code interpretation; the code interpretation merely serves as the exhaustion requirement for her appeal of the Department's original decision to find a Historic Lot. The developer is the ultimate requestor of the city's services, not Appellant. Appellant only appears to be a requestor of services because she was told repeatedly by the Department that the only way to appeal the Department's decision is to request a code interpretation. The actual service at issue is the granting of the MUP and the finding of the Historic Lot Exception.

Because the developer was the actual requestor of city services, the developer is required to bear the costs of defending those services before the Hearing Examiner under SMC 22.900C.010(A). The Department must refund any defense fees assessed against Appellant and must waive any further fees against her.

Respectfully submitted this 9th day of January, 2017.

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CERTIFICATE OF SERVICE

I certify that on this date, I electronically filed a copy of this Appellant's Prehearing Brief 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 9th day of January, 2017 at Seattle, Washington.

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