HON. MARIANE C. SPEARMAN

IN THE SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

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 **RESPONDENTS' MOTION FOR RECONSIDERATION OR CLARIFICATION**

I. INTRODUCTION AND RELIEF REQUESTED

Respondents Blueprint Services, LLC, David Biddle, All Day Constructors, LLC and JMS Homes, Inc. respectfully request that the Court reconsider the portion of its Memorandum Decision (the "Decision") which concluded that Parcel A did not meet the 75/80 Rule for lot area exceptions in the Seattle Land Use Code because a deck encroached onto Lot 9. All other aspects of the Court's Decision were fully briefed and argued by the

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parties, including the role of the deck with respect to the Historic Lot Exception. However, the role of the deck with respect to the 75/80 Rule was not briefed or argued by any party. Upon further analysis, it becomes clear that the Court's conclusion on that one issue is not supported by law. In the alternative, Respondents request clarification of the Decision so that the parties may implement it.

II. STATEMENT OF ISSUES

1. Should the Court reconsider its conclusion that because of the deck encroachment on Lot 9, Parcel A did not meet the 75/80 Rule when the portion of the Seattle Land Use Code relied on in the Decision was not briefed or argued *with respect to the 75/80 Rule*, and a full analysis of the Code shows that the deck on Lot 9 is not relevant to the 75/80 Rule or that the Code section relied on is inapplicable, or in the alternative, that the Code section is applicable but is met?

2. If the Court does not grant the Motion for Reconsideration, should the Court clarify its Decision to allow the applicant to adjust the parcel sizes so that Parcel A meets the square footage the Court found necessary to satisfy the 75/80 Rule?

III. EVIDENCE RELIED UPON

Respondents rely upon the Declaration of Ron Day (the "Day Declaration"), the Declaration of Melody B. McCutcheon (the "McCutcheon Declaration"), and upon the records and files herein.

IV. STATEMENT OF FACTS

A house and deck were constructed on Lots 10 and 11. DR 17. Lots 10 and 11 form the new Parcel A in the Lot Boundary Adjustment ("LBA"). *Id.* A one-foot portion of the

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deck extended onto Lot 9. DR 27, Day Declaration ¶2. The deck was constructed on grade and was less than 18 inches above the ground. Day Declaration ¶2.

The LBA application was filed on December 17, 2012. DR 3. Concurrent with the City's review of that application, a building permit application was filed to make modifications to the deck on Lots 9, 10 and 11. DR 27. The modifications included removal of the deck in the northeastern corner of the future Parcel A, so as to replace it with a parking space, and removal of the approximate one-foot portion of the deck that extended onto Lot 9. DR 27. (Building Permit #6347893, "Remove Existing Wood Deck"); Day Declaration ¶2.

The building permit application for removal of the deck was filed and issued on January 4, 2013. DR 27. The deck was removed on January 15, 2013. Day Declaration ¶3. The LBA was approved by the City on January 18, 2013. DR 41.

V. AUTHORITY AND ARGUMENT

Pursuant to Civil Rule 59(a)(7), a party may move for reconsideration of any decision when the decision is contrary to law. Respondents respectfully request that the Court reconsider its Decision that Parcel A does not meet the 75/80 Rule because: a) the deck is not relevant to the 75/80 Rule, b) the Land Use Code section relied on by the Court is inapplicable, or c) *if* that Code section is applicable, it is met because a building permit authorizing removal of the deck was issued, and the deck was removed, prior to approval of the LBA. Alternatively, if the Court affirms its Decision, then pursuant to Civil Rule 59(h), Respondents seek clarification as to the next steps for implementing the Court's Decision.

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A. THE DECK IS NOT RELEVANT TO THE 75/80 RULE.

Certain structures are so minor that they do not require a permit and are not restricted by the Seattle Land Use Code. For example, decks 18 inches or less from the lot grade: 1) do not require a building permit (*See* DPD Client Assistance Memo #312, McCutcheon Declaration, Ex. A), 2) are allowed in required setbacks for single family houses (SMC 23.44.014.D.11), 3) do not count in single family lot coverage (SMC 23.44.010.E.2.c.), and are excluded from the measurement of single family structure depth (SMC 23.43.008.C). In addition, DPD Director's Rule 10-95 defines the physical circumstances that lead to an accessory structure being regulated as an "attached" structure. *See* DPD Director's Rule 10-95, McCutcheon Declaration, Ex. B. Under that Director's Rule, a deck 18 inches or less above grade is referred to as a "minor attachment" that does not render the deck as "attached" to the principal structure. *Id.* at 2.

The deck encroachment on Lot 9, which was the basis for the Court's conclusion that Lots 10 and 11 did not meet the 75/80 Rule, is less than 18 inches above grade. Day Declaration ¶2. (The portion on Lot 9 is also only about one-foot wide. *Id.*) Under the City's Code and Rule, that deck is a minor element. There is nothing in the Code or Director's Rules to suggest that such a minor element has the effect of attaching Lot 9 to Lots 10 and 11. For the purpose of the separate Historic Lot Exception, which was fully briefed, the Court concluded that removal of a deck is specifically allowed. But it is reasonable to conclude that Exception is referring to a deck that is actually regulated by the Code, *i.e.* a deck that is more than 18 inches above grade. Certainly, there is no provision of the Code one can point to that disqualifies use of a lot exception due to a non-regulated deck less than 18 inches above

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grade. Thus, the minor deck encroachment on Lot 9 is not relevant to an analysis of the 75/80 Rule.

B. THE CODE SECTION RELIED ON BY THE COURT IS INAPPLICABLE TO LOT BOUNDARY ADJUSTMENTS.

The Decision concluded that Parcel A does not satisfy the 75/80 Rule because Lot 9 should be included with Lots 10 and 11 in the 75/80 calculation due to the deck encroachment on Lot 9. The basis for that conclusion was SMC 23.44.010(B)(1)(a)(4) (referred to herein as "Subsection 4"), which says: "A determination of 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*." (emphasis added). However, the deck encroachment on Lot 9 at the time of the LBA application only matters if Subsection 4 applies to LBAs. But this Code section makes no reference to LBAs, and so it does not apply to LBAs. Thus, it was error to rely on Subsection 4 to conclude that Parcel A did not meet the 75/80 Rule.

Determining whether Subsection 4 applies to LBAs requires statutory interpretation. Traditional rules of statutory interpretation apply to reviews of municipal ordinances. *City of Gig Harbor v. N. Pac. Design, Inc.,* 149 Wn. App. 159, 167, 201 P.3d 1096 (2009). When interpreting a statute, the court must give effect to the legislature's intent. *State v. J.P.*, 149 Wn.2d 444, 450, 69 P.3d 318 (2003). Words or clauses cannot be added to an unambiguous statute when the legislature has chosen not to include that language. *State v. Delgado*, 148 Wn.2d 723, 727, 63 P.3d 792 (2003); *State v. J.P.*, 149 Wn.2d 444, 450, 69 P.3d 318 (2003); *see also Durland v. San Juan Cnty.,* 174 Wn. App. 1, 23, 298 P.3d 757, 767-68 (2012) (a LUPA case involving interpretation of the San Juan County Code where the court refused to

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add words to the definition of "living space"). Instead, a statute should be read to mean "exactly what it says." *Delgado*, 148 Wn.2d at 727.

Another principle of statutory interpretation is that "where the Legislature uses certain statutory language in one instance, and different language in another, there is a difference in legislative intent." *Guillen v. Contreras,* 169 Wn.2d 769, 776, 238 P.3d 1168 (2010); *see also Vogel v. City of Richland,* 161 Wn. App. 1036, 2011 WL 1797177 *9 (2011) (a LUPA case where the court found that the planning commission was not required to make written findings of fact because "the lack of any mention is significant, where other provisions of the municipal code do require the planning commission to enter findings").

LBAs are specifically mentioned in Subsection 2 of the 75/80 Rule, evidencing legislative intent that the 75/80 Rule applies to LBAs. But Subsection 4, as to the point in time when the facts are considered for application of the 75/80 Rule, only refers to short plats and building permits, ***not*** LBAs. SMC 23.44.010(B)(1)(a). State and local law make clear that short plats and LBAs are distinctly different. *See* RCW 58.17.040(6) that exempts LBAs from the short plat statute, and compare the Seattle Municipal Code chapters which regulate short plats and LBAs differently (SMC ch. 23.24 for short plats and ch. 23.28 for LBAs). It is not legally supportable to substitute "LBA" for "short plat" since they are legally distinct from each other.

Moreover, applying Subsection 4 to LBAs requires the Court to add words to an unambiguous code provision which is also not legally supportable. In addition, application of Subsection 4 to LBAs also violates the principle that different language indicates a different legislative intent. LBAs are mentioned in subsection 2, but they are not mentioned in

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Subsection 4, and this reflects a legislative intent to exclude them. As it is written, Subsection 4 only applies to short plats and building permits, and it violates fundamental principles of statutory interpretation to read "LBAs" into Subsection 4.

To support its conclusion, the Court referred to a DPD decision where a deck over the property line resulted in two lots being counted as one. Decision at 10. However, that was a decision on a *short plat* (DR 532) so Subsection 4 would have been applicable to that short plat application, depending on the height of the deck.[1] But that is distinguishable from our case which is an LBA, not a short plat. Since Subsection 4 is inapplicable to LBAs, it was error to rely on that Code section, and the Court should have concluded that Parcel A met the 75/80 Rule.

C. IF THE COURT FINDS THE DECK IS RELEVANT AND THAT THE CODE SECTION IS APPLICABLE, THEN THE COURT SHOULD FIND THAT PARCEL A MEETS THE 75/80 RULE.

Under Subsection 4, the dates of two types of applications determine the lot area facts: date of a short plat application or date of a building permit application for the lot. Given that the Code uses the phrase "application for a short plat *or* building permit" (emphasis added) and does not direct that one of the dates takes precedence over the other, such as by saying "the earlier of" or "the later of," the result is that *either date* applies. Using the date of a building permit application, the only building permit for the lot filed prior to LBA approval

[1] The DPD decision does not indicate the height of that deck above grade. The decision does note that the deck could be removed and then the lots would be counted as two lots for the 75/80 Rule. DR 534. The reason deck removal in that case was not effectuated, unlike here, is that the deck was on lots elsewhere on the block, *i.e.* not the lots being altered by the LBA, and thus, not lots owned by the applicant where deck removal is under the LBA applicant's control.

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was the building permit to remove the deck, including the small portion encroaching on Lot 9.[2]

The deck removal building permit was issued the same day it was applied for (DR 27) given the minor nature of the work. Therefore, on the date of the "building permit" application, the operable fact is that DPD had issued a permit authorizing removal of the encroaching deck. Given that, DPD was entitled to consider the deck to be removed for the purpose of analyzing the 75/80 Rule. To the extent there is any ambiguity in the Code, deference is owed to DPD's interpretation that the deck encroachment did not affect application of the 75/80 Rule. *See* cases cited in Petitioner's Reply Brief at 6 (deference is due when the law is ambiguous). Thus, DPD properly concluded that Parcel A met the 75/80 Rule. The Court should also note, as well, that the encroaching deck was actually removed prior to the LBA approval. Day Declaration ¶3. Thus, in reconsideration, the Court should conclude that Parcel A meets the 75/80 Rule.

D. IN THE ALTERNATIVE, RESPONDENTS REQUEST CLARIFICATION SO AS TO IMPLEMENT THE DECISION.

In the event the Court does not grant the Motion for Reconsideration, Respondents request clarification to avoid confusion on implementation of that Decision.

The Court affirmed the LBA approval on two issues, and reversed the approval on one issue. Decision at 13. The Court affirmed that the LBA met the Historic Lot Exception and was properly processed as an LBA. Those two issues are the crux of the case, because if either had been reversed, the LBA could not have been proposed or processed. For example,

[2] After the LBA was approved, a building permit was filed and issued to allow a second house to be built on the property, and that house is now under construction. Petitioners have acknowledged that a second home can be built on the property (DR 75) and have instead focused their challenge on the proposal to build a third house on the property.

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the Historic Lot Exception is critical because it determines how many lots exist now for the purpose of lot area exceptions, and thus how many lots can exist through the LBA process.

The only reversal of the LBA was a decision that Parcel A needs to be 4,527 square feet in order to meet the 75/80 Rule (Decision at 11), rather than the slightly less square footage that was proposed.[3] Thus, due to the one-foot deck encroachment onto Lot 9, Parcel A needs to be increased by 131 feet (4,527 – 4,396 = 131). This is a minor adjustment to the parcel boundaries in order to conform to the mathematical result of the Court's Decision.

Following the Court's Decision, the applicant applied for a revision to the LBA in order to change the parcel boundaries to conform to the Court's Decision. McCutcheon Declaration, Ex. C. DPD accepted the change as a revision: "Post Land Use Revision to Lot Boundary Adjustment 3014542. Revision consists of an adjustment to the previously approved lot lines." *Id.* at Ex. C, p. 1. A comparison of the original LBA parcel dimensions (DR 18) to the parcel Dimensions in Ex. C, Sheet 3 of 3 shows what has been revised:

- The eastern boundary of Parcel A has shifted 1.5 feet to the east, and the northern boundary of Parcel B has shifted 1.72 feet to the north.
- With the revision, Parcel A becomes 4,527.8 square feet in size to conform to the Decision.
- To offset the 131-foot increase in the size of Parcel A, with the revision Parcel B becomes smaller by 30 feet, and Parcel C becomes smaller by 101 feet. Both Parcels B and C continue to be above the 3,750 square feet necessary to meet the 75% part of the 75/80 Rule. *Id.*; DR 15.

The above information demonstrates that implementation of the Decision only requires a minor change to the parcel boundaries.

[3] The Decision referred to Parcel A as "4395 feet." Decision at 11. However, the correct square footage for Parcel A was 4,396.5. DR 18; see also DR 1.

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Changes of the type here are routinely processed as revisions to previously-approved LBAs or short plats and not as new applications. The revised documents are recorded with the King County Recorder's Office. *See* McCutcheon Declaration, Ex. D: Short Subdivision 3007886, revised to adjust boundary between and shapes of Lots A and B with resulting change in square footages; Short Subdivision 3013349, revised to adjust boundaries for Lots A, B and C with resulting change in square footages; and Lot Boundary Adjustment 3009824, revised to adjust boundary and shape of Lot A with resulting change in square footages.

Respondents understand on information and belief that DPD provided prompt notice to the Petitioner that the applicant filed an LBA revision and that DPD had accepted it as a revision, even though no notice is legally required. Respondents also understand that Petitioner then communicated with the City to protest the processing of the revised boundaries as a revision, insisting instead that a new LBA application be required. Perhaps Petitioner hopes to make the process more onerous to the applicant by forcing him to start over again from the very beginning. Perhaps Petitioner hopes for a different decision as to whether a third lot exists, and thus whether a third house can be built, if the applicant has to proceed with a new application unrelated to the existing one. Whatever the circumstance, it is plain that the parties have different views as to how to implement the Court's Decision: the applicant believes the LBA can be revised to reflect the mathematical correction in the Decision, and Petitioner believes a new application must be processed.

The Land Use Petition Act ("LUPA") provides the Court with explicit authority to remand a land use decision. RCW 36.70C.140 states: "The court may affirm or reverse the land use decision under review or remand it for modification or further proceedings." We ask

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the Court to clarify that its "reversal" on the limited issue of changing the square footage of Parcel A to meet the 75/780 Rule is in effect a remand of the LBA for DPD to process a revision of the parcel boundaries in accordance with the Court's Decision and the Land Use Code. Processing of a revision is an appropriate "modification or further proceeding" to implement the Court's Decision.

This provision of LUPA makes plain that the legislature intended to provide the reviewing court with means to address particular circumstances. As an example, in the LUPA case of *Knight v. City of Yelm*, 173 Wn.2d 325, 267 P.3d 973 (2011), the Washington Supreme Court upheld a Superior Court decision that remanded a preliminary subdivision approval. The Petitioner had requested that the preliminary subdivision be denied due to the issue of alleged inadequate water rights. Instead, the Superior Court remanded the application to the City Council to add a condition to address water rights. 173 Wn.2d at 332 – 34. The Supreme Court found this to be appropriate, and there was no suggestion that a new subdivision application was needed to address Petitioner's issue. *Id.* at 344 – 45.

Similarly here, given the specific nature of the Court's Decision, it is appropriate to remand the LBA to DPD for processing of a revision to make the parcel boundaries conform to the Court's decision.

VI. CONCLUSION

Respondents urge the Court to reconsider its Decision that Parcel A did not meet the 75/80 Rule. In the alternative, Respondents ask the Court to clarify that it is remanding the LBA to DPD for processing of a revision in conformance with the Court's Decision.

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