Hon. Mariane C. Spearman
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 REPLY BRIEF

I. INTRODUCTION

The City of Seattle and the other Respondents (collectively, "the Respondents") argue that this Court should defer to the City and adhere strictly to the City's written land use rules. However, they then ignore written rules and instead ask the Court to accept the City's "longstanding consistent" approach. The Respondents cannot have it both ways.

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As discussed below, the City's current approach is not longstanding enough to be relevant here, since many of the issues in this case must be resolved by applying the Land Use Code from 1952. The City's approach to other issues has not been consistent. As a result, the City's approach has allowed an absurd exploitation and manipulation of the written land use rules to the detriment of the Benchview Neighborhood. The Court cannot defer to the City's approach, when it contravenes written land use rules. Therefore, the Benchview Neighborhood Association (the "Association") respectfully renews its request for the Court to reverse the erroneous Lot Boundary Adjustment #3014542 (the "LBA Decision") issued by the City's Department of Planning and Development ("the DPD").

To avoid redundancy, the Association is submitting this one combined Reply Brief, which replies to the Response Briefs of both the City and the other Respondents.

III. EVIDENCE AND STATEMENT OF FACTS

The following facts are drawn from the City's Documentary Record; the Declaration of Allan Caldwell; and the Declarations of David Allen, and the Supplemental Records attached thereto.[1]

A. Procedural Facts

The City issued its decision to approve the LBA on January 18, 2013. R41. The LBA Decision was one of the first projects for an "out-of-class" planner from the Applicant Services Center. R51. Andy McKim commented on this fact in an e-mail on December 24, 2013: "Once again an out-of-class planner in the ASC has gotten a hot one for one of their first projects!" R51.

There is nothing in the City's Documentary Record to show that the inexperienced planner analyzed material facts concerning the orientation of the house, its common-line

[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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front setback with 3660 55th Avenue, the years when Manning street dead-ended east of the property, the size and location of the balcony on the north side of the house, the size of the neighboring property on the 55th Avenue block face, etc. in reaching the LBA Decision. These facts were first raised by the Association in e-mails on January 22, January 28, and January 29, 2013. R292-R294; R310-R319; R329-R334. Analyses of these facts first appear in the City's Documentary Record in an e-mail response from Andy McKim on January 29, 2013, ***after*** the LBA Decision was issued. R336-R368.

B. Substantive Facts

1. The Historic Lot Exception

a. House Orientation

While the City now argues that the actual orientation of the house is irrelevant, weeks before the LBA Decision was issued Andy McKim stated that the LBA analysis would turn, in part, on the orientation of the house - "whether the house was ***deemed to front*** on 55th Avenue or on Manning Street." R51. Mr. McKim's December 24, 2012 e-mail states:

> [A]s this is a corner property, and Lots 8 and 9 may be a required rear yard ***if the house is deemed to front on 55th Ave SW*** rather than SW Manning Street. This is something we will need to look at when we review the LBA.

R51 (emphasis added). .

The house on the LBA Property can only be ***deemed to front*** on 55th Avenue, since its address, main entrance, walkway access and driveway access were all oriented toward 55th Avenue when the house was built in 1952. S505-S508. For years after the house was constructed there was ***no other*** street for the house to front on; the area adjacent to the north side of the LBA Property remained covered with underbrush. Caldwell Decl. at ¶ 2. Even after Manning Street was finally extended along the north side of the LBA property, there was ***never*** any access to the LBA Property from the Manning Street side. Allen

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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.

b. Common Line Front Setback

The neighboring house to the south, at 3660 55th Avenue, was also originally oriented toward 55th Avenue, with its address, main entrance, walkway access and driveway all oriented toward 55th Avenue. S555. Both houses – at 3650 and 3660 55th Avenue - were built with the same common line setback ***fronting*** 55th Avenue. R25.

However, unlike the LBA Property, the house at 3660 55th Avenue was built with a door and walkway to Orleans Street as well as to 55th Avenue. Second Allen Decl. at ¶2. In 1954, a garage and driveway were added facing Orleans Street. S558. The orientation of the house at 3660 55th Avenue thus changed to front on Orleans Street before the boundary lines on that property were adjusted in 1999. *Id.*

c. Street Frontage Characteristics

Also, unlike the LBA Property, the house at 3660 55th Avenue was adjacent to ***two*** finished streets when it was constructed in 1952. Second Allen Decl. at ¶2. To the south of that property, Orleans Street was finished and connected to 55th Avenue by 1952. *See id.* Thus, in 1952, that house had ***frontage*** on two streets.

In contrast, when the house on the LBA Property in 1952, 55th Avenue was the ***only frontage*** for the LBA Property. *See,* S509 (showing dense forest beyond the LBA Property, to the north); R314. At that time, Manning Street did not exist adjacent to the LBA Property. Caldwell Decl. at ¶ 2; *see* R334; S509; S510. Manning Street was dead-ended east of the LBA Property. *Id.*

d. Setbacks for Balcony

While the City challenges the date when it was added, there is no dispute that the house on the LBA Property featured a balcony that was approximately 8.53 feet from the

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north lot line. R40; S512; Allen Decl. ¶ 4; S513-S520; R25; R314. This balcony covered a concrete patio area below. *Id.* The balcony is clearly shown on the original house site plan from 1952. S557. There is no evidence in the record that the City ever issued building permits for this balcony to be constructed or re-constructed in 1985.

e. LBA Application

The Respondents do not dispute that the LBA Property was originally platted with four thin rectangular parcels all situated parallel to one another. S501. ***All*** of the other lots that share the Manning Street block face and the 55th Avenue block face share the same platting pattern. *Id.* All are platted with parallel rectangular lots, the long sides of which extend north to south. *Id.*

However, the platting pattern approved by the LBA Decision shifts one of the new lots 90 degrees, perpendicular to the other lots. R40; R159. All three of the new lots are irregular in shape, with six lot lines each. R159. In contrast, the LBA Decision for the adjacent property at 3660 55th Avenue, maintained the original platting pattern with the new lot situated parallel to the built lot. R363. Each of the two lots have rectangular shapes and yards that are uninterrupted by the yards of the other. *Id.*

2. The 75/80 Rule Exception

a. Neighborhood Lot Sizes

The Respondents also do not dispute that ***all*** of the other lots that share the Manning Street block face and the 55th Avenue block face with the LBA Property have the minimum 5000 sq. ft. lot area that is required in the SF-5000 zone. R23. In fact, the other lots all range from 5000 sq. ft. up to 6991 sq. ft. *Id.*; R30-R31; S503.

In contrast, the three building lots approved for the LBA Property would all have less than 5000 sq. ft., measuring approximately 3414 sq. ft., 3781 sq. ft. and 4396 sq. ft. R38-R40.

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IV. STANDARD OF REVIEW

In reviewing an administrative decision, the Court reviews conclusions of law *de novo* and findings of fact for substantial evidence ***in the record***. *Wenatchee Sportsmen Ass'n v. Chelan County*, 141 Wn.2d 169, 176, 4 P.3d 123 (2000); *City of Univ. Place v. McGuire*, 144 Wn.2d 640, 647, 30 P.3d 453 (2001); *Sunderland Family Treatment Servs. v. City of Pasco*, 107 Wn.App. 109, 117 (2001); *Waste Mgmt. of Seattle, Inc. v. Utils. & Transp. Comm'n*, 123 Wn.2d 621, 627, 869 P.2d 1034 (1994).

A. Conclusions of Law

The Respondents urge this Court to defer to the City's interpretations of the Land Use Code because they argue judicial deference should be given to the construction of an ordinance by the agency charged with its enforcement. City's Response Brief at 8; Other Respondents' Response Brief at 7. But as explained by the Court of Appeals for Division I in *Brown v. City of Seattle*, 117 Wn.App. 781 (2003), ***deferring to an agency's interpretation "applies only when the law being interpreted is ambiguous, and even then, the agency's interpretation is not "absolutely controlling" on the court."*** *Brown*, 117 Wn.App. at 790 (emphasis added) (quoting *Hama Hama Co. v. Shorelines Hearings Bd.*, 85 Wn.2d 441, 448, 536 P.2d 157 (1975)). The Respondents thus overstate the deference due here.

Brown was also a LUPA case, and the *Brown* Court explained that it is ultimately for the court to determine the purpose and meaning of land use laws. *Brown*, 117 Wn.App. at 790; accord *Postema v. Pollution Control Hearings Bd.*, 142 Wn.2d 68, 77, 11 P.3d 726 (2000); *Overton v. Econ. Assistance Auth.*, 96 Wn.2d 552, 555, 637 P.2d 652 (1981); *Waste Mgmt. of Seattle*, 123 Wn.2d at 627-628; *Franklin County Sheriff's Office v. Sellers*, 97 Wn.2d 317, 325-26, 646 P.2d 113 (1982). Accordingly, the *Brown* Court

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found the City's interpretation of its Land Use Code in that case was not entitled to deference because the language at issue in that case was not ambiguous.

In another LUPA case, the Court of Appeals for Division II found in *Tahoma Audubon Soc'y* that no deference was due a county agency's interpretation of unambiguous terms from its Land Use Code. "***Absent ambiguity . . . courts do not defer to the agency's interpretation.***" *Tahoma Audubon Soc'y v. Park Junction Partners*, 128 Wn. App. 671 (2005) (citing *City of Pasco v. Pub. Employment Relations Comm'n*, 119 Wn.2d 504, 507, 833 P.2d 381 (1992) (emphasis added)).

In particular, "[the] court does not defer to an interpretation which conflicts with the language of the law." *Brown*, 117 Wn.App. at 791 (citing *Waste Mgmt. of Seattle*, 123 Wn.2d at 628). When interpreting a statute, the court must discern and implement the ***legislature's intent***. *Tahoma Audubon Soc'y*, 128 Wn.App. at 682. To accomplish this, the court must "give effect to a statute's ***plain meaning***." *Tahoma Audubon Soc'y*, 128 Wn.App. at 682 (citing *McGinnis v. State*, 152 Wn.2d 639, 645, 99 P.3d 1240 (2004)); accord *Dep't of Ecology v. Campbell v Campbell & Gwinn, LLC*, 146 Wn.2d 1, 9, 43 P3d 4 (2002); *City of Olympia v. Drebick*, 156 Wn.2d 289, 290, 126 P3d 802 (2006). Plain meaning is discerned from the ordinary meaning of the language itself. *Campbell & Gwinn, LLC*, 146 Wn.2d at 9-12. Undefined regulatory terms are given their common and ordinary meaning. *Burton v. Lehman*, 153 Wn.2d 416, 422-423; 103 P.3d 1230 (2005). Thus, while the Court cannot add words, the Court must give effect to the plain meaning of each word, including undefined terms.

Courts derive plain meaning from the applicable statute and related statutes disclosing legislative intent about the provision in question. *Tahoma Audubon Soc'y*, 128 Wn.App. at 682 (citing *Campbell & Gwinn*, 146 Wn.2d at 11). Related statutory provisions are interpreted in relation to each other, to harmonize provisions. *Drebick*, 156

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Wn.2d at 290 (citing *Campbell & Gwinn*, 146 Wn.2d at 9). Courts construe statutes to avoid strained or absurd results. *Tahoma Audubon Soc'y*, 128 Wn.App. at 682 (citing *Strain v. W. Travel, Inc.*, 117 Wn.App. 251 , 254 (2003), review denied, 150 Wn.2d 1029 (2004)).

Respondents thus overstate the deference due to the DPD's interpretation of its written land use rules here. Where the language is unambiguous, no deference is due. If specific words are not defined, effect is given to their plain meaning. Laws are interpreted so as to give effect to each word, fulfill legislative intent and prevent absurd results.

B. Findings of Fact

Respondents also argue that this court should defer to the City's factual findings because it was the agency with the highest fact-finding authority. City's Response Brief at 8; Other Respondents' Response Brief at 7. However, on most of the issues raised here, the City made no factual findings until after rendering its decision. Therefore, here again, the Respondents overstate the deference due in this case.

Under LUPA, courts must review questions of fact to see if they are supported by "substantial evidence" ***in the record of the decision***. RCW 36.70C.130(1)(c); RCW 36.70C.120. "Substantial evidence" 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). Thus, on findings of fact, deference can only be accorded to factual findings that are in the record that was actually used to support the decision.

Here, there can be no deference on issues where no factual findings were made in the record. Also, there can be no deference for factual findings that were not actually considered by the decision-maker. Substantive analyses of the factual issues raised by the Association in this case, including the orientation of the house, the dead-end of Manning

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Street, the side balcony toward Manning Street, the common-line front setback, the 55th street block face calculations, etc., do not appear in the City's Documentary Record until ***after*** the DPD rendered its decision. *See* R1-R43; R51-R272. There are no factual findings on many of these issues in the record on which the City based its decision. *Id.* So, there can be no deference to *post hoc* justifications made about such facts after the LBA Decision was rendered.

V. AUTHORITY AND ARGUMENT

The other Respondents argue their Response Brief that land use decisions must be based upon written rules, as stated in *City of Seattle v. Rory Crispin*, 149 Wn.2d 896, 905, 71 P.3d 208 (2003). However, Respondents then ignore the City's written rules and argue instead that the Court should defer to the DPD's "longstanding consistent" practice, a review of which demonstrates it is neither longstanding nor consistent. The Respondents cannot have it both ways.

The other Respondents overstate the holding in *Crispin*. The *Crispin* Court rejected the use of ***unwritten*** subjective standards that sought to narrow the scope of the LBA exception to the Subdivision Statute, Ch. 58.17 RCW. That LBA exception states that a short plat subdivision process is required unless an LBA results in lots that meet the jurisdiction's minimum dimensional requirements:

> A division made for the purpose of alteration by adjusting boundary lines, between platted or unplatted lots or both, which does not create any additional lot, tract, parcel, site, or division nor create any lot, tract, parcel, site, ***or division which contains insufficient area and dimension to meet minimum requirements for width and area for a building site*** . . .

RCW 58.017.040(6). What the *Crispin* Court rejected were the City's ***unwritten*** subjective distinctions between minor LBAs that should fall within the scope of this exception and substantial or major LBAs that should not. However, the Court of Appeals for Division I has confirmed that a local jurisdiction's written rules concerning lot

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dimensions can (and must) still be used after *Crispin*, to distinguish between LBAs that fall within the scope of the exception and those that do not. *Mason v. King County*, 134 Wn.App. 806, 812 (2006).

The other Respondents overlook the *Mason* case. The *Mason* Court confirmed that a local jurisdiction can only approve an LBA if the proposed lots meet the dimensional standards for a building site that are set forth in the local jurisdiction's written rules. *Id.* at 812. As the *Mason* Court explained:

> *Crispin* does not address whether a jurisdiction may grant a [LBA] that would transform a legally created lot into a substandard, undersized lot. Nonetheless, the County argues that the court in *Crispin* broadly held that a local land use restrictions may not be applied to preclude approval of a [LBA] that would not create an additional lot. We disagree. ***Neither Crispin nor any other authority cited to us construes this chapter 5817 RCW as allowing a [LBA] to transform a legally created lot into a substandard, undersized lot.***
>
> To the contrary, Mason cogently urges that the County must look to its applicable minimum lot size requirements when determining whether a new lot following a [LBA] qualifies as a "building site" pursuant to RCW 58.17.040(6). ***Because RCW 58.17.040(6) provides only that a lot resulting from a [LBA] may not contain "insufficient area and dimension to meet minimum requirements for width and area for a building site," local governments are free to determine the dimensions of a "building site" so long as that definition is consistent with applicable local zoning requirements.***

Mason, 134 Wn.App. at 812 (emphasis added).

Accordingly, in the *Mason* case the Court found the County's written rules setting forth dimensional standards for lots, minimum lot areas, minimum areas for construction and minimum lot widths, etc. were all applicable to the lots proposed by the LBA. *Id.* at 813. Comparable dimensional standards within the City's written rules in this case, include provisions of its Land Use Code and active Director's Rules.[2]

[2] Director's Rules are binding written rules concerning Land Use Code and other Codes that the DPD administers, which are adopted according to the Administrative Code of the City of Seattle (SMC 3.06.040).

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Among the written rules that the DPD should have applied in this case, is DR 10-87, an active Director's Rule that precludes the 90-degree rotation of lots from the surrounding platting pattern. *See* DR 10-87, Exhibit A (S560). The City erred in approving the LBA, when it rotates the smallest lot 90-degrees from the common north to south platting pattern. While DR 10-87 still contains some of the subjective language concerning major and minor LBAs that was rejected by the *Crispin* Court, it also contains specific dimensional requirements similar to those found at SMC 23.28.030.3 (such as the requirement that each lot have no more than 6 lot lines, etc.). *See* S569-S561. These specific dimensional requirements should have been applied here, and the LBA should have been denied.

A. DPD Erred in Approving the LBA

As detailed below, although the Respondents cite *Crispin's* requirement for written dimensional standards, they actually argue for the Court to defer to the DPD's "longstanding and consistent" approaches instead. The City's current approach is not longstanding enough to be relevant to the analysis of the historic lot exception, as that analysis requires application of the 1952 Land Use Code. Moreover, deference is not appropriate for approaches that failed to adhere to written rules and ignored material facts.

1. LBA Misapplies Historic Lot Exception to Parcel 9.

A key question in this case whether a portion of Parcel 9 was needed to meet the requirements for the house under the 1952 Land Use Code. The Respondents argue that the DPD can apply its current approach of hypothesizing how the house "could have been" oriented, based upon yard dimensions. Not only does that approach turn a blind eye to actual facts on the ground (with absurdly inconsistent and unintended consequences), it also fails to give effect to specific words in the written rules. The DPD cannot apply a current approach so as to diminish the effect of the 1952 Code.

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The historic lot exception requires that the DPD apply ***the least restrictive Code*** that was in effect at one of three specific points in time (including the time of original construction). SMC 23.44.010.B.1.d(3). The exception does ***not*** say to apply these Codes in ***the least restrictive manner***, as the DPD attempts to do by superimposing its current approach onto the 1952 Code. *See id.* The DPD's current approach is ***not*** written in the Land Use Code or the Director's Rules.

The DPD has determined that the least restrictive Code was the one in effect in 1952, when the house was built. Having made that determination, the 1952 Code must be applied as written.

Throughout its Response Brief, the City mischaracterizes the fundamental issue here as what the house orientation "could have been" at any point in time. But, to give effect to the plain meaning of the words used in the 1952 Code, one must evaluate the actual orientation of the house toward 55th Avenue. The DPD's approach of hypothesizing about would "could have been" leads it to the inevitable inconsistencies of deeming Manning Street to be the front in 1952 (for purposes of applying front and rear setbacks when analyzing the historic lot exception), 55th Avenue to be the front in 1985 (for purposes of explaining construction or re-construction of the north side balcony), and Manning Street to be the front again in 2013 (for purposes of calculating block face areas when analyzing the 75/80 exception). This absurd result cannot be upheld.

The real issue here is the actual orientation of the house. In that, there has been no inconsistency. The house was constructed fronting on 55th Avenue in 1952, and has remained oriented toward 55th Avenue consistently until 2013.

a. Front Features Oriented Toward 55th Avenue.

While the 1952 Code does not define "front" or "rear," these are not ambiguous terms. Their meaning is plain. The definitions of "front" and "rear" cited in the

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Association's Opening Brief were only provided as examples. There are countless other definitions from other sources that all reflect the same plain meaning for this Court to apply. *See Campbell & Gwinn*, 146 Wn.2d at 9; *Burton*, 153 Wn.2d at 422-423. Just from the photographs of the house one can discern which façade is the front of the house. Since the house on the LBA Property was constructed facing 55th Avenue - with its address, main entrance, walkway and driveway all facing 55th Avenue - the plain meaning of "***front***" inevitably leads to the conclusion that the house on the LBA Property fronts on 55th Avenue. *See* S505-S507; S509; S514. The plain meaning of the "***rear***" inevitably leads to the conclusion that the opposite side of the house on the LBA Property is the rear. That means that the front yard faces 55th Avenue, and the rear yard is along the rear line of the building on the opposite (eastern) façade.

Although the 1952 Code did not define "front," it used the terms "fronting," "frontage" and "front line" in ways that reflect an orientation, consistent with the plain meaning of "front." Similarly, the 1952 Code did not define "rear," it used the terms "rear yard" and "rear line of the building" in ways that reflect an orientation, consistent with the plain meaning of "rear." As discussed below, harmonizing these related provisions leads to the conclusion that the house on the LBA Property must be deemed to have fronted on 55th Avenue with its rear yard on the opposite (east) side.

The Court must give full effect to the plain meaning of these words in the 1952 Code. "Fronting," "frontage," "front line," "rear yard" and "rear line," all mean more than simply abutting a side. The legislature chose words in the 1952 Code that imparted more than adjacency, it used terms intended to reflect orientation.

Determining the orientation of the house is critical to correctly applying the rear setbacks that were required under the 1952 Code. Andy McKim acknowledged this point weeks before the LBA Decision was issued, stating that "lots 8 and 9 may be a required

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rear yard ***if the house is deemed to front on 55th Avenue*** rather than SW Manning Street." R51 (emphasis added). Now, the DPD argues that the actual orientation of the house is irrelevant and that DPD's "longstanding and consistent" practice is to determine how a house "could have been" oriented. This approach cannot be very longstanding or consistent when it contradicts Mr. McKim's thoughts in his e-mail last December. R51.

In support of its position, the DPD offers draft meeting minutes from internal departmental forums conducted from 2002-2004. With all due respect, such informal meeting notes, even if they do reflect the DPD's current approach, are irrelevant to applying the written Land Use Code that was in effect back in 1952.

b. Only Frontage Was On 55th Avenue.

In 1952, although the written Code did not define "front," it did require that every lot have ***frontage*** on a street 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).[3] ***But for its frontage*** on 55th Avenue, the existing house could not have been built under the 1952 Code.

The DPD erred in concluding that the house could be considered to have fronted on SW Manning Street when it was built. In 1952, 55th Avenue provided the only frontage for the LBA property. Caldwell Decl.; S509; S510. Manning Street did not exist

[3] The City points out on pages 9-10 of its Response Brief that the Association mistakenly relied upon the DPD's characterization of the 1952 Code (having received only the two pages of Section 18 of the 1952 Code that were attached to the City's January 15, 2013 letter), and erroneously agreed that that the 1952 Code allowed developers of corner lots to choose which street to orient a house toward. However, after having obtained and reviewed the rest of the 1952 Code, the Association saw that Section 17(d) of the 1952 Code would have precluded any other orientation that fronting 55th Avenue, because 55th Avenue was the only frontage adjacent to the property at the time the house was built.

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adjacent to the LBA Property at the time when the house was constructed. *Id.* If having a side lot line along a street were enough, the Code could have used language like "abutting" or "adjacent to" or "access to." But it did not. The 1952 Code required that each property have ***frontage*** on a street in order for a building to be constructed.

There is nothing in the City's Documentary Record before January 18, 2013, to indicate that the DPD analyzed the extent of Manning Street prior to reaching its LBA Decision. The Respondents still ignore this key difference when arguing that the DPD deemed the house on the adjacent property at 3660 55th Avenue to front on Orleans Street for purposes of the LBA Decision there. While the LBA Property had no ***frontage*** on Manning Street in 1952, the house at 3660 55th Avenue had an actual frontage on Orleans Street in 1952. Second Allen Decl. ¶ 2. Unlike Manning Street, Orleans Street was finished adjacent to the 3660 55th Avenue by 1952. *Id.* Therefore, the house at 3660 55th Avenue satisfied the ***frontage*** requirement of the 1952 Code. The house on the LBA property did not.

c. Common Line Setback Fronting 55th Avenue.

In 1952, the written Code only required a common line setback for yards ***"fronting"*** on the same 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. . .

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

The deeper common line setback was only required where a property was ***fronting*** on the same street as an adjacent property, creating block faces with consistent deeper front yards. If this deeper setback requirement was intended to apply to side yards instead

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of front yards, the Code could have used the terms like "abutting" or "adjacent to." But, it did not. The written Code used the term ***fronting***.

Both the house on the LBA Property and the house on the abutting property to the south (at 3660 55th Avenue) were built with the same deep common line setback ***fronting*** 55th Avenue. R25; *see also,* S503-S506. There is nothing in the City's Documentary Record before January 18, 2013, to indicate that the City analyzed this fact before rendering its LBA Decision.

d. Balcony Extended Into Building Line Setback from Front Line.

In 1952, although the Code did not define the term "front," the written Code generally required a minimum 10 ft. building line setback from the street that constituted the "***front line***" of the property.

> **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). In 1952, the written Code did not allow balconies or covered patios to extend into a required ***front line*** setback. *Id.*

The house on the LBA property could not have satisfied this 10 ft. building line setback if the Manning Street side had constituted the "***front line***," because the balcony and the patio it covered on the north side of the house were only about 8.53 ft. from the north lot line. S512. There is nothing in the City's Documentary Record before January 18, 2013, to indicate that the City analyzed this issue prior to issuing its LBA Decision.

The DPD now asserts that the balcony was not added to the house until 1985. But, the only evidence the DPD cites for this assertion is a page from the King County Assessor's file (added to the Documentary Record after the LBA Decision was issued),

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which notes the existence of decks in 1985 for purposes of assessing taxes.[4] We have not found among the DPD's permitting records, and the DPD has not provided any permitting records from their files, to show that balcony construction actually occurred in 1985 (or if construction did occur at that time, that it was not simply to re-construct pre-existing structures from 1952). There is no other evidence in the record to refute the original site plan for the house from 1952, which clearly shows the balcony area to be constructed with the house. S557. This evidence is far more compelling that a balcony was constructed along the north side of the house when it was constructed in 1952.

The City errs in stating on page 16 of its Response Brief that the historic lot exception in the current Code allow balconies to be removed for purposes of assessing compliance with front or side setbacks. The historic exception only allows the removal of unenclosed spaces that extend ***onto adjacent properties*** so as not to tie the parcels together if they otherwise qualify for the exception.

> 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.4 (emphasis added). So, the balcony that extends into the required yard must meet the 1952 setbacks.

If the balcony had been constructed in 1985 as the DPD asserts, it would only provide additional evidence that the Manning Street side was the side yard, not the front yard. The 1985 Code required a minimum 20 ft. front yard and a minimum 5 ft. side yard. City of Seattle, Ordinance 110381, Section 23.44.08.D (1982) (S568; S571). The 1855

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[4] It is unclear what timeline conclusions, if any, can be drawn from the notes on the King County's Assessor's building data sheet. One note supposedly from 1985 concerning a deck was inserted before an earlier note from 1978 concerning the driveway. R315.

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Code only allowed uncovered porches and decks to project into a required front yard, not balconies over patios, and only if they were less than 4 ft. above grade. *Id.* (S573; S577). Consequently, under the Code that was in effect in 1985, the balcony on the north side of the house would only have been permitted if the Manning Street side was deemed to be the side yard, not the front yard.

e. Rear Yard.

Although the 1952 Code did not define "rear" it did define the "rear yard" in a manner consistent with the plain meaning of "rear." In 1952, the written Code defined the "***rear yard***" in relation to the orientation of the building. "***Rear yard***," was defined as

> 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 . . .

City of Seattle, Ordinance 78837 (1950), Part IV, Section 18 (emphasis added) (R351). Here again, the legislature could have chosen words other than the "***rear line of the building***," had they not intended to reflect the building's orientation. By using the words "***rear line of the building***," the legislature very clearly tied the ***rear yard*** requirement to the actual rear façade of the building.

The 1952 Code required a rear yard setback of 15 ft. for the LBA Property. *Id.* R351. Since the house itself[5] was only setback 3.49 ft. from the east lot line of lot 10-11, the required rear yard extended eastward onto parcel 9. Consequently, parcel 9 fails to qualify for the historic lot exception under SMC 23.44.010.B.1.d, leaving only one undeveloped historic parcel (parcel 8) available for adjustment through the LBA process.

[5] For purposes of applying the historic lot exception (not the 75/80 exception), unenclosed decks ***extending onto an adjacent property*** (like the rear deck here) may be removed and do not serve to tie the properties together. SMC 23.44.010.B.1.d.4.

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In sum, the analysis of the historic lot exception above shows that the DPD's reliance on its current unwritten approach of determining what the orientation of the house "could have been" does not give effect to the plain meaning of all of the words that were in the Land Use Code in 1952.

In 1952, the written Code required the house to have ***frontage*** on 55th Avenue, it required a deeper common line setback ***fronting*** 55th Avenue, and it precluded a balcony from extending with 10 feet of a ***front line***. Since the ***front*** of the house faced 55th Avenue, the ***rear yard*** extended from the ***rear line of the building*** back onto parcel 9. Consequently, parcel 9 was needed for the construction of the house and does not qualify for the historic lot exception.

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

Another key issue in this case is whether Parcels 10-11 satisfy the 75/80 exception to the minimum lot requirements under the current Land Use Code. The Respondents again argue that the Court should defer to the DPD's "longstanding and consistent" approach of only analyzing one block face for corner lots, and including proposed parcel areas in the 80% calculation.

However, a review of the Record shows that the City's approach has not been consistent. The City states on page 18 of its Response Brief that it used one approach to the analysis in this LBA case - it included the proposed lot on the Manning Street side, but excluded the proposed corner lot. The City provides with the Declaration of Andy McKim examples of a different approach to the analysis that it has taken in other LBA cases - including all of the proposed lots, even those not in existence at the time of application. And, there are various examples from the Hearing Examiner's decisions where the DPD has taken yet a third approach - including none of the proposed lots when applying the 75/80 Rule to plats. *See* S589-S600.

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We argue that the third approach – including none of the proposed lots – is the correct one. This is the only approach that gives effect to the legislative intent of the 75/80 rule, which seeks to compare the size of the proposed lots with the other lots sharing the same block face. Moreover, this approach is the most consistent with the language of the 75/80 Rule. The DPD's first two approaches cannot be correct when they are at odds with the language of the applicable written rules.

Under the current Code, the written 75/80 rules includes the following:

> **23.44.010 Lot Requirements**
> . . .
> B.1.a. "The Seventy-Five/Eighty Rule."
> 2) If the lot is or was created by subdivision, short subdivision or lot boundary adjustment . . . 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.1.a(2) (emphasis added). The written rule specifies that the lots that must be included in the analysis are ones within the same block face, and the facts to be analyzed are those in existence at the time of application.

a. The 55th Avenue Block Face Must be Analyzed and it Fails.

The Code defines "block face" exactly the same as "block front." Both terms mean:

> [T]he land area along one (1) side of a street bound on three (3) sides by the centerline of platted streets and on the fourth side by an alley or rear lot lines.

SMC 23.84A.004 "B." Here, ***two*** block faces or block fronts meet this definition from the written Code, and both should have been evaluated by the DPD.

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Both the lots along Manning Street and the lot to the south along 55th Avenue fall within the land area along the same side of the street as the LBA Property that is bound on three sides by platted streets. Thus, under the terms of the written 75/80 rule the DPD was required to analyze both the Manning Street block front and the 55th Avenue block front. Analyzing both block faces is particularly appropriate for this LBA, because this LBA would turn one new lot 90 degrees from its north-south platting pattern to create a new additional lot on 55th Avenue that had not previously existed.

Part (4) of the written 75/80 rule states that the calculation along 55th Avenue must be done on the basis of facts that were in existence at the time of application.[6] Accordingly, lots that were not in existence at the time of application (i.e. the proposed lots to be created by the LBA Decision along 55th Avenue) should not be counted in the calculation.[7] That leaves only the adjacent lot to the south, at 3660 55th Avenue, at 6991 sq. ft.; and the perhaps old corner lot, at 6552 sq. ft. The analysis finds that 80% of 6991 sq. ft. for the one other lot is 5592 sq. ft., and the mean lot area for the two lots is 6772 sq. ft., 80% of which is 5417 sq. ft. *See* S601. Therefore, the proposed corner lot would fail to meet the 75/80 rule.

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[6] The 75/80 Rules actually anticipates an application for a "short plat or building permit." SMC 23.44.010.B.1.a(2). Therefore, the rule may be ambiguous with regard to the calculation for LBAs. While the Court would normally defer to the City's interpretation of such a provision, it cannot defer to one City approach here because the City's has taken a variety of different approaches to the 75/80 calculation, as detailed on p. 19 above. If this provision of the 75/80 rule applies to LBAs, we interpret it to mean facts at the time of the LBA application, since an LBA application is similar to a platting application and building permits could issue both before and after an LBA application (as is the case for the property in question here). This approach – including none of the proposed parcels - is the approach the City takes when making the 75/80 calculation for short plats, when new lots are being created along a block face. *See* S589-S600. Moreover, this approach seems logical here, where the LBA rotates one parcel 90 degrees creating a new additional lot along the 55th Avenue block face (as might be done through a short plat).

[7] We note that the City excluded the proposed corner lot from its calculation of the Manning Street block front. The Association excluded the entire LBA Property form its calculations of the 55th Avenue and Manning Street block faces in its Opening Brief.

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b. The Manning Street Block Face Also Fails.

On the Manning Street block face, the analysis must give effect to the written Director's Rule 12-87, which states the same rule as applied in the Analysis and Decision of the Director of the DPD, Application #304-14664, p. 3. (S578-S579); S534. DR 12-87 states that lots that have been historically tied together with common development, ***including decks***, are ***not*** counted separately in LBA calculations. S578. Applying DR 12-87 to the facts in existence at the time of application, the rear deck would tie the old corner lot on parcels 10-11 to old parcel 9 yielding a combined area of 9071 sq. ft. This leaves just old parcel 8 as a separate lot measuring 2519 sq. ft. Running the calculation then, one finds that the mean lot area for those two parcels and the other 8 properties along the Manning Street block face would be 5658 sq. ft., 80% of which is 4526 sq. ft.[8] *See* S601. Since the new corner lot is only proposed to have 4396 sq. ft., it fails to meet the 75/80 rule on the Manning Street side as well.

To summarize, as discussed above, the LBA Decision misapplied both the historic lot exception and the 75/80 exception to the minimum lot area requirement. Therefore, it must be rejected.

B. LBA Process Erroneously Applied to this Application.

As discussed above, the DPD erred with regard to its interpretation of the Land Use Codes, its failure to follow active written Director's Rules, its application of those written Codes and rules to the facts, its methodology for calculating and applying exceptions, and its failure to gather and consider relevant facts. Processing this application as an LBA, shielded the DPD's flawed decision-making from public review. *Post hoc* justifications offered ***after*** the LBA Decision cannot correct these errors.

[8] These calculations are shown on S601, along with the calculations excluding the proposed lots used in the Association's Opening Brief. Both block faces fail using both approaches.

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Even more egregious, the LBA Decision allowed the written rules to be manipulated unfairly, to created special privileges for the developers of the LBA property that are not shared by other property owners in the Benchview Neighborhood – to the ***detriment*** of other property owners in the Benchview Neighborhood. The LBA Decision allowed exceptions to be bootstrapped onto other exceptions, leading to an absurd result. And, that manipulation of the rules continues. The new lot lines approved by the LBA Decision, which created lots just large enough to qualify for increased building heights, have been fenced over. S602. A portion of the gerrymandered front yard of the new lot on the 55th Avenue block face, which jutted between the house on the corner lot its 55th Avenue frontage, has been fenced into the corner lot. *Id.* The fenced area leaves a smaller new lot on the 55th Avenue block face than should qualify for increased heights. S603.

The Respondents state that the City has proposed Amendments to the Single Family Minimum Lot Area Exceptions, to close the loopholes that were manipulated in this LBA. S580-S588. The Proposed Amendments would preclude the absurd LBA Decision that was issued here. However, the Proposed Amendments do not cure the harm occurring now in the Benchview Neighborhood. Only the Court can remedy the harm to the Benchview Neighborhood.

VI. CONCLUSION

For all the reasons discussed above, the Benchview Neighborhood Association implores the Court to reject the City's LBA Decision. In reaching its LBA Decision, the DPD failed to follow the appropriate process, erroneously interpreted the law, failed to analyze substantial evidence, made a clearly erroneous application of the law to the facts, applied unwritten approaches outside of its authority, and violated the constitutional rights of the Association. Under LUPA, the LBA Decision must therefore be reversed.

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DATED this 8th day of July, 2013.

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