HON. MARIANE C. SPEARMAN
HEARING DATE: AUGUST 19, 2013

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' REPLY IN SUPPORT OF MOTION FOR RECONSIDERATION OR CLARIFICATION

I. INTRODUCTION

Respondents request reconsideration as to *which lots count* toward the 75/80 calculation because arguments about the deck were devoted to the different issue of whether the deck negated the *Historic Lot Exception*. Benchview prefers that the Court not consider the issue fully. We disagree. Moreover, Benchview has failed to respond to key arguments in our Motion, and its Response relies on irrelevant information about portions of the deck on *other parts of the lot*, rather than the portion of the deck that encroached on Lot 9.

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II. EVIDENCE RELIED UPON

In addition to the records and files herein, Respondents rely on the Second Declaration of Ron Day ("Day Second Declaration") which conclusively establishes that the portion of the deck on Lot 9 was only one-foot wide and was less than 18 inches above grade.

III. AUTHORITY AND ARGUMENT

A. THE COURT SHOULD CONSIDER FULL INFORMATION ABOUT THE DECK.

Benchview's Response attempts to show that the deck was considered in relation to all issues. But the context for their arguments was the Historical Lot Exception in SMC 23.44.010.B.1d, not the 75/80 method of calculation in subsection B.1.a of that Code provision. Their Reply Brief is illustrative. It is divided into three numbered sections: 1) Historic Lot Exception (pp. 11-19), 2) which lots count toward 75/80 (pp. 19-22), and 3) whether an LBA was the right process (pp. 22-23). The deck on Lot 9 is only discussed under issue 1 Historic Lot Exception; *there is no mention whatsoever of the deck under issue 2 (which lots count toward 75/80)* or issue 3. Moreover, Subsection 4 as to the date when facts are to be determined for short plats was only mentioned in Benchview's rebuttal oral argument, when Respondents had no time allocated for further argument. Although Benchview wants the court to consider the deck issue without full information, it is plain that the issue was not fully addressed. We urge the Court to consider all the relevant information.

Benchview also objects to the additional materials filed with our Motion, but the objection is not well founded. Since Benchview's arguments about the deck on Lot 9 related to the Historic Lot Exception, Respondents could not have known that this one-foot deck would be determinative of the separate issue of which lots count toward the 75/80 calculation. We could not have brought our evidence forward earlier because the argument had not been

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made. Our other evidence, the multiple other revised LBAs processed by the City, could not have been brought forward earlier because it was only after the Court's Decision that Benchview argued to the City that the revision to the LBA should not be processed as a revision. We thus urge the Court to consider the additional materials filed by both parties.

B. BENCHVIEW OFFERS NO ANSWER TO THE ARGUMENT THAT SUBSECTION 4 DOES NOT APPLY TO LBAS.

Benchview virtually ignores a key part of our Motion for Reconsideration. The Court's Decision on which lots count toward 75/80 is based on the assumption that Subsection 4 applies to LBAs. It does not apply to LBAs, as detailed in our Motion. Short plats are referenced in Subsection 4, but LBAs are not, and LBAs are distinct and separate from short plats as a matter of State statute and Seattle's Code.

Benchview fails to answer these arguments, but the inapplicability of Subsection 4 is critical: since Subsection 4 does not apply to LBAs, the Court should not have applied it to this LBA. The only thing Benchview has to say about this key argument is that LBAs are "similar to" short plats. Benchview Response, p. 10. But that is no answer to the many reasons why the Court cannot read "lot boundary adjustment" into Subsection 4 and therefore have it apply to an LBA. An apple is similar to an orange in that they are both fruit, but no one would say they are the same thing. It was an error to apply Subsection 4 to this LBA, and it does not matter that the deck encroachment existed when the LBA application was filed.

C. THE DECK ENCROACHMENT ON LOT 9 DOES NOT REQUIRE LBA REVERSAL.

Benchview argues that since the Code allows deck removal for the Historic Lot Exception, but does not mention decks under the separate provision of which lots count toward 75/80, that must mean decks count for the purpose of 75/80. However, even if true in

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a general sense, *that does not mean that all decks count*, because we know the Code treats decks less than 18 inches above grade differently from decks that exceed that height. And we know from the Day Second Declaration that the portion of the deck encroaching one foot onto Lot 9 was definitely less than 18 inches above grade. Second Day Declaration ¶¶ 3-7. Benchview's photos of different portions of the deck that are *not on Lot 9* are irrelevant.

The Code does have a general definition of decks and some decks are regulated, but decks that are less than 18 inches from grade are carved out as an exception to the zoning rules. Respondents have no answer to our proof that such decks do not even require a permit, and that Director's Rule 10-95 specifically states that decks less than 18 inches from grade are "minor features" that do not have the effect of attaching one structure to another.

There is certainly no provision of the Code that says a minor, one-foot wide deck encroachment, less than 18 inches above grade, that did not even need a permit to be built, that was authorized for removal and was *actually removed prior to the LBA decision* would have the effect of attaching Lot 9 to Lots 10 and 11 such that Lot 9 could not count toward the 75/80 calculation. That draconian result is not justified by the totality of the City's Code and Director's Rule interpreting it. But even if the Court considers this minor deck to be a factor in the 75/80 analysis, it is enough that the deck was removed prior to LBA approval, since Subsection 4 is inapplicable to LBAs. We thus urge the Court to reconsider its Decision.

D. IF THE COURT AFFIRMS ITS DECISION, WE ASK THE COURT TO CLARIFY THAT IT IS REMANDING THE LBA TO THE CITY FOR FURTHER PROCESSING.

Benchview suggests that a remand cannot dictate a specific action, but the case they cite for that position does not even discuss the issue, much less stand for that proposition. However, we cited *Knight v. City of Yelm* which specifically authorizes a remand to the City

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Council to modify the decision to add a condition related to water supply. 173 Wn.2d. 325, 334 (2011). Moreover, Benchview provided no response to our "plain language" argument that the Land Use Petition Act contains broad authority for the court to remand a land use decision "for modification or further proceedings." RCW 36.70C.140.

Respondents have applied for an LBA revision to make the slight boundary modification required by the Court's Decision, and the City has accepted that revision for processing. Our Motion provided numerous examples of other minor boundary changes that had been processed as revisions to previously approved and recorded LBAs. Benchview provided no argument to counter those examples or explain why a revision process was unlawful. We thus urge the Court to remand the LBA to the City for processing of a revision to the LBA in conformance with the Court's Decision.

IV. CONCLUSION

The Court should reconsider its Decision and affirm the City's decision that the LBA meets the 75/80 Rule. Should the Court conclude otherwise, then we request that the matter be remanded to the City for processing of a revision to the LBA that conforms to the Court's Decision.

DATED this 16th day of August, 2013.

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By s/ Melody B. McCutcheon

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