BEFORE THE HEARING EXAMINER
City of Seattle

In the Matter of the Appeals of	)	Hearing Examiner Files:
	)	**MUP-16-019 (SE)**
Lisa Parriott et al.	)	**S-16-007**
	)	
from a decision and interpretation by the Director, Seattle Department of Construction and Inspections	)	Department Reference: 3026248
	)	
	)	**SDCI Closing Statement**

This memorandum constitutes the written closing statement of the Seattle Department of Construction and Inspections (SDCI) in the above-captioned appeal. SDCI limits its written closing to a brief summary of the issues and a response to the oral closing arguments of the parties given on January 12, 2017.

Summary

The property in question is addressed in SDCI records as 3036 39th Ave SW. This property is described as the South 16 ⅔ feet of Lot 14 and North 16 ⅔ feet of Lot 15, Block 1, J. Walther Hainsworth's 1st Addition to West Seattle. For convenience, this property has been referred to as "Parcel B." Parcel B is not developed with any structure, apart from a portion of a porch attached to the house to the south. SDCI has determined, based on the minimum lot area exceptions of the Land Use Code, that Parcel B may be developed as a separate building site, provided that the encroaching porch is removed. Neighbors of the subject property, including the appellants, requested a formal interpretation of the Land Use Code to challenge that determination. Interpretation No. 16-006, addressing this issue, was published on December 9, 2016, and subsequently appealed.

The available record, not in dispute, shows that in 1913, Lots 13, 14 15 and 16 were all under common ownership by Coulthard. Building permit 294395, for the property addressed as 3038 39th Ave SW, described on the permit as the South 8 ⅓ feet of Lot 15 and Lot 16, was issued in 1930 for the construction of a home. That parcel, which is the south one-third of the original Coulthard property, has been referred to in this appeal as Parcel A. Building permit 297240 for the property addressed as 3030 39th Ave SW,

described as Lot 13 and the North 8 ⅓ feet of Lot 14, was also issued in 1930 for construction of a home. That parcel, the north one-third of the original property, has been referred to as Parcel C. Neither of these permits included Parcel B, the middle one-third of the original property, in their site descriptions. Parcel B was therefore left vacant following the approval of the two building permits.

With an area of 3,166 square feet, Parcel B does not meet the minimum lot area of the Single Family 5000 zone in which the parcel is located. However, Seattle Municipal Code (SMC) Section 23.44.010.B.1.d, "The Historic Lot Exception," allows the 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 by building permit prior to 1957. Since Parcel B was not identified in either the building permit directly north or south of it, it clearly qualifies as a separate building site based on the record created by the two building permits approved in 1930.

Burden of Proof

SMC Section 23.88.020.G.5 provides in part that a formal interpretation of the Director of SDCI shall be given substantial weight, and the burden of establishing the contrary shall be upon the appellant. This standard of review is whether the SDCI decision was "clearly erroneous." Based on the record presented at the hearing on this matter, the appellants have not met their burden to show that the SDCI interpretation was clearly erroneous. No evidence has been provided to the Hearing Examiner to support a conclusion that SDCI made a mistake in its determination, on the basis of building permit history, that Parcel B is a legal building site.

Argument

To answer the question whether SDCI was clearly erroneous in determining that Parcel B is a separate building site, we must look at undisputed facts and at the process used by SDCI.

In 1930, when the building permits for Parcels A and C were issued, there were no formal restrictions or regulations for short subdivision of land. At that time, if a property owner wanted to subdivide their property, dividing it by building permit was one of the ways this could be done. Since the owner of Parcel A specifically obtained a building permit that called out only the southern portion of the 4 platted lots he owned, it is correct to conclude that this subdivided the property. The separate sale and issuance of a building permit for the north portion also effectively divided the property. The clear public record of these actions reflects that the original property was effectively subdivided, by the means available at that time, into three equal lots.

SDCI's reasonable interpretation of the minimum lot area exception conforms to the Seattle Comprehensive Plan, which supports the use of minimum lot exceptions to allow the development of building sites created in the public records under previous codes.

Vacant Lots Do Not Have Building Permits

One of the main arguments put forward by the appellant deals with the lack of a building permit or additional records for Parcel B. It is impossible to have additional records or permits for a lot that was never developed. A vacant lot would never have a building permit. Vacant lots mean lots that have not been built on under an issued permit. To reason otherwise, and conclude that permits are required to describe vacant lots, would effectively read the Historic Lot Exception for lots established by building permit out of the Land Use Code.

Appellant's Review Standards Are Not in The Land Use Code

The standards of review argued by the appellant are not a proper basis for determining whether a parcel qualifies for the Historic Lot Exception to minimum lot area requirements. The standards provided in the code for that exception do not require or allow SDCI to consider the purchase price of Parcels A and B. Similarly, a standard of "fairness" proposed by the appellants is not a standard described or contemplated by the code. The subjective intent of the original owner also is not a standard described or contemplated by the code.

Parcel B was "established" within the meaning of the code

The appellants spend a significant amount of time in their prehearing brief discussing their interpretation of the term "establish." The three cases cited strain to pull the term "establish" from cases involving black lung, insurance, and DUIs and insert that use of the term in an evidentiary sense into the land use code. This employment of the meaning found in these cases into the land use code is completely out of context. A more appropriate definition of "establish," in the context of the Historic Lot Exception, is "to recognize" (see Black's Law Dictionary, Second Edition). The Historic Lot Exception plainly states a process for recognition of existing legal building sites. The context of SMC 23.44.010.B.1.d provides clarity about how a lot may have been historically "established." The two 1930 building permits, for the north and south portions of the lot, effectively subdivided the property into three equal lots, and all three were thus historically "established" as a matter of public record.

Sewer Card and Sewer Plat Were Not Used to Reach Decision

The application of the Historic Lot Exception is not based on the subjective intent of the historic property owner or historic City officials. Sewer records are not allowed, under the code, as a basis for applying that exception. However, evidence was provided showing that the intent of the exception was to preserve the expectations of an owner that

a parcel that was carved off before minimum lot area requirements were first imposed would continue to qualify for separate development. The sewer card (started in 1928) and sewer plat (entered in 1931) also introduced at the hearing reflect that Parcel B was contemplated by the City at that time as a separate lot. This demonstrates that the City's application of the Historic Lot Exception is consistent with the original legislative intention behind that exception.

SDCI Did Not Ignore Pertinent Contrary Evidence

The appellant also argues that SDCI ignored contrary evidence. This evidence includes tax records, failure to build by owners after 1957, sale price of the parcels, common ownership of the parcels, and existence of a porch.

Where a parcel qualifies as an historic lot of record, within the meaning of Section 23.44.010.B.1.d, the code is very clear about what subsequent actions would cause it to no longer qualify for the Historic Lot Exception. In particular, if it is developed together with an abutting lot where a principal structure extends over the lot line, the lots would no longer qualify, but if the encroaching portion of the structure is a feature such as a deck or eaves, and that feature is removed, the vacant lot may again qualify, so long as it is not otherwise required to meet development standards for the neighboring house. If a lot has been used to meet a parking requirement for a house on a neighboring lot, that parking must be moved to the same lot as the house in order for the vacant lot to qualify for separate development under the exception.

Tax records, failure to build by owners after 1957, and the sale prices of the parcels (as mentioned earlier) are not records or actions cited in the code for determining building site legality. Conveyance in common with an adjacent parcel, or failure to develop, or transfer for a sales price that does not reflect development potential, are not listed in the code as factors that would prevent a parcel from qualifying for the Historic Lot Exception, and it would not be appropriate to read these restrictions into the code.

The deed history does show common ownership of the property from 1913 until the present date. However, as the code clearly states, "A lot is considered to have been established as a separate building site ***by deed*** if the lot was held under separate ownership . . . ." (emphasis added) per 23.44.010.B.1.d.1). SDCI found Parcel B to qualify as a legal building site based on building permits. The restriction on common ownership related only to sites recognized by deed.

Since the porch is an unenclosed minor feature of the existing house on Parcel A, its encroachment onto Parcel B is irrelevant, as Section 23.44.010.B.1.d.3 allows removal of minor structural features in order to allow a property to qualify for the Historic Lot Exception.

SDCI Applied Historic Lot Exception in Conformity with Past Opinions

Appellants claim SDCI decided this case differently from others – specifically a legal building site analysis of property owned by Thor Sunde. As discussed during oral arguments, Mr. Sunde's situation is distinguishable from the parcel at issue. Mr. Sunde sought to establish only *a portion* of a parcel created by building permits. In Mr. Sunde's case, building permits were issued to parcels to the north and south of a third parcel. A portion of the third parcel was then sold to the owner of the north property. Mr. Sunde asked for a legal building site determination of the remaining portion of the third property. The building permits had omitted the entire third property in the middle, so in its entirety it would qualify for separate development, consistent with the reasoning applied in this case. However, a portion of that middle parcel was sold to the north owner by the south owner, and Mr. Sunde's inquiry related only to the remaining portion of the middle parcel. That portion could not qualify for the lot area exception based on the historic permits, as it was not the entire property that had been excluded from those permits.

Conclusion

The property described as the South 16 ⅔ feet of Lot 14 and the North 16 ⅔ feet of Lot 15 (Parcel B) is a separate legal building site based on the Historic Lot Exception, pursuant to SMC 23.44.010.B.1.d. The original Coulthard property was effectively subdivided into three equal lots, as reflected by the 1930 building permits, which called out the north one-third and the south one-third of that property, both excluding the middle one-third (Parcel B). No subsequent actions have caused Parcel B to cease to qualify for the exception, based on the code standards. SDCI Interpretation No. 16-006 should be affirmed.

Entered this 19th day of January, 2017.

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