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The Honorable Sue A. Tanner

**BEFORE THE HEARING EXAMINER**
**CITY OF SEATTLE**

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

TO: Office of the Hearing Examiner;

TO: Respondent, Department of Construction and Inspections; and

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

This posthearing brief is a response to the arguments respondents presented at the hearing on January 12, 2017. Appellant maintains all the arguments raised in her prehearing brief and at the hearing, but for brevity does not repeat those arguments here.

## CAN A 1930 BUILDING PERMIT FOR AN ADJACENT HOME ON A LARGE LOT ESTABLISH A SEPARATE LOT BY OMISSION?

Andy McKim, a member of the respondents' legal team and a witness for the respondents, testified that the Department of Construction and Inspections (the Department) was justified in finding separate building sites even when no document speaks directly to the site in

question. Mr. McKim called this approach the "Leftover Slice of Pie" theory. Under the Leftover Slice of Pie theory, a 1930 building permit that was silent about the physical boundaries of a proposed building site can nonetheless "establish" a separate building site even if the building permit does not mention the adjacent site. We believe Mr. McKim is wrong: a separate building site (here lot A) established in 1930 cannot "establish" Lot B by omission.

Mr. McKim's Leftover Slice of Pie theory is undermined by Mr. McKim's admission on cross examination that this theory does not appear anywhere in the Historic Lot Exception ordinance. He further admitted that the Department has not published any Director's Rule or other guidance document explaining or justifying the Leftover Slice of Pie theory. Thus, there is nothing in law or regulation that justifies the Department's use of the Leftover Slice of Pie theory.

In the absence of a Director's Rule or other binding law, the only basis for the Leftover Slice of Pie theory is Mr. McKim's assertion at the hearing that people in pre-zoning times used these "silent" building permits to reserve potential future lots. But he did not provide any factual support for this assertion, and there are numerous other plausible reasons why a 1930 homeowner would situate his or her home on only a portion of a larger lot; that person may have intended to enjoy a larger lot or use the extra area for some other function. He also did not explain why people would feel the need to create separate lots in this way in those days, when they could just as easily create lots of any size prior to any transaction through any number of other methods. Given the plethora of lot-creation methods available for easy use in 1930, there is no logical reason why an owner would need to create a lot in advance of a building or sale. He could simply create whatever new lot he needed at the time of the transaction. There was no reason in pre-zoning days to create a Leftover Slice of Pie and then let it sit for decades on end. Mr. McKim's assertion is both factually unsupported and illogical. In sum, 86 years have gone

by and this "left-over piece of pie" has just been used and enjoyed as a unified large lot, even after the zoning changed to 5000 square feet in 1952.

Because there is nothing in law that justifies the Leftover Slice of Pie theory, the Hearing Examiner is not required to give the theory deference. Washington courts must give deference to an agency's interpretation of its own "properly promulgated regulations."[1] But here, there is no regulation to afford deference to, much less a "properly promulgated" one. If the Department's legal team believe the Leftover Slice of Pie theory should control Historic Lot Exception cases, they should prevail upon their director to issue a Director's Rule to that effect.[2] A Director's Rule would ground the Leftover Slice of Pie theory in law and create predictability, but the Department has not chosen to promulgate such a rule.

Even the Department's case-by-case application of its Leftover Slice of Pie theory is inconsistent and undeserving of deference. The Department has never stated the scope and standards it uses when applying the Leftover Slice of Pie theory. In the Thor Sunde example discussed at the hearing,[3] the Department found no separate lot in a case where there was a Leftover Slice of Pie, because a portion of that Leftover Slice (though not all of it) was later reattached to a different slice. There was still a rump Leftover Slice even after the reattachment, but for inexplicable reasons, the Department's Leftover Slice of Pie theory did not extend to that rump slice. The whole theory lacks consistent boundaries and standards, either in law or in practice. Such a theory does not deserve deference under Washington law.[4]

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[1] *Silverstreal, Inc. v. Dep't. of Labor and Industries*, 159 Wn.2d 868, 884 (2007).

[2] The Department's website describes Director's Rules as "binding rules about land use, construction, housing, and other codes we administer."

[3] *See* Exhibit 17, "Thor Sunde Legal Building Site Letter."

[4] *See Sleasman v. City of Lacey*, 159 Wn.2d 639, 647 (2007): "[The City] bears the burden to show its interpretation was a matter of preexisting policy...[The City] needs more than two nearly simultaneous examples of its application to single-family residences to demonstrate this was city policy, because a nonexistent enforcement policy cannot provide notice to the [plaintiffs.]"

The Department's interpretation of the Historic Lot exception does not, as a matter of law, deserve deference. And even if it did, the Department cannot create secret, ad hoc "rules" and then expect deference to them. The Hearing Examiner should reject the Leftover Slice of Pie theory as a method for finding a Historic Lot in this case. The theory has no basis in the text of the law, no cognizable basis in the Department's past practice, and no logical basis in the facts in the record.

## ESTABLISH MEANS "FIRMLY SHOW," NOT MERELY "CREATE"

In his closing argument, the developer's attorney argued that when the Historic Lot Exception demands that a lot be "established as a separate building site in the public records,"[5] what the ordinance is saying is that a separate site must only be created, and that such a separate lot can be created by omission. We disagree. We believe the ordinance provides that there must be some *affirmative* evidence in the record showing unequivocally that a building owner intended to establish a separate building site and this establishment is affirmatively documented and clear in the historical record.

The term "establish" in its ordinary meaning requires affirmative conduct. In this ordinance, "establish" means prove, not create.

Public records like deeds, plats, and building permits do not create lots, such as the lot at issue in this case. Public records are merely evidence of that specific lot's existence. The owner's title is what actually creates a lot, and the records function as evidence of that title.[6] Here, the title and taxes reflect one lot.

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[5] SMC 23.44.010.B.1.d.

[6] *See, e.g.*, RCW 84.64.190, "Certified Copy of Deed as Evidence."

An application of this principle can be found in the unpublished case of *Tomkins-Flowers, LLC v. Counterpoint Design and Development, LLC*, 146 Wn. App. 1020 (2008).[7] In *Tomkins-Flowers*, a question arose as to whether a predecessor's deed describing but not delineating "rights of way" created an easement across a certain portion of a neighboring property.

The court examined the text of the deed and found that "nothing in the deed establishes that either an easement or right of way...was given to Tomkins-Flowers's predecessors. Only the existing 10-foot easement to access the property, which the parties do not dispute, is identified in this deed. The [trial] court did not err by concluding that Tomkins–Flowers failed to prove the existence of a prescriptive easement under color of title."

The *Tomkins-Flower* case illustrates the appropriate use of public record documents, here a deed: as a piece of evidence to be examined to determine whether a right exists. The deed in *Tomkins-Flowers* was not called upon to "establish" the easement in the sense of creating the easement. It was called upon to "establish" the easement in the sense of proving the existence of the easement in the minds of the drafters.

We believe the word "establish" carries the same sense in the Historic Lot Exception as it does in *Tomkins-Flowers*. No deed, plat, or building permit could ever create a separate building site; they could only prove the existence of a separate building site in the mind of the drafters.

Because the proper sense of the word "establish" here is "to prove," the law of the Historic Lot Exception is saying that public records must convincingly prove the existence of a separate building site. This means the Department must use the 1930 building permit to show firm evidence that a separate building site unquestionably exists, created by the 1930 owner with

[7] We cite this case not as binding precedent but as an illustration of a principle of property law.

the intent to build on the site. As discussed in the prehearing brief and hearing, the Department cannot meet that burden—the building permit does not say what is to happen with the northern half of the lot, and the sewer card is not one of the permissible types of document that can be used as evidence of the reservation of a future lot. All the Department is left with is the Leftover Slice of Pie theory. That is not enough to prove the existence of a separate building site.

## CONCLUSION

The Department's Leftover Slice of Pie theory is ungrounded in law or fact and is not entitled to deference by the Hearing Examiner because it involves a legal interpretation of the Historic Lot exception. There is not enough evidence to prove that a separate building site exists on the northern half of the property at issue in this case. All Mr. Low can prove is that he purchased an existing home on a lot larger than that currently required by the zoning regulation in effect. There were numerous plausible reasons why the 1930 building permit for the southern lot did not reference the larger lot aside from the intent to reserve a future building lot. The normal zoning law should apply to this property, and a separate house should not be permitted.

Respectfully submitted this 19th 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 Posthearing 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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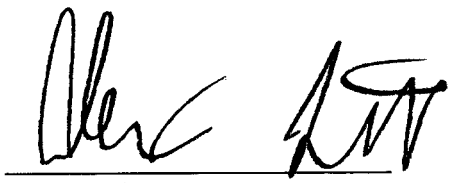
DATED this 19th day of January, 2017, at Seattle, Washington.



Alex Sidles