Hon. Joan DuBuque
Hearing Date: July 19, 2013

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF KING

BENCHVIEW NEIGHBORHOOD ASSOCIATION, a Washington Unincorporated Association,

Petitioner,

v.

CITY OF SEATTLE, a Washington Municipal Corporation; BLUEPRINT SERVICES, LLC, a Washington Limited Liability Company; DAVID BIDDLE, an individual Washington resident; ALL DAY CONSTRUCTORS, LLC, a Washington Limited Liability Company; and JMS HOMES, INC., a Washington Corporation,

Respondents.

No. 13-2-05025-1 SEA

BENCHVIEW NEIGHBORHOOD ASSOCIATION'S OPENING BRIEF

I. INTRODUCTION

The Benchview Neighborhood Association (the "Association") implores the Court to reverse the City of Seattle's ("City's") Lot Boundary Adjustment #3014542 (the "LBA Decision"), which would allow three houses to be shoe-horned onto a property in its

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neighborhood that should only accommodate two homes. The density of development approved by the LBA Decision would be starkly out of character with the existing pattern of development in the rest of the Benchview Neighborhood.

The Association members want to preserve the character of their long-established residential community near Schmitz Park, where the 1950's era homes are spaciously set on standard-sized single-family lots. The existing pattern of development preserves ample light, air, views and open space between neighborhood houses, and thus enhances the health, safety and welfare of the community.

The Association does not oppose redevelopment of the LBA Property. It simply wants to ensure that the redevelopment is consistent with the existing pattern of development, so that it maintains the character of the neighborhood, the quality of life and property values.

Three substandard-sized lots, crammed onto this prominent corner lot through gerrymandered lot lines and boot-strapped exceptions, would drastically change the character of the Benchview Neighborhood. The unique development privileges granted by this LBA – of building on substandard-sized lots that are each much smaller than any of the surrounding properties – are privileges not shared by the rest of the property-owners in the neighborhood. The other homes in the Benchview Neighborhood are built on standard-sized lots.

The Association feels that in its haste to issue a decision, the City's Department of Planning and Development ("DPD") failed to gather and consider all of the pertinent facts that were needed to correctly interpret and apply the Land Use Codes. The Association also feels the DPD's LBA process denied neighborhood residents a meaningful opportunity to participate and to be heard in a highly discretionary decision-making process.

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Therefore, the Association respectfully requests that this Court reverse the DPD's LBA Decision and, if needed, remand this matter back to the DPD for further review in accordance with all the pertinent facts and applicable Codes.

II. ISSUES

The DPD erred in reaching its LBA Decision. The LBA Decision erroneously interpreted and applied the Land Use Codes, and their intent, and was based upon incomplete factual information.

The DPD also erred in approving this application as an administrative Type I LBA Decision, without due public process. The administrative LBA Decision shielded this application from appropriate public review and denied the Benchview Neighborhood Association a meaningful opportunity to be heard.

III. EVIDENCE AND STATEMENT OF FACTS

The following facts are drawn from the City's Documentary Record; the Declarations of Allan Caldwell and David Allen; and the Supplemental Records attached to the Declaration of David Allen, and referenced in the Association's Motion to Supplement the Record, filed herewith.[1]

A. Procedural Facts

The LBA application was filed on December 17, 2012, on behalf of developers who purchased the LBA Property following the death of a long-time neighborhood resident and property owner. R11.

The DPD processed the LBA application as a Type I administrative LBA decision. R1. In accordance with Seattle Municipal Code ("SMC") 23.76.012, the LBA process did not provide public notice, a public comment period or a hearing.

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[1] Citations to the City's Documentary Record are indicated by R and page number. Citations to Declarations are noted with paragraph numbers. Citations to the Association's Supplemental Records are indicated by S and page number.

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Upon learning of the LBA application, even though no formal notice or public comment period were provided, members of the Benchview Neighborhood Association began submitting written comments and questions to the DPD opposing the LBA. Allen Decl. at ¶ 8; *see generally,* R51-R195. These communications included facts and other records showing why it was not appropriate to approve the LBA, as well as discussions and illustrations of the specific adverse impacts the proposed LBA would have on the character and special qualities of the neighborhood. *Id.*

The DPD responded with various e-mails and a letter to the Benchview neighbors on January 15, 2013, but these communications did not fully address the neighbors' questions and concerns. *See generally,* R51-R195; R196-R203. Therefore, communications between the DPD and the Benchview neighbors continued. *See generally,* R204-R291.

On January 22, 2013, and again on January 29, 2013, the Association's legal counsel asked the DPD to review additional facts showing that the LBA should be denied. R292-R294; R310-R319; R329; R334. On January 24, 2013 DPD's Land Use Planning Supervisor, Andy McKim, responded that the DPD would consider the Association's factual information before issuing its decision. R299.

However, on January 29, 2013 Andy McKim admitted that a more junior and less experienced member of the DPD staff had prematurely approved the LBA 11 days earlier, on January 18, 2013, before the additional factual information was reviewed. *See e.g.,* R336. Unbeknownst to Supervisor McKim, the DPD staffer had issued a decision while he was still actively discussing this matter with the Benchview neighbors and their legal counsel. *See e.g.*, R371-R378; *see generally*, R379-R454. The DPD Director apologized to Association members for the DPD staff's "misunderstanding about timing and direction." *E.g.*, R414. However, the LBA had been approved.

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In its haste to issue a decision, the DPD apparently failed to fully consider or analyze the following pertinent substantive facts.

B. Substantive Facts

1. The Benchview Neighborhood

a. SF 5000 Zoning

The Benchview Neighborhood lies in an "SF 5000" zone, a single family zone where the standard lot size is 5000 sq. ft. SMC 23.44.010.A; R1. The Benchview Neighborhood was built-out during the 1950s. Allen Decl. at ¶ 2. Most neighborhood homes are characteristic of that era, with low profiles and spacious yards separating the structures. *Id.*

The area was originally platted with small 2500 sq. ft. parcels. *See,* R343-R344; S501. However, because Seattle's SF 5000 zoning generally requires 5000 sq. ft. per building lot, the homes in the neighborhood span at least two of these historic small parcels. R343-R344. Typical lot sizes in the neighborhood range from 5000 sq. ft. to 7300 sq. ft. R23; S502.

The property subject to LBA #3014542 at 3650 55th Avenue SW (the "LBA Property"), today sits at the corner of 55th Avenue and Manning Street, at the end of a double block. Allen Decl. at ¶ 6; R25. This is a prominent location within the neighborhood, cattycorner to the "Bench View" scenic overlook that gives the community its name. Allen Decl. at ¶ 6; *see also*, R26.

The LBA Property is a double lot, spanning four of the originally platted small parcels (8-11). *See,* S501. At approximately 11,500 sq. ft.,[2] it can accommodate two standard-sized 5000 sq. ft. building lots. S3; SMC 23.44.010.A.

[2] The LBA Decision is inconsistent with the property report recorded with King County. The LBA decision approves three lots that total 11591 sq. ft. R40. But, the survey on record with King County Assessor's office shows the LBA Property to be 11500 sq. ft. S501.

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All of the other lots that share the Manning Street block face with the LBA Property have the required minimum 5000 sq. ft. lot area. R23. In fact, these lots range from 5000 sq. ft. to 6000 sq. ft. *Id.*; R30-R31. The other lot that shares the 55th Avenue block face with the LBA Property measures 6991 sq. ft. S503.

In contrast, the three building lots approved for the LBA Property would all have less than 5000 sq. ft. R38-R40. These substandard-sized new lots would measure approximately 3414 sq. ft., 3781 sq. ft. and 4396 sq. ft.[3] *Id.*

The houses on the LBA Property and the neighboring property to the south along 55th Avenue were both built in 1952. R314-R316; S503; S504. The LBA Property was built-out consistent with the character of the surrounding neighborhood - one house was generously setback from 55th Avenue, with plenty of space around it. *See,* R25. To remain consistent with the pattern of development in the neighborhood, only one additional house should be built on the LBA Property. *See id.*

b. Orientation

The house on the LBA Property was built with its address, main entrance, walkway access and driveway access all oriented toward 55th Avenue. S505-S508. The house on the LBA Property was built across lot 10-11, with its rear deck extending onto parcel 9. R200; R343-R344. Parcel 8 served as the back yard for the LBA Property. Allen Decl. at ¶ 5; S508.

c. Street Frontage Characteristics

When the house on the LBA Property was built in 1952, 55th Avenue was the only finished street adjacent to the LBA Property. *See,* S509 (showing dense forest beyond the

[3] The LBA Decision is inconsistent with the property information recorded with King County. The LBA Decision indicates the third lot measures 4396 sq. ft. However, King County Assessor's records report the third lot measures 4697 sq. ft.

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LBA Property, to the north); R314. 55th Avenue provided the only vehicular and pedestrian access to the LBA Property. *Id.*

Although the LBA Property today sits at the corner of 55th Avenue and SW Manning Street ("Manning Street"), when the house was built in 1952, Manning Street did not exist adjacent to the property. Caldwell Decl. at ¶ 2; *see* R334; S509; S510. Manning Street was a dead-end east of the LBA Property; it stopped just west of 5344 SW Manning Street. *Id.* Past that point, the area was covered with underbrush. Caldwell Decl. at ¶ 2.

Even after Manning Street was extended, years later, there was no access to the LBA Property from the Manning Street side. Allen Decl. at ¶ 5; S510; S511. A steep rise in grade, a rockery, landscaping and fencing precluded any access to the house from the north. Allen Decl. at ¶ 5; S511. The only door on the Manning Street side of the house was a sliding glass door from the bedroom out onto the rear deck on the east side of the house. Allen Decl. at ¶ ; *see*, S512.

d. Setbacks

The house on the LBA Property was generously set back 24.43 feet from the west lot line, along 55th Avenue. R200. This ample setback from the 55th frontage is the same deep front setback that was provided on the neighboring property to the south (3660 55th Avenue SW), which was constructed at the same time. *See,* S503-S506; R25.

The house itself on the LBA Property was setback 11.53 feet from the north lot line (where Manning Street was eventually constructed). R200. But, the house featured a balcony that projected another few feet into that side yard. S512; Allen Decl. ¶ 4; S513-S520; R25; R314. There was also a concrete patio under the west balcony. Allen Decl. at ¶ 4; *see,* S514-S515, S520.

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The house itself on the LBA Property was built across lot 10-11, 3.46 feet from the east lot line of parcel 10. R200. But, the rear deck of the house and the required rear yard extended several feet across the east lot line, onto parcel 9. *Id.*

The house was setback 38.58 feet from the south lot line, and a detached garage was built in this side yard in 1959. R200; R315; S521.

Had the DPD fully considered and analyzed the substantive facts above – regarding the LBA Property's zoning, orientation, street frontage characteristics and setbacks – the LBA should have been denied.

C. The LBA Application

The LBA Decision creates three substandard-sized lots of 3414 sq. ft., 3781 sq. ft. and 4396 sq. ft. R38-R40. The two smallest new lots establish new building sites on each block face adjacent to the LBA Property, along Manning Street and 55th Avenue. *Id.* The third new lot incorporates the existing house on the corner. *Id.*

All three of the new lots are irregular in shape, with six lot lines each. R159. The front yard of the new small lot on 55th Avenue cuts between the house on the corner lot and its 55th Avenue frontage. *Id.*; *see,* S522; *compare* S522 (showing actual fenced-in use of this gerrymandered lot area for smallest LBA lot, *with* R40 (showing the LBA-approved use of area).

The potential building envelopes of these three sites are vastly different in character from the surrounding properties, in terms of light, air and open space. See R157-R159; S523-S526. The impacts of such development have been a catalyst for proposed amendments to the minimum lot exceptions. Allen Decl. at ¶ 7. Some of these proposals have included: establishing absolute minimum lot areas, limiting structure height on certain small lots, limiting the ability for multiple abutting undersized lots to

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qualify for separate development under the exception for historic lots, and alternatives to the 75/80 rule that allow for public notice, etc. S527-S529.

IV. STANDARD OF REVIEW

The Land Use Petition Act ("LUPA"), Ch. 36.70C RCW, provides specific standards for granting relief from a local jurisdiction's land use decisions. The Court may grant relief from a land use decision if the petitioner demonstrates that the local jurisdiction made one of six types of errors.

> **Standards for Granting Relief . . .**
> (a) The body or officer that made the land use decision engaged in unlawful procedure or ***failed to follow a prescribed process***, unless the error was harmless;
> (b) The land use decision is an ***erroneous interpretation of the law***, after allowing for such deference as is due the construction of a law by a local jurisdiction with expertise;
> (c) The land use decision is ***not supported by evidence that is substantial*** when viewed in light of the whole record before the court;
> (d) The land use decision is a ***clearly erroneous application of the law to the facts***;
> (e) The land use decision is ***outside the authority or jurisdiction*** of the body or officer making the decision; or
> (f) The land use decision ***violated the constitutional rights*** of the party seeking relief.

RCW 36.70C.130(1) (emphasis added). The LBA Decision violates these standards in regard to each of the issues discussed in Section V below and must, therefore, be reversed.

Applying LUPA's standards of review, courts review questions of law *de novo*. *Association of Rural Residents v. Kitsap County*, 95 Wn. App. 383, 391, 974 P.2d 863 (1999); *King County v. Central Puget Sound Growth Management Hearings Bd.*, 91 Wn. App. 1, 12, 951 P.2d 1151 (1998); *aff'd in pertinent part and rev'd in part*, 138 Wn.2d 161, 979 P.2d 374 (1999). If the law is ambiguous, the Court may give deference to an interpretation of the law by an agency with special expertise. *Id.*

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Applying LUPA's standards of review, courts review questions of fact to see if they are supported by "substantial evidence." RCW 36.70C.130(1)(c). "Substantial evidence" is more than a mere scintilla; it is enough relevant evidence that a reasonable person would accept as adequate to support the decision. *Ware on Behalf of Ware v. Shalala*, 902 F. Supp. 1262, 1270 (E.D. Wn. 1995). Factual determinations are based upon the administrative record and supplemental evidence that is permitted under RCW 36.70C.120.

V. AUTHORITY AND ARGUMENT

The LBA Decision erroneously approved three building sites to be crammed onto an 11500 sq. ft. property, where only two standard-sized 5000 sq. ft. building lots properly exist. SMC 23.28.010 precludes the LBA process from being used to increase the number of lots on a property. But, as discussed below, the DPD misapplied two exceptions to the 5000 sq. ft. minimum lot area requirement (1 - the historic lot exception, and; 2 - the 75/80 rule) to do just that.

A. DPD Erred in Approving the LBA

In applying the historic lot exception to parcel 9, the DPD made three errors. First, the DPD ignored the orientation of the existing house, which was built to front on 55th Avenue SW. Second, the DPD failed to consider the fact that the existing house could not have fronted another street, because SW Manning Street did not exist adjacent to the LBA Property when it was built-out. Third, the DPD misapplied setbacks, ignoring the balcony and covered patio that extended into the side yard setback on the northern side of the lot (where Manning Street was eventually built). Had the DPD analyzed these issues correctly, it would have concluded that historic lot exception did not apply to parcel 9. Since the house and its required yards extended across lot 10-11 and onto parcel 9, that left only one other parcel (parcel 8) for adjustment through the LBA process.

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In applying another exception to lot 10-11, the 75/80 rule, the DPD made three other errors. First, the DPD applied the exception to a standard-sized conforming lot so as to reduce it to a substandard-sized lot. Second, the DPD erroneously counted LBA Property in with the other lots on the Manning Street block face to which the LBA Property was being compared. Third, the DPD failed to compare the LBA Property with the other lot on the 55th Avenue block face. The result of the DPD's approach was to bootleg one exception onto another, granting the developers of the LBA Property the unique privilege of building out three lots that are each less than 80% of the average size of the other lots on the block.

In sum, as detailed below, the DPD, relying on incomplete facts and/or failing to gather or consider material facts, issued an LBA approval that erroneously created three building sites where there should only be two.

1. LBA Misapplies Historic Lot Exception to Parcel 9.

SMC 23.44.010.B.1.d sets forth the historic lot exception for small parcels that were platted prior to July 24, 1957. The exception ***only*** applies if no portion of the historic parcel was needed for construction on an adjoining lot or to meet setback or yard requirements on an adjoining lot.

> **23.44.010 Lot Requirements**
> . . .
> B. Exceptions to Minimum Lot Area Requirements. . .
> 1. A lot that does not satisfy the minimum lot area requirements of its zone may be developed or redeveloped separately under one of the following circumstances:
> . . .
> d. The lot has an area at least 50 percent of the minimum required under section 23.44.010.A, and was established as a separate building site in the public records of the county or City prior to July 24, 1957, by deed, contract of sale, mortgage, platting or building permit, and falls into one of the following categories:
> . . .

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> 3) The lot is or has been held in common ownership with a contiguous lot after January 17, 1987 and is not developed with all or part of a principal structure, but ***only if no portion of the lot is required to meet the least restrictive of lot area, lot coverage, setback or yard requirements that were in effect for a principal structure on the contiguous lot*** at the time of the construction of the principal structure, at the time of its subsequent additions, or that are in effect at the time of the development of the lot (Exhibit B for 23.44.010). . . .
> 4) For purposes of subsection 23.44.010.B.1.d . . . minor features containing no interior floor area including but not limited to eaves and unenclosed decks extending onto an adjacent property do not serve to tie the properties together for purposes of this exception, and these features may be removed to allow separate development of the lots if they otherwise qualify.

SMC 23.44.010.B.1.d (emphasis added). The emphasized language highlights that the exception would ***not*** apply if a portion of parcel 9 was needed to satisfy the rear yard requirements for the house that was built on lot 10-11 (as discussed below).

This exception allows a historic parcel to be evaluated under the least restrictive of the Land Use Codes that was in effect either: at the time of original construction, at the time of construction of an addition, or the time of redevelopment. Accordingly, the DPD analyzed both the current Code requirements as well as those that were in effect at the time the house was built on the LBA Property, back in 1952 (the "1952 Code").

Applying the historic lot exception under today's Code, the DPD correctly determined that a portion of parcel 9 is needed to satisfy the current setbacks for the house on lot 10-11. R199-R201. The current Land Use Code generally requires the following setbacks in the SF 5000 zone: front yard – 20 ft.; side yard – 5 ft.; rear yard – 20% of lot depth, but not less than 10 ft. SMC 23.44.014. The DPD concluded that when considering the 55th Avenue façade as the front, a portion of parcel 9 is needed to satisfy the current rear yard requirement for the existing house. R199-R201. DPD went on to analyze the setbacks considering Manning Street as the front – ignoring the actual

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orientation of the house toward 55th Avenue – but this error turned out to be harmless in the analysis of the current Code, as a portion of parcel 9 was needed to satisfy the side yard requirement for the house in that orientation. *Id.* The DPD correctly concluded that parcel 9 did not qualify for the historic lot exception under the current Code. *Id.*

The same holds true when applying the 1952 Code. As detailed below, the rear yard that was required under the 1952 Code extended onto parcel 9. In finding otherwise, the DPD erroneously ignored the actual orientation of the house (this time, the error was ***not*** harmless), failed to consider its sole frontage access from 55th Avenue, and incorrectly applied the LBA Property's setbacks. Each of these factors is critical to the analysis, as they demonstrate parcel 9 did not qualify for the historic lot exception under the 1952 Code.

a. The House Was Built To Front On 55th Avenue, With Its Rear Yard Extending Onto Parcel 9.

The house on the LBA Property was built to "front" on 55th Avenue, with its address, main entrance, walkway access and driveway access all oriented toward 55th Avenue. S505-S507; S509; S514. Although "front" was not a defined term under the 1952 Code, it is not an ambiguous term. Nor was it an ambiguous term in 1952. If a regulation's meaning is plain on its face, then the court must give effect to that plain meaning. *Dep't of Ecology v. Campbell v Campbell & Gwinn, LLC*, 146 Wn.2d 1, 9; 43 P3d 4 (2002). Plain meaning is discerned from the ordinary meaning of the language itself. *Id.* at 9-12. Thus, an undefined regulatory term should be given its common and ordinary meaning. *Burton v. Lehman*, 153 Wn.2d 416, 422-423; 103 P.3d 1230 (2005). The front of a building is commonly defined as the side that contains the principal entrance. *See, e.g.*, MERRIAM-WEBSTER, NEW COLLEGIATE DICTIONARY, 461 (8th Ed. 1977); Merriam-Webster.com.

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Front Yard. Front yards are generally determined in relation to the functional street "frontage." *See* DONALD G. HAGMAN, JULIAN CONRAD JUERGENSMEYER, URBAN PLANNING AND LAND DEVELOPMENT CONTROL LAW § 4.8 (2nd Ed. 1986); INTERNATIONAL CONFERENCE OF BUILDING OFFICIALS, HANDBOOK TO THE UNIFORM BUILDING CODE § 603 (1991). Even where Codes allow for the selection of one street as the front for corner lots, the front is commonly understood to be the façade with the primary access point and the main entrance of the building. *See* ARDEN H. RATHKOPF, THE LAW OF ZONING AND PLANNING, Ch. 61. (4th Ed. 1975) (citing *City of Baltimore v. Swinski*, 235 Md. 262, 201 A.2d 368 (1964) (holding that the physical construction of a building may establish the front lot line for purposes of determining compliance with zoning ordinances)). Accordingly, the orientation of the house on the LBA Property shows which façade is the front.

The primary access points to a property are commonly oriented toward the front, in order to ensure adequate access for public services such as fire trucks and other emergency vehicles. *See* INTERNATIONAL CONFERENCE OF BUILDING OFFICIALS, HANDBOOK TO THE UNIFORM BUILDING CODE § 603 (1991). For the same reason, the main entrance of a house is typically oriented toward the front, in order to ensure easy egress for occupants during emergencies. *See id.* Similarly, the yards in front of houses are typically required to be deeper than side yards,[4] in order to ensure adequate space for staging emergency responses. *See id.* Wider front setbacks are also used to enhance visual appearance, improve visibility, promote traffic safety, and to preserve light, space, and air. *See* HAGMAN AND JUERGENSMEYER, *supra* at § 4.8.

[4] The 1952 Code generally required the following setbacks in the First Residence District-Area District A in which the LBA Property was located: front yard - 10 ft. from road margin, unless a deeper common line front setback was used by 35% of the block face; side yard – 3 ft.; rear yard – 15 ft. City of Seattle, Ordinance 78837 (1950), Part IV, Section 18 (R351-R353).

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Applying these ordinary and common definitions and understandings of "front," one can only conclude that the front of the house on the LBA Property faced 55th Avenue frontage. All of the attributes of "frontage" – the vehicular access, the pedestrian access, the main entrance, and the deep common line setback – all confirm the 55th Avenue façade as the front of the house. S505-S507; S509; S513. The only driveway into the LBA Property was from 55th Avenue. *Id.* The only walkway onto the LBA Property was from 55th Avenue. *Id.* And, the main entrance to the house was from 55th Avenue. *Id.*

Front Common Line Setback. The deeper front common line setback was also along 55th Avenue - the house on the LBA Property was setback 24.43 ft. from 55th Avenue. The 1952 Code generally required a 10 ft. front setback from road margin, unless a deeper common line front setback was used by 35% of the block face (as was the case here). R352-R353. Both the house on the LBA Property and the house on the abutting property on the 55th Avenue block face were built with the same deep common line front setback from 55th Avenue. R25; *see also,* S503-S506. The abutting house (3660 55th Avenue SW) was built in 1952, at the same time as the house on the LBA Property. S503. Both houses were oriented to front on 55th Avenue. S503; S509. Both houses were built with the same deep yards along 55th Avenue, utilizing a common line approach to their front yard setbacks. R25.

The DPD interpreted the 1952 Code to be silent with regard to which street becomes the front on a corner lot. However, the common line setback only applied to properties ***"fronting"*** on the same side of the street.

> **Section 18. Building Line**
> ***(b) Whenever at least thirty-five percent (35%) of all the property fronting on one side of the street between two intersecting streets is improved with dwellings and all the dwellings in said area are setback from the street margin a minimum distance greater than ten (10) feet, then no new building other than one on a slope or a garage in a terrace . . . shall project beyond such minimum setback line. . .*** In the case of a

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> corner lot that is held under separate and distinct ownership from adjoining lots . . . the above setback provisions may be waived only to allow the building to occupy seventy-five percent (75%) of the width of the lot: provided it does not come nearer than ten (10) feet to the lot line on one street and meets the required setback on the other street.

City of Seattle, Ordinance 78837 (1950), Part IV, Section 18 (emphasis added) (R352).

Moreover, when the house was developed, a choice was in fact made to orient the front of the house toward 55th Avenue. 55th Avenue was established as the front when the house was built with all of its vehicular and pedestrian access points off 55th Avenue and a deep common line front yard setback from 55th Avenue. DPD's analysis errs by ignoring the actual orientation of the house.

Rear Yard. Since the house was built to "front" on 55th Avenue, on the opposite side of the LBA Property (at the "rear" or east of the property), the deck and the required 15 ft. rear yard for the house extended onto parcel #9.

"Rear" was not a defined term under the 1952 Code either. But, here again, "rear" is not an ambiguous term. Accordingly, this undefined regulatory term should be given its common and ordinary meaning. *Burton v. Lehman*, 153 Wn.2d at 422-423; 103 P.3d 1230 (2005). The rear of a building is commonly defined as the façade opposite the front. *See, e.g.*, MERRIAM-WEBSTER, NEW COLLEGIATE DICTIONARY, 962 (8th Ed. 1977); Merriam-Webster.com. Thus, the rear line of a building is commonly understood to be the line opposite the front line of the building. This is consistent with the 1952 Code's definition of "rear yard," which is "that area which extends across the full width of the lot between the ***rear line of the building*** and the rear line of the lot . . . (emphasis added)." R351. Since the house on the LBA Property fronted on 55th Avenue, the rear yard was located adjacent to the opposite yard, extending from the house eastward. The yard on the east side of the property (opposite 55th Avenue SW), did in fact serve as the back yard. Allen Decl. at ¶ 5; S508.

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The 1952 Code required deeper setbacks for rear yards than for side yards. *Id.* The 1952 Code required a rear yard setback of 15 ft. for the LBA Property. Since the house itself was only setback 3.49 ft. from the east lot line of lot 10-11. The rear deck and the required rear yard setback both extended eastward onto parcel 9. Under SMC 23.44.010.B.1.d.4, the unenclosed deck would not disqualify parcel 9 for purposes of the historic lot exception. However, the fact that the required rear yard extended onto parcel 9 would disqualify it.

These common definitions and understandings are consistent with the common practice in the neighborhood, as the other corner lots on the block were built-out in the same manner. Corner lot houses with all access points from one street frontage have their deeper rear yards on the opposite side of the property. The corner lot abutting the LBA Property to the south (3660 SW 55th Avenue) was originally built with its access points, main entrance and wide setback facing 55th Avenue and, accordingly, its rear yard setback abutted the opposite façade on the east of the property. *See,* S505. The corner lot on the other end of the Manning Street block face (5307 SW Manning Street) has all of its access from Manning Street to the north and, accordingly, its deep rear yard abuts the opposite façade on the south of the property. *See,* S530. The abutting corner lot to the south (5304 SW Orleans Street) has all of its access from Orleans Street to the south and, therefore, its deep rear yard abuts the opposite façade on the north of the property. *See id.*

To summarize, since this house was oriented toward 55th Avenue, was built with all of its access points along 55th Avenue, and was built with a common line front yard setback from 55th Avenue, the yard abutting 55th Avenue is the front yard. Accordingly, on the opposite side of the house, the rear yard faced east toward parcel 9. Under the 1952 Code, as under the current Code therefore, the required 15 ft. rear yard extended onto parcel 9. Consequently, parcel 9 fails to qualify for the historic lot exception under

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SMC 23.44.010.B.1.d, leaving only one undeveloped historic parcel (parcel 8) available for adjustment through the LBA process. On this basis, the LBA should have been denied.

b. The House Could Not Have Fronted On Manning Street Because Manning Street Did Not Exist When The House Was Built.

The 1952 Code required that every lot have access to a street frontage as a precondition for construction.

> **Section 17. General**
>
> . . .
>
> (d). . .***No lot shall be used for building purposes unless it shall have a frontage on a street or place.***

City of Seattle, Ordinance 45381, Part IV, Section 17(d) (emphasis added) (S553).

The purpose of this requirement apparently was a practical one - to ensure that all building sites had an actual street frontage for access to the property. Not just platted or planned future street frontage. But, an actual street frontage for access.

The DPD errs in concluding the house could have fronted on Manning Street, as Manning Street did not exist adjacent to the LBA Property at the time when the house was constructed. Caldwell Decl.; S509; S510. The only actual street frontage for this property in 1952 was 55th Avenue. *Id.*

In 1952, and for several years thereafter, Manning Street dead-ended east of this property. Caldwell Decl. at ¶ 2. King County records show dense forest adjacent to the property. S509. Longtime Benchview residents report that the portion of Manning Street adjacent to this property was still covered with underbrush when they moved into the neighborhood in 1955. Caldwell Decl. at ¶ 2. There was no pavement beyond 5334 SW Manning Street; there were no sidewalks; there weren't even any utilities. Caldwell Decl.

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at ¶ 3. There was no actual Manning Street frontage along the LBA Property when the house was built in 1952. Caldwell Decl. at ¶ 2; *see, also,* S509-S511.

At the time when the house was constructed on the LBA Property, 55th Avenue was the only actual street frontage providing access to the property. *Id.*; Allen Decl. at ¶ 5. Given the requirements of Section 17, ***but for*** fronting on 55th Avenue, the existing house could not have been built under the 1952 Code. Therefore, the DPD errs in concluding that the house could be considered to have fronted on SW Manning Street when it was built.

Since the house on the LBA Property could ***only*** have fronted on 55th Avenue, in that orientation the rear yard extended onto parcel 9 (as discussed above). Therefore, parcel 9 fails to qualify for the historic lot exception. On this basis as well, the LBA should have been denied.

c. The House Could Not Have Met the Front Setback on Manning Street.

Even if Manning Street had been finished adjacent to this property at the time it was constructed, the DPD still errs in concluding that the house as built could have satisfied a front yard setback from Manning Street. The balcony on the north side of the house was only about 8.53 ft. from the north lot line. S512.

The 1952 Code generally required a minimum 10 ft. front building line setback from streets.

> **Section 18. Building Line**
> (a) ***No building or any of its appurtenant buildings (not including uncovered porches or steps) shall be constructed nearer than 10 feet to any street margin which constitutes the front line of any lot*** or lots in the same block . . .

City of Seattle, Ordinance 78837 (1950), Part IV, Section 18 (emphasis added) (R354).

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The house on the LBA Property was setback 11.53 ft. from the north lot line (where Manning Street was eventually constructed). R199-R201. However, it had a balcony that projected another 2-3 ft. toward the north lot line. S512; Allen Decl. at ¶ 4. There was a concrete patios under the west portion of the balcony. *Id.; see* S513-S520. While uncovered porches and steps were allowed to project into a required front yard under the 1952 Code, balconies and covered patios were not. R354. Therefore, the house did not meet the 10 ft. front yard setback required under the 1952 Code on the Manning Street side.

Manning Street could not be considered the front of the house on the LBA Property, because the house could not meet the required front setback on the Manning Street side. Only 55th Avenue could be considered the front of the house on the LBA Property, as this is the only side that met the required front setback. As discussed above, in that orientation the rear yard for the house extended onto parcel 9. Therefore, parcel 9 fails to qualify for the historic lot exception. On this basis as well, the LBA should have been denied.

2. LBA Process Misapplies 75/80 Rule to Lot 10-11.

In addition to the historic lot exception for parcel 9, the LBA Decision is also predicated upon another exception to the minimum lot requirements for lot 10-11 - the 75/80 rule. It provides:

> **23.44.010 Lot Requirements**
> . . .
> B. Exceptions to Minimum Lot Area Requirements. The following exceptions to minimum lot area requirements are allowed, subject to the development standards for undersized lots in subsection 23.44.010.C, except as limited under subsection 23.44.010.B.2:
> 1. ***A lot that does not satisfy the minimum lot area requirements of its zone*** may be developed or redeveloped separately under one of the following circumstances:
> a. "The Seventy-Five/Eighty Rule."

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> 1) 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, contract of sale, mortgage, property tax segregation, platting or building permit and has an area of at least 75 percent of the minimum required lot area and at least 80 percent of the mean lot area of the lots on the same block face and within the same zone in which the lot is located (Exhibit A for 23.44.010), or
> 2) If the lot is or was created by subdivision, short subdivision or lot boundary adjustment, is at least 75 percent of the minimum required lot area, and is at least 80 percent of the mean lot area of the lots on the same block face within which the lot will be located and within the same zone (Exhibit A for 23.44.010).
> 3) For purposes of this subsection 23.44.010.B.1.a, if the platting pattern is irregular, the Director will determine which lots are included within a block face.
> 4) A determination whether a lot qualifies for this exception shall be made on the basis of facts in existence as of the date of application for a short plat or building permit for that lot.

SMC 23.44.010.B (emphasis added).

The highlighted language expressly applies to "lots that do not satisfy the minimum lot area requirements of their zone," i.e. nonconforming or undersized lots. Therefore, it is not clear that it applies to the standard-sized lot 10-11, which at 6500 sq. ft. ***conforms*** to the minimum lot area requirements of the SF 5000 zone.

Director's Rule ("DR") 97-13, which explains that the LBA process, suggests that the exception should not be apply. DR 97-13 provides:

> **RULE:**
> If a lot in a single family zone does not meet the minimum lot area requirement, but qualifies as a legal building site pursuant to the lot area exceptions of Section 23.44.010B, the lot lines of that lot may be modified through the Lot Boundary Adjustment process if:
> 1) the area of the undersized lot is not decreased, and
> 2) ***no nonconformity of that lot or of other lots involved in the Lot Boundary Adjustment is created or worsened***, and
> 3) the criteria for Lot Boundary Adjustments are otherwise met.
> **REASON:**
> ***This Rule is intended to give applicants and owners of undersized lots more opportunity to determine how to configure their properties, while***

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> ***helping to promote a more regular development pattern and streetscape.*** As an illustration of what this Rule allows, consider two adjacent lots, both zoned SF 5000 (5000 square feet is the minimum lot size required of new lots). One lot, created prior to 1957, contains 3500 square feet and qualifies as a legal building site under the provisions of 23.44.010B. The second lot has 6000 square feet, with 1000 square feet more than the minimum required. Under this Rule, the lot lines could be adjusted through an LBA to create two different lots, one of 4500 square feet and the other of 5000 square feet, so that the first lot becomes more conforming and ***the second lot remains conforming***.

DR 97-13 (emphasis added).

Reducing the size of lot 10-11 to less than 5000 sq. ft. would create a substandard lot. In the example provided by DR 97-13, this was not allowed; the conforming lot was not reduced below 5000 sq. ft. Contrary to the example in DR 97-13, here, the DPD allowed the LBA process to reduce a conforming lot to less than 5000 sq. ft.

Assuming *arguendo* that the 75/80 rule can be used to convert the conforming standard-sized lot 10-11 into a substandard-sized lot, the exception ***only*** applies if the substandard-sized lot has at least 75% of the minimum required lot area for the zone (3750 sq. ft.) and at least 80% of the mean lot area of the ***other*** properties on the block face.

While the first part (75%) of the rule is satisfied here, the second part (80%) is not. The purpose of the second part of the rule is to compare the subject property with the other similarly situated properties, to make sure that the resulting lot will be compatible with the surrounding density of development. In making this comparison, lots that have been historically tied together with common development, including decks, are not counted separately. Analysis and Decision of the Director of the DPD, Application #3014664, p. 3 (S534).

The DPD erred by counting a portion of the LBA Property in with the other lots on the block face when applying the second part of the 75/80 rule. These lots were

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historically tied together by the deck that crossed over the lot line from lot 10-11 onto parcel 9 and, therefore, should not have been counted separately. The DPD's analysis here is contrary to its application of the 75/80 rule in other cases. *See id.*

No portion of the LBA Property should have been counted in this case. The LBA created a new substandard lot on each block face shared by the new corner lot. Counting the new substandard-sized lots that were being created by this same LBA Decision, literally changed the equation for comparing the new corner lot to the other lots on the block under the 75/80 rule. Instead of comparing the LBA Property to the other properties on the block, the LBA Property was compared to itself. One substandard-sized lot being created by the LBA was compared to another substandard-sized lot being created by the LBA. This did not provide a reasonable comparison between the new substandard-sized corner lot and the other existing standard-sized lots on the block face. Such bootlegging of the 75/80 is clearly erroneous.

If DPD had followed its precedents and not counted the LBA Property, it would have found that the other 8 properties along the Manning Street block face have a combined area of 44998 sq. ft. *See* R23. That equates to a mean lot area of 5625 sq. ft., 80% of which is 4500 sq. ft. Since the LBA would reduce the corner lot to just 4396 sq. ft., it should not have been approved. Analyzing the other direction, the DPD should have found that the other property on the 55th Avenue block face has a lot area of 6991 sq. ft., 80% of which is 5593 sq. ft. S503. Since the LBA would reduce the corner lot to 4396 sq. ft., here again, the LBA should not have been approved.

The LBA for the adjacent lot on the 55th Avenue block face (3660 55th Avenue SW) serves as a precedent for the number of lots that should have been be allowed on the LBA Property. Prior to the LBAs, 3650 55th Avenue SW and 3660 55th Avenue SW were virtually the same size (11590 sq. ft. and 11591 sq. ft. respectively), they were built out to

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a similar extent, and shared the same orientation toward 55th Avenue. S1; S503; S509; R23. But, the LBA Decisions were very different. The LBA for 3660 55th Avenue SW adjusted the lot lines to form two lots and the conforming built lot was not reduced to less than 5000 sq. ft. R360-R363. A similar outcome should have occurred here, instead of the three substandard-sized lots that were approved for the LBA Property.

But, the DPD ignored its precedents and counted the LBA Property, leading to absurd result where its approval to develop substandard-sized lots on each block face under one exception, became the basis for approving the development of another substandard-sized lot on the corner, ***all*** under the auspices of a rule that was designed to assure parity with the ***other*** standard-sized properties in the neighborhood. Rather than achieving parity, the DPD's application of the 75/80 rule granted the applicant the unique privilege of building out three substandard-sized lots on the LBA Property, each of which are less than 80% of the mean size of the other lots on their block face - a privilege that is not shared by any of the other property owners in the neighborhood. This is clearly erroneous.

To summarize, as discussed above, the LBA Decision misapplies both the historic lot exception and the 75/80 exception to the minimum lot area requirement, to create three substandard-sized building sites on the LBA Property. The erroneous LBA Decision should be rejected.

B. LBA Process Erroneously Applied to this Application.

The LBA Process is a Type I administrative process. SMC 23.76.004, Table 1. An administrative LBA Decision is made with no public notice, public comment period public hearing. SMC 23.76.012. Because there is no public process, an LBA is only appropriate for decisions that do not involve subjective discretionary decision-making such as the creation of new lots.

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The Purpose of the LBA process is to provide a summary administrative process for documenting a change in lot boundaries.

> **23.28.010 Purpose.**
> The purpose of this chapter is to provide a method for summary approval of lot boundary adjustments which do not create any additional lot, tract, parcel, site or division, while insuring that such lot boundary adjustment satisfies public concerns of health, safety, and welfare.

SMC 23.28.010. The LBA process is ***only*** appropriate when it does not create any additional lots or create public concerns of health, safety and welfare. The LBA Decision does both.

This LBA involves an 11500 sq. ft. LBA Property, where only two standard-sized building sites can exist. As discussed above, the DPD misapplied two exceptions to the minimum lot requirements to create three substandard lots on the LBA Property. These three substandard lots will drastically alter the character of the Benchview Neighborhood and will have a significant adverse effect on the welfare of the Benchview community. *See,* S523-S526. SMC 23.28.010 precludes the LBA process from being used under these circumstances.

Processing this application as an LBA, shielded from public review the highly discretionary and flawed decision-making of the DPD staff concerning the interpretation and application of Land Use Codes and the methodology for applying exceptions to the minimum lot requirements. The closed-door LBA decision-making could not benefit from the additional material factual information a public process could have provided. The result was a Type 1 administrative LBA Decision that granted to the applicant special development privileges that are not shared by any of the surrounding properties – a result that is not permitted even under the DPD's most subjective discretionary public decision-

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making processes. Thus, DPD erred in approving this application through the LBA process.

VI. CONCLUSION

For all the reasons discussed above, the Benchview Neighborhood Association implores the Court to reject the City's LBA Decision. If the LBA Decision is allowed to stand, Association members will suffer a drastic change in the character of their neighborhood, negative impacts to their neighborhood's environmental qualities and associated impacts to their property values. In short, their quality of life will be prejudiced. We urge the Court not to let that happen.

DATED this 10th day of June, 2013.

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