Hon. Mariane C. Spearman
Hearing Date: August 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 OBJECTIONS AND OPPOSITION TO RESPONDENTS' REQUEST FOR RECONSIDERATION OR CLARIFICATION

I. INTRODUCTION

The Respondents' Request for Reconsideration must fail, as it seeks to introduce additional evidence and reopen issues that were fully briefed and decided during the proceedings. The Respondents had opportunities to make these arguments, in their Response Brief and at the Hearing, and they failed to do so. It is simply too late to do so

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now. The Respondents' failure to introduce evidence and respond to these issues at the appropriate time during the proceedings, does not give rise to yet another opportunity to do so now after the Decision has been issued.

Moreover, as discussed below, even if the Court were to consider the Respondents' late evidence and/or arguments, they fail both as a matter of law and as a matter of fact. The Court's Decision is consistent with the law and should not be changed.

II. OBJECTIONS

A. Objection to Late Evidence

The Benchview Neighborhood Association ("Benchview" or the "Association") objects to the Respondents' attempt to submit 52 pages of new evidence - 50 pages of documentary evidence and 2 pages of factual declarations - into the record at this late date. The Parties agreed to a schedule for supplementing the record, which has long since elapsed. *See* Order Granting Benchview Neighborhood Association's Motion to Supplement the Record. The Respondents offer no reasons why this evidence could not have been submitted in accordance with the agreed schedule. Thus, the Respondents' late evidence, and any other evidence subsequently submitted by the Respondents, should no longer be admitted into the record.

B. Objection to Late Response Arguments

The Association also objects to Respondents' attempt to use a Request for Reconsideration to respond to issues concerning the effect of the deck on the 75/80 calculations that were fully briefed in Benchview's Opening Brief and Reply Brief (as set forth below). Respondents had opportunities to respond in their Response Brief and at the Hearing. They failed to do so at the appropriate time and, therefore, should be barred from doing so now. *See* Order Setting Case Schedule.

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On page 22 of its Opening Brief, Benchview argued that the deck tied lots 9, 10 and 11 together for purposes of the 75/80 Rule:

> 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).***

Opening Brief, page 22.

On pages 22-23 of its Opening Brief, the Association continued its argument that the deck that tied parcels 9, 10 and 11 together for purposes of the 75/780 Rule:

> 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 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.*

Opening Brief, pages 22-23 (emphasis added).

The Respondents failed to respond to the Association's arguments in their Response Brief. On pages 14-15 of their Response Brief, instead of raising any facts about the height of the deck or the ability of minor features to tie properties together for purposes of the 75/80 Rule (as they do now), Respondents simply argued that "the City's calculation under the 75/80 Rule . . . reflects its current approach" and that the City's interpretation of the 75/80 Rule "was grounded firmly in the text of its Code." Respondents' Response Brief, pages 14-15. In reply, the Association briefed additional authorities showing that the 75/80 Rule calculations for the LBA did not reflect the City's current approach and was not firmly rooted in the Code.

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On page 22 of its Reply Brief, the Association cited the City's Department of Planning and Development's (DPD's) Director's Rule 12-87 which states that lots tied together with common decks are counted as one combined lot:

> . . . [T]he written Director's Rule 12-87 . . . 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. *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.

Reply Brief, page 22 (emphasis added).

On page 21 of its Reply Brief, the Association cited the City Land Use Code's requirement that 75/80 Rule calculations be based on facts in existence at the time of application (these facts include the existence of the deck):

> ***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.*** 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. 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.

Reply Brief, page 21 (footnotes omitted) (emphasis added).

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In footnote 6 of its Reply Brief, the Association argued that the Land Use Code's reference to facts in existence at the "time of application" within the 75/80 Rule should be interpreted to mean the time of the LBA application:

> ***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 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).

Reply Brief, Footnote 6, page 21.

Respondents failed to respond to these arguments at the Hearing. At no time did Respondents respond to these arguments, object to these arguments, move to strike them, or offer a surreply to rebut them. It is simply too late for responses now. Having declined to make any arguments about the effect of the deck on the 75/80 Rule calculations in their Response Brief, or at the Hearing, Respondents should be barred from making these arguments at this late date.

III. EVIDENCE

The facts discussed herein are drawn from the City's Documentary Record; the Supplemental Records attached to the First, Second and Third Declarations of David

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Allen; the Supplemental Records attached to the Fourth Declaration of David Allen, filed herewith; and the Second Declaration of Kay Sansone, filed herewith.[1]

If the Association's first objection is denied, and the Respondents are permitted to submit late Declarations and exhibits into the record, then the Association similarly seeks admission of the responsive evidence set forth in the Declaration of Kay Sansone and the evidentiary exhibits attached to the Fourth Declaration of David Allen, filed herewith. If the Association's first objection is affirmed, then we respectfully withdraw those additional evidentiary exhibits.

IV. AUTHORITY AND ARGUMENT

If the Association's objection is denied with regard to the late arguments offered by Respondents, the Association provides the following arguments in opposition to the Respondents' Request for Reconsideration or Clarification.

As discussed below, even if the Court does consider Respondents' late arguments concerning the effect of the deck on the 75/80 Rule calculations, those arguments fail both as a matter of law and as a matter of fact.

A. Respondents' Deck Arguments Fail as a Matter of Law

As a matter of law, in the City's Land Use Code, where the legislative intent is to exclude minor features like decks from the exceptions to the minimum lot area requirements, the Code excludes them expressly. Therefore, in other exceptions, where decks were not carved out expressly, the legislative intent is that decks are included. As Respondents correctly cite on page 6 of their Request for Reconsideration, courts have confirmed that where the legislature uses certain language in one section of a regulation and different language in another, it signals a different legislative intent. Request at p. 6,

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

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l. 4-6; citing *Guillen v. Conteras*, 169 Wn.2d 769, 776, 238 P.3d 1168 (2010); *Vogel v. City of Richland*, 161 Wn. App. 1036, 2011 WL 1797177 *9 (2011).

Thus in SMC 23.44.010.B, where the exceptions to the minimum lot area requirements are set forth, since minor features like decks are only carved out of the calculations for the historic lot exception, they are included in the 75/80 Rule calculations.

> **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:
> a. "The Seventy-Five/Eighty Rule."
> . . .
> 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 . . . .
> 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.
> . . .
> d. ["The Historic Lot Exception"]
> . . .
> 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 . . .
> 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.***

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SMC 23.44.010 (emphasis added).

The highlighted language above expressly addresses "minor features" like unenclosed decks, and it expressly excludes those minor deck features from the calculations under 23.44.010.B.1.d (the historic lot exception), not subsection of 23.44.010.B.1.a (the 75/80 Rule exception). Since the minor deck features were only carved out of the historic lot exception calculations, the legislative intent is that such features be included in the 75/80 Rule calculations. *Guillen v. Conteras*, 169 Wn.2d 769, 776, 238 P.3d 1168 (2010); *Vogel v. City of Richland*, 161 Wn. App. 1036, 2011 WL 1797177 *9 (2011).

Respondents seem to suggest that "minor features" like decks less than 18 inches above grade are unregulated by the Land use Code altogether. Request for Reconsideration, page 4. This is not correct. If minor features like decks less than 18 inches above grade were unregulated by the Land Use Code, there would be no need for the legislature to have expressly excluded such minor features from the historic lot exception. Similarly, if decks less than 18 inches above grade were unregulated by the Land Use Code, there would be no need to expressly exclude them from the single family residential yard and setback requirements under SMC 23.44.014.D.11 (or other exceptions that the Respondents note on page 4 of their Request for Reconsideration).

The fact is, decks less than 18 inches above grade are regulated by the City's Land Use Code. The Code defines decks broadly, to include decks of all heights.

> **SMC 23.84A.008"D"**
> "Deck" means a platform extending more than eighteen (18) inches from a structure, or an unattached platform. A deck may be cantilevered or connected to the ground by posts and may have steps or ramps to the ground and a door to the structure. (*See also* "Porch.").

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SMC 23.84A.008.D. The Code definition does not exclude decks less than 18 inches above grade. It does not define decks with regard to their height at all, but rather with regard to their width extending out from the structure. Thus, decks of all heights fall within this definition and are regulated under the Land Use Code.

The Respondents are correct that the Code excludes some decks from some provisions of the Land Use Code. However, it follows, therefore, that where the Code does not mention such an exclusion, the assumption must be that decks (all other decks) are included. *Guillen v. Conteras*, 169 Wn.2d 769, 776, 238 P.3d 1168 (2010); *Vogel v. City of Richland*, 161 Wn. App. 1036, 2011 WL 1797177 *9 (2011).

On this basis alone, the Request for Consideration should be denied. The Court need not reach any of the other arguments raised in the Request for Reconsideration, as all of the Respondents' other arguments are premised on the erroneous assumption that the deck can be excluded from the 75/80 Rule calculations.

B. Respondents' Deck Arguments Fail as a Matter of Fact

If the Court considers the Respondent's other arguments, the Respondent's deck argument also fails as a matter of fact. Assuming *arguendo*[2] that a portion of the deck at its far eastern edge may have been only 18 inches above grade, the Second Declaration of Kay Sansone confirms that other portions of the deck were elevated more than 18 inches above grade. Second Decl. K. Sansone, p. 2; S610-S614. There was a raised section of the deck that went from the bedroom door to the southeastern corner of the deck. *Id.* This raised section of the rear deck can be seen in the photographs attached to the Fourth Declaration of David Allen. S610-S612.

[2] The height of the deck can no longer be measured, since it has been removed by the very Respondents who now seek to introduce new facts related to its height. This and other new factual evidence submitted with the Respondents' Request for Reconsideration, and any reasonable inferences related to such evidence, must be construed in favor of the Association as the non-moving party. *Schofield v. Spokane County*, 96 Wn. App 581, 586, 980 P.2d 277 (1999).

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Photographs attached to the Fourth Declaration of David Allen, and other photographs already in the record, show that the rear deck was also elevated higher above grade where the property sloped away from the house toward the north lot line. S613-S614; S513-S514. Moreover, photographs and the diagram of the deck in the record show that it was one contiguous feature that wrapped around the house from the rear deck, across the balcony on the north side of the house and onto the viewing platform on the west side of the house, where the property slopes most steeply toward the corner of the north and west lot lines. S513-S514; S557. Thus, portions of the deck were more than 18 inches above grade. Respondents' arguments fail as a matter of fact.

If the Court considers Respondents' argument regarding the facts in existence at the time of the application for a short plat or building permit, it will find that the Respondents err both by discounting the similarities between short plats and LBAs, and by glossing over the timing of the building permit application *vis a vis* the demolition of the deck, which did not occur until January 15, 2013. Decl. of R. Day, p. 2. As the Association pointed out in its Reply Brief, Part 4 of the 75/80 Rule states that the 75/80 calculations must be based upon facts in existence at the time of the application for a short plat or building permit. SMC 23.44.010.B.1.a.4. The Association argued that this part of the 75/80 Rule should be interpreted to mean the time of application for the LBA (December 17, 2012), because LBA applications are so similar to short plat applications (both are used to create new lot configurations). If Part 4 refers to the date of the LBA application, then just as a deck that was in existence at the time of short plat application #3014664 tied parcels together in the case of the *Analysis and Decision of the Director of the DPD*, Application #3014664, p. 3 (S534), the deck that was in existence at the time of the LBA application in this case tied parcels 9, 10 and 11 together here.

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However, if analogizing LBA applications to short plat applications reads too much into Part 4 of the 75/80 Rule, then the same result is reached here when considering the timing of the building permit application instead. The Respondents acknowledge submitting a building permit application for the removal of the deck. Request for Reconsideration at page 8. The copy of that application in the Record and was stamped received by DPD on January 4, 2013. R27. The Respondents admit that the deck was not removed until January 15, 2013. Decl. of R. Day, p 2. Therefore, on the date that the building permit application was submitted, January 4, 2013, the deck was in fact in existence on parcel 9, and tied 9, 10 and 11 together for purposes of the 75/80 Rule.

Respondents attempt to gloss over the fact that the deck was in existence for 10 days following the date of the building permit application, by arguing instead that the City's approval of the building permit to remove the deck is somehow the same as the actual removal of the deck. This argument is untenable and contradicts the plain language of Part 4 of the 75/80 Rule which refers to actual facts in existence as of the date of the application for a building permit.

In sum, the Court's Decision complies with the law and is supported by substantial factual evidence in the record. The Decision should not be changed.

C. Remand Does not Mean Dictating City's Action on Erroneous LBA

Finally with regard to the Respondents' Request for Clarification, we note that remanding a matter for further action does not mean dictating the specific action to be taken. *See e.g., Wenatchee Sportsmen Ass'n v. Chelan County*, 141 Wn.2d 169, 176, 4 P.3d 123 (2000). The City Code provides procedures for processing applications, and provides specific authority for the City to properly revoke permits that are issued in error. Ch. 23.76 SMC; SMC 23.76.034.A.

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The Court's Decision confirms that the LBA is incorrect. The LBA lot configuration, as applied for with the City and as recorded with the County, does not meet the City's 75/80 Rule. This necessarily means the Respondents must submit to the City and record with the County a new LBA, with a new lot configuration that does meet the 75/80 Rule. It also means that the City will issue a fresh approval based upon the new LBA application and the facts in existence at the time that application is received.

The facts in existence on the date of the new LBA application include a new structure that the Respondents have begun constructing on old parcels 8 and 9. The City did not require the developers to forge ahead and begin construction while this case was pending. The developer chose to do so, despite the pendency of this appeal. In making that choice, the developer assumed certain risks about whether the development would be able to proceed as envisioned in the original LBA, if the LBA was reversed on appeal. As that situation has now occurred, the City should retain its authority to revoke the erroneous LBA, and to process the new LBA application in accordance with the procedures set forth in its Code.

V. CONCLUSION

For all the reasons discussed above, the Benchview Neighborhood Association respectfully requests that the Court deny the Respondents' Request for Reconsideration and Clarification. The Court's Decision comports with the law, is supported by the facts in the record, and should not be altered.

DATED this 14th day of August, 2013.

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