Hearing Examiner Sue A. Tanner

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 OWNER'S POSTHEARING BRIEF

COMES NOW the property owner Nehem Properties LLC ("Nehem Properties"), by and through its undersigned attorneys, Samuel M. Jacobs and Brandon S. Gribben of Helsell Fetterman LLP, and submits the following posthearing brief.

A. Introduction.

This appeal concerns Seattle Department of Construction and Inspection's ("SDCI") interpretation and application of the Historic Lot Exception, Seattle Municipal Code ("SMC") 23.44.010.B.1.d; namely, whether a building permit that was issued prior to July 24, 1957 that only legally describes and refers to a portion of a certain property, is sufficient to establish the portion of the property that is not legally described or referred to as a separate building site. Under the plain language of the Historic Lot Exception and SDCI's long-standing and consistent interpretation of that ordinance, the 1930 building permit for Parcel A established Parcel B as a separate building site. SDCI's determination that Parcel B is a separate building site should be upheld, and the Appellant's appeal should be

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dismissed because she failed to demonstrate that SDCI's code interpretation was clearly erroneous.

B. The Building Permit and the Historic Lot Exception.

The facts of this case are undisputed and relatively straightforward. Nehem Properties is the current owner of the property known as and located at 3038 39th Avenue SW, Seattle, WA (the "Property"). The Property is comprised of Parcel A[1] and Parcel B[2]. Directly to the north of Parcel B is the property known as 3030 39th Avenue SW that will be referred to as Parcel C[3]. Parcel A and Parcel B are 3,166 square feet each; Parcel C is slightly smaller at 3,135 square feet. There is a single family home located on Parcel A and another single family home located on Parcel C. Parcel B, which is located between Parcel A and Parcel C, is currently undeveloped.

In 1906, the J. Walther Hainsworth's 1st Addition to West Seattle[4] established the plat for Lots 13, 14, 15, and 16. These platted lots were only 25 feet wide and 95 feet long for a total lot area of only 2,375 square feet. In the early 1900s, Coulhart purchased Lots 13, 14, 15 and 16. In 1930, Lots 13, 14, 15 and 16 were divided by building permits into three approximately equal sized parcels: Parcel A, Parcel B and Parcel C. During the same time period a building permit was issued by the City that allowed construction of a single family home on Parcel A. The building permit referred to Parcel A, but omitted Parcel B. A separate building permit was issued by the City that allowed construction of a single family

[1] The terms Parcel A and Parcel B will be used throughout this brief for ease of reference since those terms (or sometimes Lot A and Lot B) were used by SDCI and Nehem Properties in the request for opinion letter dated November 15, 2015 (Ex. 18), the preliminary opinion letter dated January 5, 2016 (Ex. 24), the code interpretation No. 16-006 (Ex. 1) and throughout the appeal hearing. Parcel A is legally described as the South 8 1/3 feet of Lot 15 and Lot 16, Block 1, J. Walther Hainsworth's 1st Addition to West Seattle.

[2] Parcel B is legally described as South 16 2/3 feet of Lot 14 and the North 16 2/3 feet of Lot 15, Block 1, J. Walther Hainsworth's 1st Addition to West Seattle.

[3] Parcel C is legally described as Lot 13 and the North 8 1/3 feet of Lot 14, Block 1, J. Walther Hainsworth's 1st Addition to West Seattle.

[4] Ex. 20.

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home on Parcel C. That building permit referred to Parcel C, but also omitted Parcel B. Parcel B, which was not described in the building permits for Parcel A or Parcel C was established as a separate building site. This development is consistent with what other property owners in the J. Walther Hainsworth's 1st Addition to West Seattle plat were doing during this time period[5].

In 1930, Coulthart owned Parcel A and Parcel B when the City issued a building permit[6] that legally described Parcel A, but did not refer to Parcel B. In its preliminary opinion letter and code interpretation, SDCI determined that this building permit established Parcel B as a separate building site under the Historic Lot Exception, SMC 23.44.010.B.1.d. Other documents introduced into evidence at the hearing support SDCI's determination that these were separate building sites. For example, the sewer plat[7] issued by the City specifically carves out Parcel A as a separate building site from Parcel B. The 1928 sewer card[8] is consistent with the sewer plat in that it depicts Parcel A and Parcel B as separate building sites. There is also a mortgage that was obtained by Coulhart in 1930 for Parcel A only. In 1937, Parcel A and Parcel B were transferred from Rose to Costello subject to the mortgage that was only for Parcel A[9]. The mortgage was then modified by Costello, the then owner of Parcel A and Parcel B. The loan modification specifically referred to Parcel A, while again, omitting Parcel B. These documents reflect the intent of the owners and the City to establish Parcel B as a separate building site because it was intentionally segregated from Parcel A.

The Historic Lot Exception, SMC 23.44.010.B.1.d, provides that:

B. Exceptions to minimum lot area requirements. The following exceptions to

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[5] Ex. 2.
[6] Ex. 5.
[7] Ex. 11.
[8] Ex. 10.
[9] Ex. 9.

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> 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.

Parcel B qualifies as an exception to the minimum lot area requirements under the Historic Lot Exception because (a) it at least 2,500 square feet (in fact, it is over 20% larger); and (b) the 1930 building permit established Parcel B as a separate building site.

The Appellant argued in her prehearing brief and during the hearing that the word "establish," as used in the ordinance, refers to some heightened burden of proof that is found nowhere in the SMC, hearing examiner's decisions or case law. In support of this specious argument, the Appellant cites to a U.S. Supreme Court case concerning the evidentiary standard to qualify for black lung benefits, a Tennessee Supreme Court case concerning the burden of proof in jury instructions, and an unpublished Kansas Court of Appeals case concerning a DUI conviction. Each of these cases are inapposite to whether the building permit established Parcel B as a separate building site.

Merriam-Webster defines the word "establish" as "to bring into existence." It is clear in the context of the ordinance that this is the meaning the City Council had in mind when they passed the Historic Lot Exception. To suggest otherwise requires a nonsensical reading of the ordinance. The City's long-standing interpretation and application of the Historic Lot Exception is congruent with this definition of the word establish. Under this definition, the 1930 building permit unequivocally established Parcel B as a separate building site.

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C. The Appeal Hearing.

On January 12, 2017, the hearing in this matter took place before Hearing Examiner Sue Tanner. The Appellant, Lisa Parriott, did not offer any witnesses in support of her appeal even though she carries the burden of proof. More specifically, the Appellant did not elicit any testimony or otherwise introduce any evidence that contradicted SDCI's determination that the building permit established Parcel B as a separate building site or that SDCI had not consistently applied the Historic Lot Exception. The Appellant merely offered conjecture and unsupported theories in support of her argument that the 1930 building permit was insufficient to establish Parcel B as a separate building site.

SDCI called two witnesses: David Graves and Andy McKim. Mr. Graves is a senior land use planner employed by SDCI who authored the preliminary opinion letter and code interpretation. Mr. Graves testified that when a building permit, which was issued prior to July 24, 1957, legally describes only a portion of the property, and specifically omits the remainder of the property, which is sufficient to create a separate building site under the Historic Lot Exception. Mr. Graves further testified that the documents entered into evidence during the hearing was sufficient to establish Parcel B as a separate building site and was consistent with SDCI's interpretation of the Historic Lot Exception since it was passed into law.

Mr. Graves also distinguished the opinion letter issued by SDCI to Thor Sunde[10] from the facts of this case. Mr. Graves testified that Mr. Sunde's property did not qualify as a separate building site because it had never been specifically omitted from the larger property by a building permit that was issued prior to July 24, 1957. In the Sunde matter, the specific property that was not legally described in the building permit had been further reduced in size *prior* to Sunde requesting the opinion letter. The Appellant did not cross-

[10] Ex. 17.

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exam Mr. Graves on this issue or otherwise introduce any evidence that contradicted his testimony that the facts of the Thor Sunde matter were materially different from the facts of this appeal.

Andy McKim, a land use planner supervisor with SDCI, testified that he reviewed the code interpretation issued by Mr. Graves and that he agreed with its analysis and conclusions. Mr. McKim further testified that a building permit issued prior to July 24, 1957 that is silent to a portion of a parcel is sufficient to establish that portion of the parcel as a separate building site. He also testified at length on the various ordinances passed by the City and how this policy and application of the Historic Lot Exception is consistent with the various ordinances. Mr. McKim testified that the opinion letter dated September 10, 2013 for project number 3015709[11] and the opinion letter dated December 20, 2013 for project number 3016341[12] that were both authored by Mr. McKim were analogous to the facts of this case because SDCI found that a building permit which only referred to a portion of a piece of property was sufficient to establish a separate building site in that portion of the property that was not referenced in the building permit.

Finally, Mr. McKim soundly rejected the Appellant's conclusory statements that the original owner might have omitted Parcel B from the 1930 building permit because they intended to install a chicken coop, greenhouse, gazebo, detached garage, swimming pool or other similar accessory structure. Mr. McKim testified that if this was the original owner's intent, they would have described Parcel A and Parcel B because those accessory structures would need to be accessory to the house that was ultimately built on Parcel A – they could not be built on a separate parcel. And, of course, the original owner did not install any of those accessory structures on Parcel B.

[11] Ex. 21.
[12] Ex. 22.

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Nehem Properties called William Mills, a land use planner supervisor with SDCI, as the final witness of the hearing. Mr. Mills confirmed that the testimony offered by Mr. Graves and Mr. McKim concerning the Historic Lot Exception has been consistently applied since the ordinance was passed. He also testified that the opinion letter dated November 14, 2014 for project number 30187547[13] is substantially similar to the facts of this case in that a building permit which failed to legally describe a portion of a parcel was sufficient to establish that undescribed portion of the parcel as a separate building site.

D. <u>The Appellant's Burden of Proof.</u>

The Appellant bears a heavy burden to overturn a code interpretation by the Director. SMC 23.88.020.G.5 provides that:

> G. Appeals to Hearing Examiner, process and standard of review
> 5. Appeals shall be considered de novo, and the decision of the Hearing Examiner shall be made upon the same basis as was required of the Director. **The interpretation of the Director shall be given substantial weight, and the burden of establishing the contrary shall be upon the appellant.** The Hearing Examiner shall summarily dismiss an appeal without hearing which is determined to be without merit on its face, frivolous, or brought merely to secure a delay. (emphasis added)

It is well-settled that the Appellant has the burden of proving that the code interpretation is "clearly erroneous." *Brown v. Tacoma*, 30 Wn. App. 762, 637 P.2d 1005 (1981). This is a deferential standard of review, under which the Director's decision may be reversed only if the Examiner is left with a definite and firm conviction that a mistake has been made. *Cougar Mt. Assoc. v. King County*, 111 Wn. 2d 742, 747, 765 P.2d 264 (1988); *Moss v. Bellingham*, 109 Wn. App. 6, 13, 31 P.3d 703 (2001). Under the clearly erroneous standard of review, the court "does not substitute its judgment for that of the administrative body and may find the decision 'clearly erroneous' only when it is 'left with the definite and firm conviction that a mistake has been committed.'" *Polygon Corp. v. Seattle*, 90 Wash.2d 59,

[13] Ex. 23.

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69, 578 P.2d 1309 (1978) (*quoting Ancheta v. Daly*, 77 Wash.2d 255, 259-60, 461 P.2d 531 (1969)).

While the Appellant has failed to present any evidence that could lead to the conclusion that the 1930 building permit did not establish Parcel B as a separate building site, even if she did present evidence that could lead to that conclusion, it would be insufficient to conclude that SDCI's decision was clearly erroneous based upon the substantial evidence in the record that supports SDCI's conclusion. Simply put, SDCI's code interpretation should be affirmed because mere conjecture and speculation is woefully insufficient to establish that the code interpretation is clearly erroneous.

E. Conclusion.

The 1930 building permit that described Parcel A, but did not refer to Parcel B, established Parcel B as a separate building site under the Historic Lot Exception. The sewer card, sewer plat, and loan modification confirm that Parcel B was established as a separate building site because it was intentionally segregated from Parcel A. Three separate SDCI employees, with many decades of experience between them, all testified that the code interpretation was consistent with SDCI's interpretation and application of the Historic Lot Exception since it was passed into law. The Appellant failed to introduce any evidence or testimony that could lead to the conclusion that the code interpretation was clearly erroneous. The Hearing Examiner should dismiss the appeal and affirm SDCI's code interpretation.

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Respectfully submitted this 19th day of January, 2017.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on January 19, 2017, the foregoing document was sent for delivery on the following party in the manner indicated:

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