IN THE SUPERIOR COURT OF
THE STATE OF WASHINGTON FOR KING COUNTY

WILLIAM CONNER and MARILYN CONNER, husband and wife, Petitioners/Plaintiffs, vs. CITY OF SEATTLE, a Washington municipal corporation, Respondent/Defendant.	No. LAND USE PETITION AND COMPLAINT FOR DAMAGES AND DECLARATORY JUDGMENT

William Conner and Marilyn Conner (collectively, "Conner") respectfully ask the Court to review the decision ("Decision") of the City of Seattle Hearing Examiner ("Examiner") to deny them the right to build three single family homes on three vacant lots in Seattle ("Three Vacant Lots").

The Examiner committed three central errors. First, she incorrectly concluded that the Three Vacant Lots were subject to the City's Landmarks Preservation Ordinance. Second, she incorrectly concluded that construction of the proposed three homes on the Three Vacant Lots would violate the Landmarks Preservation Ordinance. Third, she incorrectly concluded that

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denial of the right to build three single family homes on the Three Vacant Lots left Conner with a reasonable economic use.

In addition to those three central errors, the Decision to deny Conner the right to build three single family homes on the Three Vacant Lots denied Conner the constitutional rights to procedural and substantive due process, to be free of a taking without just compensation, and to equal protection. The Decision was also in excess of the City's police powers. The City's Landmarks Preservation Ordinance is constitutionally invalid on its face and as applied. These constitutional issues were ones the Examiner was without the authority to address.

Conner also respectfully asks the Court to afford declaratory relief to declare the scope and extent of their rights to develop their property in light of the City's Landmarks Preservation Ordinance

Finally, the Decision has caused damages to Conner. Because the Decision was unlawful, Conner is entitled to an award of damages.

The facts of this case present a striking illustration of the adage that "no good deed goes unpunished." Conner purchased the property at issue in this case at the invitation of the City to develop eight units of affordable housing as part of the City's innovative affordable housing demonstration program, to meet the statewide goals of the Growth Management Act to encourage in-city living, a healthy density, and housing that can be affordable. Instead of facilitating this development, which was initiated at the City's invitation, the City's land use process has frustrated Conner at every turn, ultimately denying the right to build even three homes on the Three Vacant Lots.

LAND USE PETITION

William and Marilyn Conner respectfully petition the Court to review the Hearing Examiner Decision to deny the right to build three single family homes on the Three Vacant Lots.

1. William and Marilyn Conner (collectively, "Conner") own the property at issue. Their address is 846 108th Ave NE, Bellevue, WA 98004.

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2. The attorneys for Conner are G. Richard Hill, McCullough Hill P.S., 701 Fifth Avenue, Suite 7220, Seattle, Washington 98104.

3. Respondent City of Seattle ("City") is a Washington municipal corporation. The address of the City is 700 Fifth Avenue, Seattle, WA 98104-5070.

4. The Decision is set forth in two documents. The first is a Supplemental Order on Motions for Summary Judgment and Dismissal dated March 6, 2008, and is attached as Exhibit A. The second is the Findings and Decision of the Hearing Examiner for the City of Seattle dated April 28, 2008, and is attached as Exhibit B.

5. Conner has standing pursuant to RCW 36.70C.060 because Conner is the applicant for the Certificate of Approval which the Decision denies; Conner is also the owner of the property that is the subject of the Certificate of Approval Application. Conner is aggrieved and adversely affected by the Decision because as discussed below it is unlawful, erroneous, clearly erroneous, not supported by substantial evidence, and violates his constitutional rights. In addition, Conner's interests are among those that the Examiner was required to consider when she made the Decision, and a judgment in favor of Conner would redress the prejudice to Conner. Conner has exhausted all administrative remedies prior to initiating this land use petition.

6. The facts upon which Conner relies to sustain the statements of error are set forth in the administrative record, as it will be supplemented in this proceeding. A summary of the key facts follows:

(a) The Property.

Conner owns four lots on Beach Drive SW in West Seattle. Three of those four constitute the Three Vacant Lots. The lots are zoned R-7200.

Parcel A, the westerly vacant lot, is adjacent to Beach Drive SW, and is 8779 sf in size. Parcel B, the next vacant lot to the east, is 7200 sf in size. Parcel C, the next vacant

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lot to the east, is also 7200 sf in size. These three lots are currently a grass lawn, with an occasional bush and tree. They slope down gently to the west, to Beach Drive. There is a disagreement between Conner and the City as to whether these Three Vacant Lots have been designated as landmarks under the City's Landmarks Preservation Ordinance.

The fourth, most easterly lot, Parcel D, is 16,440 sf in size. The Satterlee House, a structure that all parties agree has been designated as a landmark under the City's Landmarks Preservation Ordinance, is located on this most easterly lot.

The Satterlee House was originally a beach house. Parcels A-C historically constituted its private formal garden, surrounded by a high hedge. In later years, Parcels A-C became a lawn.

(b) The Vicinity.

Traditionally, many of the other homes along Beach Drive SW were also beach houses on large lots, with the houses set high on the lots, on the east, to gain the most sweeping views of Puget Sound. Over time, most if not all of these properties have subdivided and redeveloped the low-lying portions. The Satterlee House lot and the Three Vacant Lots are the only remaining property along Beach Drive SW with a large lawn that has not been redeveloped.

(c) Property Ownership History.

The Satterlee House was originally constructed circa 1906. Since 1953, the Satterlee Property had been owned by Lucille Borrow. Mr. Satterlee often visited the property when he was a child. As of 1972, the Satterlee Property comprised two lots, an easterly lot on which was situated the Satterlee House, and the .6 acres of the westerly lot. In 1972, Ms.

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Borrow's nephew, David Satterlee, purchased the easterly lot to serve as his family's residence. In 1977, Mr. Satterlee purchased the westerly lot, also from his aunt.

(d) The Hedge.

Historically and during the entire time that his aunt owned the property, including the first few years that Mr. Satterlee owned the property, an evergreen hedge approximately eight feet in height obscured the view of the garden and of the Satterlee House from Beach Drive SW. The hedge was removed sometime in the late 1970s or early 1980s due to maintenance issues. The remainder of the formal garden, which had become overgrown, was also removed and replaced by grass.

(e) Landmarking of the Satterlee House.

In 1980 or 1981, Mr. Satterlee's aunt, who was no longer the owner of the property, was approached by representatives of the Landmarks Board to see if she would consent to having the Satterlee House designated a City of Seattle landmark. She referred the inquiry to Mr. Satterlee. Mr. Satterlee was told that it would be "an honor" to have the house designated a landmark. Although there were no financial benefits to the designation, there was a possibility of Federal tax credits and also historic preservation grants-in-aid funds if he chose to apply for Federal landmark designation. He stated that it was in part due to his hope of receiving grants-in-aid funds that he agreed to pursue the landmark designation, since he had limited resources to maintain and upgrade the house. However, he never received any financial benefit from the landmark designation.

Mr. Satterlee recalls specifically asking the Landmarks Board representative what the landmark designation would do to his ability to sell, develop or use the property, as

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he viewed the property as a valuable part of his future financial security for his retirement. He remembers being told that "it would really not have that much effect."

He did not attend the Landmarks Board meetings on the nomination or the designation, nor did he attend the City Council meeting at which the designating ordinance was adopted. He also has no memory of signing a Controls and Incentives Agreement, and there is no record of a signed Controls and Incentives Agreement in the Board's file. There is a letter in the record in which Mr. Satterlee requests that his "home" be nominated as a local historical structure as well as nomination to the National Register. He testified that he wrote this letter at the direction of the Landmarks Board representative, who told him that the property owner's permission was required for National Register consideration, which was necessary for the potential grants-in-aid funds that the City representative had alluded to.

The Satterlee House was designated a landmark by Ordinance 111022. The recitals to the Ordinance state that the Board approved the nomination of the Satterlee House as a landmark on July 1, 1981; that on August 5, 1981 the Board approved the designation of the Satterlee House as a landmark; and that on October 7, 1981 the Board and the "owners" of the designated property agreed to controls and incentives. No record of this agreement could be produced, however, by Board staff.

Section 1 of the Ordinance acknowledges designation of the Satterlee House based on two of the Landmarks criteria: (a) It embodies the distinctive visible characteristics of an architectural style, or period, or of a method of construction; and (b) Because of its prominence of spatial location, contrasts of siting, age, or scale, it is an easily identifiable feature of its neighborhood or the city and contributes to the distinctive quality or identity of

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such neighborhood or the city. Section 2 of the Ordinance imposes the condition that a "Certificate of Approval must be obtained… before the owner may make alterations to the entire exterior of the house, as well as the entire site." The "site" is not defined.

The Board's August 19, 1981 Report on Designation made the following two comments as to why the Board felt that the Satterlee Residence (the term used by the Board) was worthy of landmark designation:

> The house is an excellent, symmetrical example of a Seattle classic box, well detailed and composed. As such it will be the first of the city's classic boxes to be designated as a city landmark.
>
> The property is in significant contrast to the surrounding, rather crowded (albeit atmospheric) area, with its long "front yard" extending back and up the slope, climaxed by location of the house near the top of the slope. Much of the design of the grounds dates from the building of the house, ca. 1906.

While these statements exist in the Board's records, the City Council, in adopting the Ordinance, did not identify any other property than the Satterlee House.

There is evidence in the record that Mr. Satterlee received correspondence from the Board stating that, by virtue of the landmarks designation, he would be required to obtain a certificate of approval before making changes to the house or adding structures to the "site," although, again, no legal description of the site is provided, beyond the vague reference in the designating Ordinance. Mr. Satterlee does not recall receiving or reading that correspondence.

In any event, Mr. Satterlee did not have the understanding that he was required to obtain a certificate of approval for painting the house (he repainted it after designation from solid white to the current "San Francisco" style) or for constructing a gazebo adjacent to the

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house (which he built for his daughter's wedding). He also had three new sewer hookups constructed with the expectation of future development of the lower lot.

(f) Purchase of Property by Conner.

In the late 1990's, Mr. Satterlee placed the Property on the market. The only persons who were interested in purchasing the property at what he considered its value were developers intent on building to the zoned density of three homes. While he wanted to receive fair market value for his property, Mr. Satterlee was concerned that development of the front lot be done in such a way that a view of the Satterlee House from the street be preserved, and that the integrity of the landmark qualities of the Satterlee House be preserved.

William Conner, recently (or soon to be) retired as President of Conner Homes, was approached by Marcia Hadley in connection with the acquisition of the Satterlee Property. Mr. Conner and Ms. Hadley were both Board members of Threshold Housing, a nonprofit affordable housing developer. Their interest was to develop design-sensitive affordable housing "cottages," pursuant to a City pilot project, in single family neighborhoods. One such development of cottages and carriage houses had recently been completed by Threshold Housing, in the Ravenna neighborhood, in Seattle. With respect to Mr. Satterlee's property, the concept was to develop six cottages and two carriage houses on the front lot of the property, using the existing driveway, that were modestly sized, architecturally compatible with the Satterlee House, and preserved a central view corridor to the Satterlee House. Mr. Conner's objective was to demonstrate to the builder community that it was possible to construct affordable housing cottages in single family neighborhoods in Seattle profitably, in accordance with Growth Management objectives.

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Mr. Conner, Mr. Satterlee, and Ms. Hadley then worked with John Chaney, Executive Director of Historic Seattle, to develop a Historic Preservation Easement to protect the view of the Satterlee House from Beach Drive SW, and to provide Historic Seattle with the right to approve of development on the front lawn to assure architectural compatibility with the Satterlee House.

At closing, a Historic Preservation Easement in favor of Historic Seattle was recorded. Mr. Satterlee was able to obtain tax benefits as a result of granting that easement. In addition, Conner paid Mr. Satterlee a purchase price of $900,000 for the property.

Mr. Satterlee was able thus to convey the property, being assured that a view corridor to the Satterlee House would be retained and that Historic Seattle would assure that new homes would be compatible with the Satterlee House.

Conner's investment-backed expectations at the time of property purchase were that they would be allowed to develop eight units on the property, contribute to the stock of affordable housing in the City, and make a reasonable economic return.

(g) The Cottage Proposal.

In 2000, the City Council enacted a Demonstration Program for Innovative Housing Design. Through a selection process, the proposal for the eight units on the Satterlee property was chosen by the City. The neighborhood design review process for the project, conducted in 2001, was controversial. The Design Review Board recommended an alternate site plan. In 2002, the City's Department of Construction and Land Use (the precursor to the current Department of Planning and Development) was prepared to approve Conner's preferred site plan, but declined to a departure for the floor to floor square footage allocation

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(which had been approved for all past cottage projects). The result was that the DCLU requirement made the project much less feasible. However, DCLU anticipated City Council adoption of a Cottage Housing Code which would revise the floor to floor square footage allocation to a workable formula. Accordingly, the application was kept on hold. However, as of 2003 and then as of 2004, even though the DCLU work plan included work on the Cottage Housing Code, no Cottage Housing Code was adopted.

Accordingly, in 2005, Conner applied for a short plat to create three new lots on the westerly portion of the property as a fall-back in case the Cottage Housing Code was not adopted. In 2006, Conner decided to proceed with the cottage housing proposal, conforming to the floor to floor allocation requirement, as the Cottage Housing Code had not been adopted. However, at that time DCLU (now DPD) canceled the cottage housing application. This left Conner with no choice but (1) to seek to sell the Satterlee Property and three lots as a single estate property or (2) to proceed with a proposal for three homes on the three lots created by the short plat.

(h) Conner Efforts to Market the Property.

Since 2006, Conner has received four formal offers to purchase all or portions of the Satterlee Property.

In September 2006, WGC Inc. offered $1,200,000 to purchase the three westerly lots. WGC designed three homes for the three lots and presented its designs to the Board's Architectural Review Committee. After that meeting, due to negative feedback, WGC determined not to proceed with the purchase.

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In June 2007, Trend Development offered $1,050,000 to purchase the three westerly lots. After determining that the Board would not approve the Conner proposal for three homes on the westerly lots, Trend Development determined not to proceed with the purchase. However, if the Hearing Examiner approves the Conner proposal, it is expected that Trend Development will be willing to proceed with the purchase.

In July 2007, Sarah Louthan offered to buy Parcel D (containing the Satterlee House) for $1,370,000. However, Ms. Louthan intended to utilize an unconventional form of financing. Conner's attorney advised that this type of financing could be potentially legally problematic. Accordingly, Conner rescinded the acceptance of the offer on advice of counsel.

In November 2007, Michan Rhodes offered to purchase all four parcels for the sum of $1,780,000. However, Ms. Rhodes declined to close based on her inspection of the property.

(i) Conner Decision to Seek Certificate of Approval.

After WGC's meeting with the Board's Architectural Review Committee and subsequent decision to terminate the purchase agreement, Conner determined that the ability to sell the three westerly lots would be dependent upon obtaining preliminary approval from the Board of a design for homes on the lots. Accordingly, Conner retained Baylis Architects to design three homes and to present them to the Board for approval.

(j) Landmarks Board Process

The Landmarks Preservation Board has both an informal and formal process for consideration of a certificate of approval. The informal process begins with a subset of the Board, the Architectural Review Committee, also referred to as the ARC. Even before

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applying for a certificate of approval, it is unwritten Board protocol that a property owner go to the ARC, describe the site, the landmark, and the project objectives. The ARC will then provide feedback as to what it will find generally acceptable or unacceptable. There may be several meetings before the ARC where the property owner will present various alternatives and increasingly refined designs. Ultimately, the property owner hopes to present a design that the members of the ARC find acceptable. The ARC meetings are not recorded. No minutes are kept by Board staff.

Following, or during, this informal process, the property owner will apply formally for either a preliminary or final certificate of approval. A preliminary certificate of approval deals with the site plan, building footprint, building mass, height, and general architectural character of the proposal. A final certificate of approval deals with the final details of the proposal, including materials, colors, and so forth.

Once the informal ARC process is complete, the property owner then submits the proposal at a formal meeting of the Board. Minutes are kept of the Board meetings. However, no verbatim tape or transcript of these meetings is maintained. The Board then considers the proposal in light of the criteria of the Landmarks Ordinance and the Secretary of Interior Guidelines. The proposal will be either approved or disapproved.

(k) The Conner Proposal.

In accordance with this process, Baylis Architects' Associate Susan Busch made an initial presentation to the ARC on behalf of Conner. She presented a zoning diagram that depicted all four Satterlee Property lots. With respect to the three westerly lots, she identified the maximum lot coverage and building footprints. She also depicted the maximum

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allowed building mass. At hearing, she testified that under the City's land use code, it would be lawful to have a home of 9216 sf on Parcel A, and of 7560 sf each on Parcels B and C. The size of the homes proposed by Conner is approximately one third of the maximum size of the homes allowed by the City's Land Use Code.

At the initial ARC meeting on June 15, 2007, in addition to presenting background information about the property and zoning constraints, Ms. Busch presented two alternative schemes, landscape studies and three dimensional diagrams.

Ms. Busch returned to the ARC on July 27, 2007 for a second presentation. She shared further development of site studies, landscape studies, three dimensional diagrams, and elevations. She reviewed the concept of the proposal: for a cohesive group of homes sharing a common green space with the Satterlee House, the neighbors and the public; a 45' minimum view corridor along the south and west sides of the Property, preserving an unobstructed view of the Satterlee House; homes of 2660 sf, 2765 sf, and 3333 sf, plus terrace and garage; terrace and landscaping to soften the architecture; proposed buildings are lower in scale than the Satterlee House, allowing it to maintain prominence at the top of the site.

The ARC commented that the homes must be smaller, lower and held as close to the north property line as possible. Homes should be "subservient" to the Satterlee House, Ms. Busch was told.

The final meeting of the ARC was held on September 14, 2007. Susan Busch stated that the site plan was fundamentally the same as before. Lot coverage is limited to 24-27% of each lot, less than the 35% allowed by Code. Design of the homes is consistent, she stated, with the Secretary of Interior Standards, by clearly distinguishing the new homes from

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the historic home. Due to the setting high above the street, the Satterlee House maintains its importance above the new homes.

The ARC comments stated that the proposed design of the homes (modern) is fine and probably appropriate. However, once again Ms. Busch was told that the homes must be smaller and clearly subservient.

On November 14, 2007, the property owners presented the proposal to the full Board for a preliminary certificate of approval. Susan Busch presented a project narrative, described the design concept, presented the existing site, the proposed site plan, described the view corridor that would be preserved, presented site sections, showed vicinity photographs and views, and depicted the landscape plan and floor plans.

At that meeting, Conner's legal counsel also presented economic information indicating that Conner had purchased the property for $900,000 in 1999, and had incurred expenses of $823,826 since that date. Conner is currently receiving less than $24,000 per year in rent on the property. Conner's legal counsel argued that this is not a reasonable rate of return on the property. He also argued that the Conner proposal, with homes approximately one third the size allowed by the zoning, was the minimum size necessary for Conner to obtain a reasonable return.

The Board held a final meeting on December 5, 2007. Ultimately, the Board voted to deny the Proposal. The majority of the Board members felt the proposed homes were too big. The formal decision denying the application asserted that (a) the massing and scale of the three houses in comparison to the landmark Satterlee House would adversely affect the features or characteristics described in the report on designation (the decision does not identify

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what features the Board believes would be adversely affected); (b) the proposal was not reasonable because there are alternatives to build homes of a smaller scale and massing that could achieve the objectives of the owner (the decision does not identify which "smaller scale" homes it believes are reasonable); (c) there was insufficient information to address the reasonable economic use issue; and (d) the proposal is inconsistent with Secretary of Interior Standard #9.

(l) Compliance with Landmarks Board Criteria.

At the hearing before the Examiner, John Chaney testified in support of the Conner proposal. He has recently retired from his position as Executive Director of Historic Seattle. He has several decades of experience in historic preservation, including a number of stints in various capacities as staff supporting the City's Landmarks Board and Pioneer Square Board.

In his position at Historic Seattle, he reviewed both the original cottage housing proposal and the current three house proposal. Both proposals, he concluded, were sympathetic and compatible with the historically significant qualities of the Satterlee House and Satterlee Property.

By virtue of the Northwest Contemporary design of the proposed homes, there is a clear differentiation between the new homes and the historic Satterlee House. In addition, the significant view corridor preserves the most meaningful views of the Satterlee House from the street, and preserves the sense of a long lawn vista from the street to the House. Finally, the topography of the site assures that the Satterlee House will remain a dominant vista viewpoint.

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In his testimony, Mr. Chaney reviewed the Secretary of Interior Standards pertinent to this proposal. With respect to the Guidelines, he pointed out that the proposal fully retains, preserves, and protects the Satterlee House. The only issue in this case is what to do with the westerly lots containing the lawn bordering Beach Drive. The Guidelines, in the section on "Alterations/Additions to Historic Buildings," state that "Some exterior and interior alterations to historic buildings are generally needed to assure its continued use, but it is most important that such alterations do not radically change, obscure or destroy character-defining spaces, materials, features or finishes." Mr. Chaney testified that the proposed new houses, although occupying the north portion of the front yard, have no significant impact on the character-defining spaces, materials, features, or finishes of the Satterlee House.

In the Introduction of the Standards on Rehabilitation, Mr. Chaney directed the Examiner's attention to the second paragraph, which defines "rehabilitation" as "the process of returning a property to a state of utility, through repair or alteration, which makes possible an efficient contemporary use while preserving those portions and features of the property which are significant to its historic, architectural, and cultural values." In this case, Mr. Chaney pointed out, the addition of three houses to the site makes possible an efficient contemporary use while preserving the Satterlee House, and those portions of the front lawn which are significant to its historic, architectural and cultural values. He also emphasized the provision that states that the "Standards are to be applied to specific rehabilitation projects in a reasonable manner, taking into consideration economic and technical feasibility." That is, he testified, what the proposal does.

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With respect to Standard 9 (the Standard relied on by the Board to deny the Proposal), Mr. Chaney confirmed that the Proposal is "differentiated from the old" and is in fact "compatible with the massing, scale, and architectural features to protect the historic integrity of the property and its environment."

When asked whether the homes proposed by Conner were "too big" and insufficiently "subservient" to the Satterlee House, Mr. Chaney said they were not. First, the topography of the site assures that the Satterlee House will remain prominent. Second, the view corridor assures that the Satterlee House will remain visible. And third, the high quality design of the proposed homes suggests that they may become the landmarks of the future. He referred the Examiner to three buildings on Second Avenue downtown, the Exchange Building, the Bank of California Building, and the Norton Building. Each is an example of a different era, each is differentiated from the other, yet all three together comprise a compatible and sympathetic whole. There is no need for one to be "subservient" to the other, so long as all three are compatible.

Mr. Chaney also discussed the guidelines associated with the Building Site. In this case, Mr. Chaney testified that the front lawn itself was not significant in its own right, but that it did provide an important setting to view the landmark House from the street. He testified that the decision to move the three homes as far as possible to the north reasonably preserved the historic significance of the lawn as a setting for the House.

With respect to the guidelines that discuss the Setting, Mr. Chaney observed that the historical setting in which the Satterlee House originally existed has been lost. All of the adjacent beach houses and lots have been subdivided and redeveloped. The Satterlee

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Property is but a remnant of its original setting. However, the Conner Proposal complies with the Guideline for "designing and constructing new additions to historic buildings when required by the new use." The new work envisioned by the Conner Proposal, he testified, will be "compatible with the historic character of the setting in terms of size, scale, design, material, color and texture."

Mr. Chaney testified that the section of the Guidelines that discusses New Additions emphasizes that they "should be designed and constructed so that the character-defining features of the historic building are not radically changed, obscured, damaged or destroyed in the process of rehabilitation." None of these concerns, Mr. Chaney testified, are present with the Conner Proposal. Such additions, the Guidelines continue, should be designed "in a manner that makes clear what is historic and what is new." That is exactly what the Proposal entails.

Mr. Chaney also addressed the certificate of approval factors set forth in SMC 25.12.750. He stated that the proposed new homes would not significantly adversely affect the features identified in the designation ordinance. The key feature, in his opinion, was the House, and the key role of the lawn was as a setting for the House. Under the Proposal, while the existing modern lawn is certainly altered, a permanent view of the house, for the public, is preserved by the site plan, the House itself remains unaltered, and the "contrast in siting and age" of the House, referred to in the Designation, is unaltered. He also testified that in his view the proposed alterations are reasonable in light of other alternatives available to the applicant. Smaller homes, in his opinion, are not necessary to preserve the significant historic features of the Satterlee House. Indeed, the smaller homes set forth in the "Board Alternative"

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seem to seek to mimic the historic Satterlee House, in violation of proper historic preservation principles.

(m) Testimony of Tom Veith

Landmarks Preservation Board Member Tom Veith testified before the Examiner to defend the Board's decision. He identified his handwritten notes and conceded that he had instructed Ms. Busch "to make [the proposed homes] smaller and go to north as far as possible." He also conceded that his notes indicated that he had told Ms. Busch "to make them into cottages." He emphasized in his notes that the new homes should be "subservient" to the Satterlee House.

He admitted that there was nothing in the Landmarks Ordinance that identified how large or small a home could be on the Satterlee Property. It was simply a subjective call on the part of the Board members. No property owner could know before going to the Board what would be acceptable and what would not.

He also agreed that the Board could not tell the property owner in advance what was acceptable and what was not. It was up to the property owner to present alternatives to the Board. Eventually, if the property owner presented enough alternatives, the Board would tell the property owner what was acceptable.

He also confirmed that he did not have a problem with the architecture proposed by Ms. Busch. His concern instead was that the homes were "too large."

Mr. Veith was shown the "Board Alternative" design considered by the Board's consultants. This design covered the same footprint as the Conner Proposal, and left the same view corridor, but was one story, rather than two. Mr. Veith stated that, "with a few

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tweaks," he could approve that alternative, because the homes were more subservient. He acknowledged that the view corridor was the same in this proposal as in the Conner Proposal. He stated that one story was better than two, however, because the one story proposal was "subservient" to the Satterlee House.

When asked to articulate what was the historical significance of the site, as opposed to the Satterlee House, Mr. Veith could identify no significance to the site independent of the House itself.

(n) Reasonable Economic Use

George Johnson testified before the Examiner on the question of reasonable economic use.

He reviewed the current fair market value of the three easterly lots, as encumbered by the Board's proposed house size limitation and then as unencumbered.

Second, he reviewed the applicable construction costs for each size alternative given the market's requirements for the size and quality of construction. Cost estimates were provided by Mark Anderson, who has estimated costs for hundreds of homes for Conner Homes. Mr. Anderson's estimates, Mr. Johnson testified, are necessary to determine "project viability," that is, to determine whether a market-rate housing developer, in this case Conner Homes, can make a target return in buying a lot, developing a home on it, and then selling the home in the current market.

Third, Mr. Johnson reviewed the fair market value of the various sizes of completed homes in light of the existing real estate market.

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Finally, he calculated the resultant gross profit of the builder/developer and compared it to the gross profit for smaller homes at the same location, and the expected normal gross profit.

He reached three conclusions.

First, the proposed three homes of 2690 sf to 3320 sf should generate a gross profit of approximately 15% to the builder. The smaller, 1800 to 2200 sf homes would yield a loss to the builder.

Second, the fair market value of each of the three lots, without size restrictions, is approximately $400,000. With the disputed size restrictions, the value is approximately $200,000 to $250,000.

Third, the expected gross profit for a builder in the marketplace is approximately 15% at the low end, based on industry data, two qualified real estate appraisers used by Conner Homes and other comparable projects completed by Conner Homes.

Mr. Johnson concluded his testimony by summarizing his findings. Denying Conner the right to build homes of the size proposed, would in his opinion deprive Conner of a reasonable rate of return on his investment.

(o) The Hearing Examiner Decision.

In her Supplemental Order on Motions for Summary Judgment and Dismissal (attached as Exhibit A), the Examiner rejected Conner's contention that the Three Vacant Lots were not landmark property designated by the City's Landmarks Preservation Ordinance. In her Findings and Decision of the Hearing Examiner for the City of Seattle (attached as Exhibit B), the Examiner concluded that the Landmarks Preservation Board acted lawfully in denying

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Conner's application to build three single family homes on the Three Vacant Lots. She concluded that the proposal would "destroy" the residence's "prominence of spatial location." She also concluded that the proposal is not necessary for Conner to achieve a reasonable economic use of the property.

8. The Decision commits the following errors:

(a) The Examiner incorrectly construed the provisions of Ordinance 111022 in her Supplemental Order on Motions for Summary Judgment and Dismissal in determining that the Ordinance designated the Three Vacant Lots as a landmark when the Ordinance in only designated the "Satterlee House" as a landmark, and when the Three Vacant Lots were not specified in any legal description as being included in the designation. The Examiner also improperly discounted the testimony of David Satterlee that he understood only the house to be designated. The Examiner also improperly distinguished the cases cited by Appellant. *Anderson v. Issaquah,* 70 Wn.App. 684, 851 P.2d 744 (1993) and *Sleasman v. Lacey,* 159 Wn.2d 639, 151 P.3d 990 (2007) are directly on point, and require reversal of the Examiner's decision.

(b) The following findings and conclusions of the Findings and Decision of the Hearing Examiner for the City of Seattle are challenged on this appeal: Findings 4-5, 19, 40-41, 43-50, and Conclusions 1, 4-10, 12-20.

(c) The Examiner improperly found that the "Satterlee House" comprises all four lots, including the Three Vacant Lots. In fact and in law, the "Satterlee House" is just that: the Satterlee House itself.

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(d) The Examiner improperly relied on a 27 year-old hearsay telephone note to find that Mr. Satterlee asked for the "house and grounds" to be nominated as a historic site. In fact, the letter that he himself wrote to the Landmarks Board Staff asked only that his house be considered for nomination. He made no mention of nominating the front lot, as his intention was to sell or develop it in the future.

(e) The Examiner improperly found that Conner had not effectively marketed the property, when in fact several purchase offers have been made. But for the denial of the proposal to build three homes on the Three Vacant Lots, the property would have been sold by now.

(f) The Examiner improperly ignored the testimony of the Appellant's financial expert, contending that "rate of return" is irrelevant to the issue of reasonable economic use, when in fact "rate of return" is considered by applicable legal authority to be one of the central criteria to be considered in determining whether a land use regulation affords a property owner with a reasonable economic use. Ironically, the Board's financial expert, upon whom the Examiner solely relies, conducted all of his analyses in light of economic rates of return.

(g) The Examiner improperly found that sale of the entire property as one residential estate would result in a positive return on Conner's purchase price and on the amount Conner had actually invested in the property. The evidence demonstrates that such a sale will result in a negative return.

(h) The Examiner improperly found that sale of the house and the Three Vacant Lots subject to the restrictions contained in the "extensive feedback from the Board

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concerning the development that can be placed on the landmark property" would result in a reasonable economic use. First, the Board never identified what development it believed it could approve to be placed on the Three Vacant Lots. It is still left, at this time, for Conner to submit still more architectural alternatives until the Board, using unwritten and subjective criteria, deems to accept one. Second, the evidence demonstrates that sale of the Three Vacant Lots subject to the "Board Alternative," assuming that is what the Board would approve, would result in a negative economic rate of return.

(i) The Examiner improperly accepted the testimony of the Board's witnesses who had no significant experience with the construction of single family homes, and discounted the testimony of Conner's witnesses who had extensive experience with the construction of single family homes. The cost estimates presented by the Board's inexperienced estimator were significantly too low. Construction of the homes proposed by the Board would result in a significant economic loss to Conner.

(j) The Examiner unlawfully concluded that she has jurisdiction over this matter. The Three Vacant Lots are not subject to the City's Landmarks Preservation Ordinance.

(k) The Examiner unlawfully concluded that the height, scale and massing of the Conner proposal would adversely affect the features and characteristics specified for the Satterlee House in the designating ordinance, and that it fails to retain the historic relationship of the Satterlee House to the site.

(l) The Examiner unlawfully concluded that it is possible to determine the reasonable economic use of the property without considering whether the property can achieve

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a reasonable rate of return subject to the limitations of use imposed by the Board. The Examiner unlawfully concluded that issues surrounding the economic impact of controls are "resolved" at the time of controls and incentives. Rather the Ordinance makes it clear that the economic impacts of controls are to be addressed at every stage of Ordinance proceedings, including the certificate of approval process.

(m) The Examiner unlawfully concluded that Mr. Satterlee understood that the designating ordinance in this case required him to obtain a certificate of approval for any alterations to the Three Vacant Lots. Mr. Satterlee's testimony – that it was not his understanding that he was required to obtain approval before building structures on the property -- was undisputed.

(n) The Examiner unlawfully concluded that Conner was "put on notice" that a certificate of approval was a legally required precondition to development of the Three Vacant Lots. The Ordinance itself, however, does not support the Examiner's conclusion, nor does the view easement or the disclosure statement.

(o) The Examiner misconstrues Conner's position with respect to the issue of reasonable rate of return. Conner does not demand a rate of return any greater than would Mr. Satterlee. When Mr. Satterlee owned the house and the Three Vacant Lots, and if he chose to develop them, he too would be entitled to a reasonable rate of return commensurate with the risk of development. Indeed, all of Mr. Satterlee's neighbors have done just that – developed their properties to obtain a reasonable economic use. Mr. Satterlee and his successor, Mr. Conner, should be entitled to the same results.

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(p) The Examiner unlawfully concluded that the Board had demonstrated that alternative development scenarios would result in a reasonable economic use. All the scenarios identified by the Examiner would not result in a reasonable economic use.

(q) The Examiner unlawfully concluded that Conner is not entitled to define his objectives for development of the property. The Ordinance affords the Examiner no discretion to re-define Conner's objectives.

(r) The Decision violates Conner's constitutional rights to equal protection, procedural and substantive due process, and to be free of a regulatory taking.

(s) The Landmarks Preservation Ordinance, on its face and as applied, violates Conner's constitutional rights to equal protection, procedural and substantive due process, and to be free of a regulatory taking.

(t) The Landmarks Preservation Ordinance, on its face and as applied, exceeds the City's police power.

(u) The Landmarks Preservation Ordinance, on its face and as applied, constitutes an unlawful delegation of legislative authority to a non-legislative entity.

(v) The City's processing of these proposals was done in a manner inconsistent with lawful process and failed to follow the prescribed process.

(w) The Decision constitutes an erroneous interpretation of law, is not supported by substantial evidence, is a clearly erroneous application of the law to the facts, and is ultra vires.

///

///

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9. Conner asks for the following relief:

(a) For an order reversing the Decision and granting the requested Certificate of Approval;

(b) For permission to submit additional evidence as appropriate to address the constitutional infirmities of the Decision and of the Landmarks Preservation Ordinance;

(c) For award of Conner's attorney fees and costs;

(d) For permission to amend this petition to conform to the proof; and

(e) For such further relief as the Court deems just and equitable.

COMPLAINT FOR DAMAGES AND DECLARATORY RELIEF

Plaintiffs allege as follows:

I. PARTIES

1.1 Plaintiff. William Conner and Marilyn Conner (collectively, "Conner") own the property at issue.

1.2 Defendant. Defendant City of Seattle ("City") is a Washington municipal corporation. The City Hearing Examiner made the Decision which is the subject of this action.

II. VENUE

2.1 Venue. Venue in King County is proper pursuant to RCW 4.12.020 and RCW 4.12.025, since Conner conducts business and own property in King County, and the City is located in King County.

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III. FACTS

3.1 The relevant facts are set forth in the land use petition herein and incorporated herein by reference.

IV. FIRST CAUSE OF ACTION

RCW 64.40

4.1 RCW 64.40 creates a cause of action for damages for applicants for project approvals. Applicants are entitled to damages when local governments act in a manner that is arbitrary and capricious, unlawful, or in excess of their lawful authority, so long as that action was made in knowledge of its unlawfulness or that it was in excess of its lawful authority, or that it should have reasonably been known that it was unlawful or in excess of its lawful authority. In addition, applicants are entitled to damages when local governments fail to act within time limits established by law.

4.2 The Decision is arbitrary and capricious. It is unlawful. It was made by the City in excess of its lawful authority. The Hearing Examiner knew or should have known that the Decision was unlawful and in excess of her lawful authority.

4.3 The Decision has damaged Conner in an amount to be proved at trial.

V. SECOND CAUSE OF ACTION

DECLARATORY JUDGMENT

5.1 Conner's rights, status and other legal relations have been affected by the Hearing Examiner Decision and her construction of the Landmarks Preservation Ordinance and City of Seattle Ordinance 111022.

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5.2 Pursuant to the Uniform Declaratory Judgments Act, chapter 7.24 RCW, Conner is entitled to have the Court review the controversy between Conner and the City, and declare the rights, status and other legal relations of Conner and the City. In particular, in addition to a determination of the legal validity of the Hearing Examiner Decision and of the Landmarks Preservation Ordinance, Conner seeks a declaratory ruling from the Court as to the extent of Conner's rights to develop the Three Vacant Lots in light of the Landmarks Preservation ordinance and City of Seattle Ordinance 111022.

VI. RELIEF REQUESTED

Conner prays for the following relief:

6.1 For an award of damages in an amount to be proved at trial;

6.2 For a declaratory judgment;

6.3 For an award of attorney fees and costs;

6.4 For permission to amend the pleadings to conform to the proof; and

6.5 For such other further relief as is just and equitable.

DATED this 14th day of May, 2008.

McCULLOUGH HILL, P.S.

G. Richard Hill, WSBA No. 8806
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EXHIBIT A

BEFORE THE HEARING EXAMINER
CITY OF SEATTLE

In the Matter of the Appeal of

WILLIAM CONNER

from a decision issued by the Landmarks Preservation Board

Hearing Examiner File:
LP-07-001

SUPPLEMENTAL ORDER ON MOTIONS FOR SUMMARY JUDGMENT AND DISMISSAL

The Hearing Examiner issued an order on February 29, 2008, in which the Examiner reserved ruling on the parties' cross motions for summary judgment on Appellant's appeal issue "(a)", and on the Landmark Preservation Board's motion to dismiss Appellant's issue "(e)". The parties addressed the Examiner's questions on the motions at a hearing held in this matter on March 5, 2008. The Appellant was represented by J. Richard Hill, attorney-at-law, and the Board was represented by Judith B. Barbour, Assistant City Attorney.

Issue "(a)"

"The Board has no jurisdiction over that portion of the Property that is the subject of the Application, because the designating ordinance does not designate that portion of the Property as a landmark". Appellant's Appeal Letter at 2. The Board moves for summary judgment on this issue, arguing that the designation in Ordinance 111022 encompasses the entire site. The Appellant disputes the extent of the property designated in Ordinance 111022 and contends that he is entitled to summary judgment on this issue.

Issue "(e)"

"The Board incorrectly relied on the Board report on approval of designation in its Denial, in violation of SMC 25.12.750.A." Appellant's Appeal Letter *supra*. The Board moves to dismiss this issue, contending that the reference to the Board report was, at most, harmless error. The Appellant responds that the error is not harmless because Ordinance 111022, not the Board report, controls the extent of the designation and, the Appellant contends, the Ordinance designated only the Satterlee residence on the site, not the entire site.

The rules used for construing statutes also apply to municipal ordinances and codes. *Spokane v. Fischer,* 110 Wn.2d 541, 542, 754 P.2d 1241 (1988). The objective in construing a statute or ordinance is to determine the legislative body's intent. *Department of Ecology v. Campbell & Gwen, LLC,* 146 Wn.2d 1, 9, 43 P.3d 4 (2002). Thus, whenever possible, every word in an ordinance must be given effect. *Dennis v.*

Department of Labor & Indus. 109 Wash. 2d 467, 479, 745 P.2d 1295 (1987). Where the meaning of an ordinance is plain on its face, that plain meaning must be given effect. *City of Olympia v. Drebick*, 156 Wn.2d 289, 295, 126 P.3d 802 (2006)(citation omitted). "Plain meaning is discerned from the ordinary meaning of the language at issue, the context of the statute in which that provision is found, related provisions, and the statutory scheme as a whole." *Christensen v. Ellsworth,* 162 Wash. 2d 365, 373, 173 P.3d, 228 (2007) (citation omitted). Finally, all parts of an ordinance should be read together and harmonized, and no words or phrases should be rendered superfluous. *Williams v. Pierce County*, 13 Wn. App. 755, 759, 537 P.2d 856 (1975).

The operative language of Ordinance 111022 (Exhibit A to the Third Declaration of Elizabeth Chave) is as follows:

> Section 1. That the designation by the Landmarks Preservation Board of the Satterlee House more particularly described as: a portion of Tract 18, Spring Hill Village Tracts, Seattle, King County, Washington as a Landmark based upon satisfaction of the following criteria of Code Section 25.12.350:
>
> 1) It embodies the distinctive visible characteristics of an architectural style, or period, or of a method of construction; and
> 2) Because of its prominence of spatial location, contrast of siting, age, or scale, it is an easily identifiable visual feature of its neighborhood or the city and contributes to the distinctive quality or identity of such neighborhood or city.
>
> is hereby acknowledged.
>
> Section 2. The following controls upon alteration of the Landmark are hereby imposed:
>
> A Certificate of Approval must be obtained or the time for denying a Certificate of Approval must have expired before the owner may make alterations *to the entire exterior of the house, as well as the entire site*.

(Emphasis added.)

The Council acknowledged the designation of "the Satterlee House more particularly described as: a portion of Tract 18, Spring Hill Village Tracts" in Section 1 of the Ordinance, and imposed controls on the "entire exterior of the house" and on the "entire site". In describing the property being designated, the Council used the phrase, "Satterlee House," but in Section 2, when referring to the residence on the property, the Council used the lower case, "house". To construe the Ordinance as designating only the house, would ignore this distinction. And to conclude that the Council intended to designate only "the house" would render the phrase, "as well as the entire site" in Section 2 superfluous. The Council had adopted the Landmark Preservation Code and is presumed

to be familiar with its contents. Therefore, the Council would have known that there would be no purpose in imposing controls on a part of the property that it had not designated. Reading Sections 1 and 2 of Ordinance 111022 together, and giving effect to all the language used in both sections, it is clear that the City Council intended to designate the "entire site," including "the house" as a historic landmark.

If for some reason Ordinance111022 were determined to be ambiguous in its designation, it would be permissible to refer to a number of extrinsic aids to construction, including the Ordinance's legislative history. *See City of Olympia v. Drebick supra.* In the Ordinance's recitals, the Council notes that the Board had recommended to the Council approval of controls and incentives for the landmark. The Board's Recommendations, (Exhibit E to the Third Declaration of Elizabeth Chave), states that the Board "approved the designation of the 'Satterlee House' as a City of Seattle Landmark. The features and characteristics identified for preservation are: the exterior of the 'house' and the grounds." The Recommendations go on to state the specific controls recommended for the property. Thus, even if Ordinance 111022 were found to be ambiguous, the result is the same. Reading Ordinance Sections 1 and 2 together, and considering them in light of the Board's Recommendations to the Council, it is apparent that the Council intended to designate the "house" and the "grounds" at "Satterlee House".

The Appellant argues correctly that the Code requires the designating ordinance to include a "legal description of the site, improvement or object". SMC 25.12.660A.1. The Appellant contends that the legal description in Ordinance 111022 encompasses only the residence and the lot on which is located. This is not correct. Tract 18 of Spring Hill Village Tracts is bounded on the west by Puget Sound, and on the east by 52nd Avenue Southwest/Southwest Jacobson Street. *See* Exhibit D-1 to Exhibit 2 to the Declaration of Judith B. Barbour dated 2/07/08; Plat map of Spring-Hill Villa Tracts. Thus, at the time of designation, Tract 18 included both parcels owned by David Satterlee, as well as parcels to the east and to the west of the Satterlee property. The parcels not owned by Satterlee were subdivided prior to the designation, and are shown on Exhibit D-1 to Exhibit 2 to the 2/7/08 Barbour Declaration as an short plat to the east of the Satterlee property, and as individual developed lots to the west of the Satterlee property and west of Beach Drive Southwest. The legal description, "a portion of Tract 18," could refer to any of these parcels. However, the Council was not considering parts of Tract 18 owned by other parties. The Council's use of the legal description, "a portion of Tract 18," in the designating ordinance could only mean that portion of Tract 18 then owned by David Satterlee, i.e., "the entire exterior of the house, as well as the entire site."

The Appellant offers David Satterlee's declaration, that he understood that only the house was designated, as a basis for concluding that Ordinance 111022 designated only the house. The Examiner knows of no authority for the proposition that a property owner's understanding of legislation affecting his property is to be considered in construing the legislation. Moreover, evidence in the record related to events leading up to the designation, to a Historic Preservation Easement and Covenant signed by Mr. Satterlee,

and to disclosures related to his sale of the property, contradict his statement that he understood that the designation affected only the house.

The cases cited by the Appellant are not on point. *Anderson v. Issaquah*, 70 Wn. App. 64, 851 P.2d 744 (1993) involved a city agency using ad hoc standards during a design review process. The Appellant's claim that the Board determined on an ad hoc basis what property was designated by Ordinance 111022 is unfounded. To decide whether or not to grant the requested Certificate of Approval, it was necessary for the Board to determine what property had been designated. Review of the Ordinance, the Board's Recommendations to the City Council on the designation, and the manner in which the Board had previously interpreted the designation does not constitute an ad hoc process. *Sleasman v. Lacy*, 159 Wn.2d 639, 151 P.3d 990 (2007), concerned strict construction of zoning ordinances. The ordinance at issue in this appeal is not a zoning ordinance, and the rule of strict construction does not apply.

There is no genuine issue of any material fact concerning the property designated for preservation by Ordinance 111022. The Ordinance designates the "entire exterior of the house" and the "entire site," and the Board is entitled to judgment as a matter of law on Appellant's issue "(a)". The Board's motion for summary judgment is **GRANTED**, and the Appellant's motion for summary judgment is **DENIED**. Further, for the reasons discussed in this Order, the Board's motion to dismiss Appellant's issue "(e)" is also **GRANTED**, and issue "(e)" is **DISMISSED**.

Entered this 6th day of March, 2008.

Sue A. Tanner

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EXHIBIT B

FINDINGS AND DECISION
OF THE HEARING EXAMINER FOR THE CITY OF SEATTLE

In the Matter of the Appeal of

WILLIAM CONNER

Hearing Examiner File:
LP-07-001

from a decision issued by the
Landmarks Preservation Board

Board File:
493/07

Introduction

The Landmarks Preservation Board denied an application for a certificate of approval to construct three new residences on property commonly known as "Satterlee House". The Appellant exercised the right to appeal pursuant to Chapter 25.12 of the Seattle Municipal Code (SMC or Code). To allow time for discovery and prehearing motions, the Appellant waived the a pplicable deadlines of Chapter 25.12 except for the decision deadline of SMC 25.12.760.

Several issues were resolved by prehearing orders, including the scope of the landmark designation for Satterlee House. The Hearing Examiner determined that the designation encompassed the entire exterior of the house and the entire property on Beach Drive owned by David Satterlee at the time of the designation.

The appeal was heard before the Hearing Examiner on March 5, 10, 13, 14, 18 and 19, 2008. Parties represented at the hearing were: the Appellant, William Conner, by G. Richard Hill, attorney-at-law; and the Landmarks Preservation Board (Board), by Judith B. Barbour and Eleanore Baxendale, Assistant City Attorneys. The record was held open through April 11, 2008, for post-hearing memoranda and the Examiner's site visit.

Having considered the evidence in the record and inspected the site, the Examiner enters the following findings of fact, conclusions and decision on the appeal:

Findings of Fact

Landmarks Preservation Board

1. The Board consists of eleven members and includes at least two architects, two historians, a structural engineer, representatives from the fields of finance and real estate management, one representative of the City Planning Commission, and three additional members. SMC 25.12.270. In accordance with procedures prescribed in Chapter 25.12 SMC, the Board designates landmarks, negotiates controls and incentives for landmarked properties with the property owners, and determines whether to issue certificates of approval for alterations and significant changes to landmarks.

2. Pursuant to Chapter 25.12 SMC, the Board has adopted rules. The current rules, adopted in 1987, incorporate the Secretary of Interior's Standards for Rehabilitation (Secretary's Standards), which the Board interprets and applies frequently in the course of its work.

3. The Board's Architectural Review Committee (ARC) is an advisory committee composed of Board members who are design and development professionals. Although the ARC has no approval authority for certificates of approval, and does not redesign a prospective applicant's proposal, it meets with the applicant to consider alternatives and provide advice and feedback on preparing the proposal for Board review.

Landmark Designation Process for Satterlee House

4. Satterlee House is addressed as 4866 Beach Drive Southwest, in West Seattle, and is approximately one acre in size. The property slopes gently down from a rise at the base of a wooded hill on the east, to Beach Drive on the west. It is developed with a large, three-story, single-family residence built in approximately 1906 in an architectural style known as the "Seattle classic box". The house is located on the rise, facing west toward Puget Sound across an extensive front lawn. The property also includes a gazebo to the northwest of the house, a garage on the southeast part of the site, and landscaping features. For many years, an eight-foot high laurel hedge was planted along the north and west sides of the property, with two walkway openings and a driveway opening along Beach Drive through which the public could view the house and setting. The hedge was removed sometime prior to May of 1980.

5. Until recently, the property consisted of two lots. David Satterlee and his spouse purchased both lots from his aunt at different times during the 1970s but lacked the resources to maintain and upgrade the house. With the idea of securing historic preservation funding, Mr. Satterlee contacted the City's Historic Preservation Officer in November of 1980 concerning the possibility of having the "house and grounds" nominated as a historic site. (Exhibit 7) He followed up with a letter to pursue the possibility of nomination. (Exhibit 6)

6. The City's Office of Urban Conservation prepared the nomination for the property, which included a Statement of significance". (Exhibit 16) The Board considered the nomination on August 5, 1981. Mr. Satterlee received notice of the meeting by certified mail (Exhibit 8), but did not attend. The notice stated that if a "designating ordinance" was adopted, a certificate of approval would be required before anyone could make alterations or significant changes to the house exterior and the site." (Exhibit 8)[1]

[1] Under the scheme of Chapter 25.12 SMC, the Board designates a landmark, but the designation has little practical effect unless the Council then adopts a "designating ordinance" acknowledging the designation and imposing controls on the designated landmark. *See* SMC 25.12.420, .110 & .660.

7. The Board met and voted to designate the house exterior and the site as a landmark. The Report on Designation states that the "entire exterior of the house, as well as the entire site" met two Code designation criteria:

> It embodies the distinctive visible characteristics of an architectural style, or period, or of a method of construction.
>
> Because of its prominence of spatial location, contrasts of siting, age, or scale, it is an easily identifiable visual feature of its neighborhood or the city and contributes to the distinctive quality or identity of such neighborhood or the city.

(Exhibit 59, *quoting* Ordinance 106348, codified as SMC 25.12.350, in part) The Report also states that the property "is in significant contrast to the surrounding, rather crowded (albeit atmospheric) area, with its long 'front yard' extending back and up the slope, climaxed by location of the house near the top of the slope." (Exhibit 59)

8. The Board recommended that the City Council impose controls on the landmark requiring that a certificate of approval be obtained "before the owner may make alterations or significant changes that would affect the identified features of the Landmark. A Certificate of Approval would be required for proposed changes to the grounds only when those changes would propose alterations to the existing site plan *or if new structures were being proposed for the site.*" (Exhibit 9, emphasis added) Mr. Satterlee received a copy of the recommendation by certified mail. (Exhibit 9)

9. In February of 1983, the City Council adopted Ordinance 111022 imposing controls on the property. The Ordinance acknowledges the Board's designation of the property and recites that "on October 7, 1981, the Board and the owners of the designated property agreed to controls and incentives". The Ordinance also recites the two landmark criteria quoted in the Report on Designation and imposes the following controls on the property: "a Certificate of Approval must be obtained ... before the owner may make alterations to the entire exterior of the house, as well as the entire site." (Exhibit 3) Mr. Satterlee did not attend the Council session at which the Ordinance was adopted. Although he recalled going to the Board's offices to "sign something," a copy of the controls and incentives agreement referenced in the Ordinance has not been located.

10. Under SMC 25.12.570, if the Board and the property owner fail to reach agreement on controls and incentives for a landmark property, the Hearing Examiner holds a hearing and makes a recommendation to the City Council on controls. There is no record of a Hearing Examiner hearing or recommendation on controls and incentives for the subject property.

Sale and Historic Seattle Easement

11. In 2000, approximately 17 years after landmark controls were imposed on the property, Mr. Satterlee sold it to William Conner, the Appellant, for $900,000. The Real

Property Transfer Disclosure Statement for the sale disclosed the landmark designation (Exhibit 10 at 1, 2 and 5).

12. Mr. Satterlee was concerned that any future development of the front lot preserve the integrity of the landmark and, in particular, views of the house from Beach Drive. Therefore, in conjunction with the sale, Mr. Satterlee and the Appellant agreed that a "Historic Preservation Easement and Covenants" (view easement) in favor of the Historic Seattle Preservation and Development Authority (Historic Seattle) would be recorded to preserve a view corridor from the street to the house. (Historic Seattle is a public development corporation not affiliated with the Board.) Mr. Satterlee obtained tax benefits as a result of granting the view easement.

13. The view easement recited the parties' understanding that "the Property" that was the subject of the easement included both the house and "an undeveloped lot between" the house and Beach Drive, and that "the Property has substantial and important historic, aesthetic, architectural, visual, spatial and scenic character *and has been designated as a Seattle Landmark" by the City.* The view easement also stated that if "an action with regard to the Property requires approval from the [Board]," the Grantor was not to undertake the action *without obtaining a certificate of approval from the Board* and notice to Historic Seattle. (Exhibit 4, emphasis added) The view easement also gave Historic Seattle two first rights of refusal in the event the property was offered for sale.

14. The Appellant acknowledged at hearing that he knew the Satterlee property was landmarked when he purchased it and understood that the landmark designation could be construed to be broader than just the features protected by the view easement.

Appellant's Marketing of the Property

15. In November of 2006, the Appellant and Historic Seattle amended the view easement to state their new understanding that only the house on the Satterlee property had been designated a landmark by Ordinance 111022, and that any alterations to the house "or the site" requires a certificate of approval. (Exhibit 39)

16. The Appellant testified that he first offered the property for sale sometime in 2006. It has been listed six times and has been marketed in several different ways: as a residential estate; as three vacant lots available for development; and as a house together with three developable lots. It is currently being offered as a residential estate at a list price of $2,200,000.

17. Marie Strong, a real estate broker with a certification in residential and luxury homes who specializes in "homes with history," testified that the marketing for the property has been confusing to the real estate community; they do not really understand what is being offered or the nature of the landmark designation and view easement. Ms. Strong has recently listed and sold luxury and historic properties in West Seattle and stated that an agent for such properties must research and understand the implications of landmark controls and any existing covenants, and must clearly convey that information and

explain the multiple purchase options to the real estate community and prospective buyers. It is also important to repair obvious defects like the sagging foundation in the Satterlee residence, to make the residence readily available for showings, and to stage the home because staged homes sell more quickly and for a higher price. None of this has been done for the Satterlee property. Ms Strong opined that not much effort had gone into favorably presenting the property to the market, and that the condition of the house, in comparison to other similar properties in the area, compromises the property's desirability. (Testimony of Strong)

18. Mark Lawless, a general contractor and certified professional estimator, visited the property and estimated that the cost to repair the Satterlee residence foundation, and the damage related to lifting the house back to level, would be between $275,000 and $300,000.

19. Despite the lack of effective marketing for the property, the Appellant received numerous purchase offers between September of 2006 and November of 2007.

20. In September of 2006, the Appellant received an offer from WGC Inc. to purchase the westerly three lots for $1.2 million. The prospective buyer contacted the Board's staff about the certificate of approval process, submitted an incomplete application for a certificate of approval, and met once with the Board's ARC in 2007 before deciding not to proceed with the purchase.

21. In late June of 2007, the Appellant received an offer of $1,100,000 from Trend Development to purchase the three easterly lots on the property. Because of the view easement ("complications with the covenants and easements of the landmark,"), the offer was reduced to $1,050,000. Ultimately, the sale did not close in October of 2007 as expected because Trend Development was "nervous about spending time & money on design work if [Historic Seattle] decides to" exercise its rights to purchase the property. (Exhibits 53 and 63) The Appellant's listing agent, A.C. Braddock, testified that Historic Seattle later waived both of its rights of first refusal under the easement for any proposal by the Appellant that is approved by the Board.)

22. In July of 2007, the Appellant received an offer of $1.37 million from Sarah Louthan to purchase the Satterlee residence. Because the buyer intended to utilize an unconventional form of financing, the Appellant rescinded his acceptance of this offer.

23. In August of 2007, the Appellant and Trend Development were negotiating an agreement whereby Trend holds an option to purchase the three westerly lots on the property for $1 million. Trend and an investor, Landed Holding Company, were to be the purchasers, and the sale was to close once building permits are issued for the Appellant's proposal. (Exhibits 55 and 63) The Appellant anticipates that Trend Development will proceed with the purchase if the Appellant's development proposal for the lots is approved.

24. On November 13, 2007, the Appellant received an offer of $1.78 million from Michan Rhodes to purchase the entire property. However, the buyer declined to close the sale after reviewing the inspection report, which noted the foundation work needed for the house and the possible existence of drainage issues on the property. Ms. Braddock testified that the foundation work was the major impediment to the sale.

25. The marketing effort created uncertainty for prospective tenants, and the Appellant found it difficult to keep the house rented after he listed the property for sale. The evidence shows that he received rental income for the property somewhere between $24,000 over the entire time he has owned it, and "at most $24,000 per year". (William Conner's Closing Memorandum at 27) But there is no evidence in the record documenting why the Appellant did not receive market rental income for the property before he listed it for sale. Mr. Chamberlain, a residential real estate appraiser with over 30 years of experience, testified that market rent for the house, without renovation, would have been $2,205 per month in 2000/2001, with an annual increase of 4%.

Appellant's Development Proposals and Board Decision

26. Shortly after purchasing the landmark, the Appellant participated in a City Demonstration Program for Innovative Housing Design pursuant to Ordinance 119241. The Program was experimental in nature, required project review through the City's Design Review process and guaranteed no particular outcome. The Appellant proposed constructing six to eight cottages on the Satterlee property, a project which required several departures from adopted development standards. The proposal went through the Design Review process, but could not be approved unless the City Council adopted an ordinance amending the Land Use Code. The Code change did not occur, the Program expired, and the application was canceled in 2006.

27. In 2002, the Appellant altered the configuration of the two lots on the property through a Lot Boundary Adjustment processed by the City. In 2005, he applied to short plat the property to create three new building lots from the front, westerly lot. The short subdivision received final approval in May of 2007, and the short plat notes the existence of the view easement and the requirement for a certificate of approval prior to issuance of any construction permits for the new lots. (Exhibit 35 at sheet 3)

28. The Appellants' architects met with the Board's ARC on June 15, 2007 in anticipation of filing an application for a certificate of approval for preliminary design to construct single-family houses on the three westerly lots. At the preliminary design phase, the Board is concerned primarily with the massing, size and scale of a proposal; issues of style are addressed in a later phase of review.

29. The Appellant's June 15 conceptual drawings showed two site plans, one a slight modification of the other. One plan showed the three houses at the northern edge of the property with an access easement shared with the Satterlee residence. The other showed the houses separated from the north property line by a new access easement, thus pushing them further to the south, in front of the Satterlee residence. The houses were shown as

two-story, contemporary "boxes" placed along the north property line and extending across more than half the width of the front lawn. The houses were slightly larger than the Satterlee house, averaging approximately 3,500 square feet of living area including patios and decks that were shown along the south side extending into the lawn, and garages. (Exhibit 36)

30. The ARC members favored keeping the houses as far to the north as possible, and expressed concern about the impact of the houses' massing, size and scale on the integrity of the landmark features. The ARC advised the architects to show an alternative in which the new residences were subservient to the landmark in size, scale and placement, and suggested that through design and placement, the houses could be made smaller or be made to appear smaller and less intrusive.

31. According to Tom Veith, an architect, architectural historian, and experienced Board member, the Board was looking for a proposal that best maintained the historic relationship between the residence and the site while still allowing a reasonable economic use of the property. He explained that a landmark that is economically viable is more likely to survive, and that preservation of the landmark is the ultimate goal of the ordinance.

32. The Appellant refused the architects' inquiries about reducing the size and mass of the houses. That option does not meet his objectives as a real estate developer, which he stated as: recouping as an "expense" the value of the lots in today's market, which he believes is $400,000 each unfinished; and building approximately 3,000 square foot houses on the lots, with very high-end finishes and a floor plan that allows a couple to have everything they need to live on one floor, accommodates other family members on a different floor, and provides level access from all parts of the first floor to outdoor areas. The Appellant believes this is the only development scenario that would allow him to receive the $400,000 lot value when selling the homes. (Testimony of Conner) Mr. Chamberlain testified that the idea of a "lot/value ratio" is not supported in the marketplace for new construction.

33. The Appellant's architects returned to the ARC on July 27, 2007, with a more developed proposal, but house size and placement remained unchanged because the developed floor plans met the Appellant's requirements for marketability. The ARC responded with the same concerns expressed at the June 15 meeting - the size, footprint and organization of the houses on the site, and the fact that they were not designed to show deference to the landmark.

34. The architects' final meeting with the ARC occurred on September 14, 2007. The massing, size and scale of the houses were unchanged. The Appellant showed a peaked roof alternative for the houses, but it did not resolve the massing issues. The ARC members responded that they wanted to see an alternative that included houses that deferred to the Satterlee residence and thus, maintained its contrast of siting and scale. Mr. Veith, who was also a member of the ARC, later summarized the ARC's concerns for the full Board:

> The new buildings should be subservient to the landmark building, maintaining the idea that it was one site and not four; the new houses should be possibly smaller and as far north as possible on the site; any part of [the] structures that could be moved between buildings (garages) should be moved there so the houses aren't pushed forward; detailing should be less busy, the buildings should be simpler and they should be lower, and a suggestion was made about how this could be accomplished by building (part) into the site. He said the main concern was that the site is part of the landmark and the proposed buildings as they are proposed now do not respect the landmark site.

(Exhibit 15, Landmark Preservation Board Meeting Minutes for November 14, 2007, at 7) The Appellant presented no alternatives for the Board's consideration because he maintained there were none that would achieve his objectives.

35. The formal application for a certificate of approval for preliminary design was complete on November 7, 2007, and was scheduled for Board consideration on November 14, 2007. The Appellant submitted a letter that day summarizing his argument that his proposal was necessary in order for him to achieve even a modest economic return on the property. The letter also reserved his "right to submit additional information and analysis on the issue of reasonable economic use before the Hearing Examiner if he deems it necessary to do so." (Exhibit 15, 11/14/07 Letter from G. Richard Hill)

36. At the November 14 meeting, several Board members expressed concern about the height and scale of the proposed houses and their effect on the landmark. In response to a question about lowering the houses by half a story, the architects responded that they believed there were grading and groundwater issues on the site that would prohibit this, but that they could not comment on them to the Board. At the appeal hearing, the Appellant testified that he had no interest in building part of the house into the site because of a potential impact on level access to the yard from all parts of the first floor.

37. The Board deferred the application to their next meeting to allow time for review of the Appellant's letter, and they requested documentation for the Appellant's economic argument. Board staff sought the requested documentation, (Exhibit 15, 11/30/07 email from Chave to Hill), and the Appellant responded with a letter on November 30, 2007, attaching his handwritten ledgers of all his expenses related to the property, and a realtor's "comparative market analysis" for the property. (Exhibit 15)[2] The Appellant's counsel sent an additional response that summarized some information on the Appellant's economic argument but did not address many of the Board's questions and included no

[2] The "comparative market analysis" was prepared by the Appellant's listing agent, who is not a real estate appraiser. The "comparable" properties reviewed in the analysis were built between 1990 and 2005, the values stated were listing rather than actual sale prices, and no adjustments were made for the qualitative differences between the comparable properties and the Satterlee property, such as views, age and condition of systems, and structural condition of the buildings. Thus, the analysis is of questionable value

documentation. (Exhibit 15, 12/7/07 email from Hill to Chave) The Appellant reiterated his right to submit additional information on reasonable economic use to the Hearing Examiner. (Exhibit 15, 12/7/07 email from Hill to Chave)

38. At the Board's December 5, 2007 meeting, the architects presented the proposal, stating that the homes would provide a size, style and amenities that future owners will expect, including 3-4-bedroom homes with 3,700 square feet of interior space including the garage and patio. They explained that although the Board had wanted the homes to be reduced in scale and size, they were not able to accomplish this because of the Appellant's need to receive a "reasonable economic return". The Board had many questions about the information supplied on reasonable economic use, and ultimately voted unanimously to deny the certificate of approval. (Exhibit 15, Minutes of Landmarks Preservation Board Meeting of December 5, 2007)

39. The Board's written decision states that the proposal was denied because: 1) the massing and scale of the three houses would adversely affect the features and characteristics of the landmark; 2) the proposal was not reasonable in light of an alternative to build houses of a smaller scale and massing that could achieve the objectives of the owner; 3) the information presented to the Board was "not sufficient to determine if the proposal is necessary for the owner to receive a reasonable use for the property"; and 4) the proposal was not consistent with the Secretary's Standards, particularly Standard 9. (Exhibit 15)

Alternatives for Reasonable Economic Use

40. Although the Board did not suggest or impose any specific size restriction on the development that could be allowed on the subject property, the parties employed a hypothetical development scenario for illustrative purposes, to evaluate whether there was a potential alternative to the Appellant's proposal that could yield a reasonable economic use. (Exhibit 22) For convenience, this was referred to as "the Board's proposal," and involved development of three homes with a Craftsman-style appearance of approximately 1,600 to 1,800 square feet plus a garage of approximately 500 square feet. This house style and size is compatible with the surrounding neighborhood. (Testimony of Chamberlain and Lawless)

41. The Appellant's financial expert evaluated the appropriateness of the size of the Appellant's proposed houses "from the perspective of the reasonable, normal financial return to the builder of the proposed homes as compared to the return on alternative, smaller homes." (Exhibit 48 at 1-2) Because this approach evaluates only rate of return, rather reasonable economic use, and is tailored to a builder/developer; it does not address the issues presented by the appeal and is not considered further.

42. William Partin, the Board's financial expert, is a Certified Public Accountant and Forensic Economist. He evaluated various investment options that would provide the Appellant with reasonable economic use of the Satterlee property. (Exhibit 29) Although some of the scenarios examine investment options the Appellant could have

pursued between the time he purchased the property and the present, Scenarios 1, 4 and 7 present information on uses the Appellant could make of the property now, having held it for seven years and been denied a certificate of approval for his preferred proposal.

43. The Appellant retains ownership and use of the entire property for residential purposes, the use to which it has been put since the house was built. He can rent the property at market rates, or sell it as a residential estate. The appraised market rental value for the property currently is approximately $3,000 per month. (Chamberlain testimony; Exhibit 29, Attachment 21) The evidence shows that after subtracting all mortgage payments, property taxes and insurance costs, the compound annual return on the property has been approximately 6.6% per year, that its current appraised fair market value is $1,450,000 to $1,550,000, and that it is expected to continue to keep pace with the rate of real property appreciation in the neighborhood. (Exhibit 24; Chamberlain testimony; Exhibit 29) This scenario would result in a positive return on the Appellant's purchase price, i.e., gross profit, and on the amount he had actually invested in the property, i.e., profit on equity. (Exhibit 29, Scenario 1; testimony of Partin)

44. The market has confirmed that the residential estate option in Scenario 1 is a reasonable use of the property, in that the Appellant received a $1,780,000 offer for the entire property in November of 2007. The sale did not close because of buyer concerns about the foundation and potential drainage issues, but the record shows that the Appellant could resolve these issues at a cost that would still allow him to sell the property for its appraised value as a residential estate.

45. The appraised value of just the house and its lot is $800,000-$850,000 as is. It was valued at $600,000 in 2000 when it was purchased. The appraised value of the lower lots if ready for construction, with all approvals in place, is $375,000-$400,000 each, as opposed to $100,000 each in 2000. (Testimony of Chamberlain; Exhibit 24) Mr. Lawless estimated that the construction cost to finish out the lots would be $40,000 each. (Exhibit 29, Scenario 4; Testimony of Lawless)

46. The Appellant has received extensive feedback from the Board concerning the development that can be placed on the landmark property. He could sell the house and its lot, and finish and sell the three westerly lots for future development subject to development restrictions that would have a high likelihood of Board approval. (Exhibit 29, Scenario 4) Mr. Chamberlain and Mr. Partin agreed that development restrictions are commonplace in the market. The market for these lots with "owner/builders" is considerable because these purchasers hire their own contractors to build the houses and do not face the same, short-term needs that a developer must consider, i.e., holding costs, resale costs and profit. Consequently, they can normally construct the homes at a lower cost. (Testimony of Chamberlain)

47. In Scenario 4, the sales price of each lot would be $387,500 (Exhibit 29) and the gross profit on each would be $154,619 after deducting holding and all construction costs, including purchase price, interest, property taxes, insurance, interest on lot development costs, and selling costs. The gross profit on the house would be $18,303.

(Exhibit 29) This scenario would involve some risk, but the Appellant's gross profit and profit on equity would be greater than the residential estate scenario. (Exhibit 29; Testimony of Partin).

48. Mr. Chamberlain testified that a historic designation has no measurable market impact on the valuation of property, but that the uncertainty involved in the timing of an approval for construction could result in a nominal discount in valuation. In Scenario 4, the Appellant would also have the option of spending a small amount on additional architectural work and securing the Board's approval for homes with a reduced mass and scale. Removing the timing uncertainty could increase the selling price for the lots.

49. The Appellant could sell the house and its lot, secure a certificate of approval and construct and sell homes with a reduced mass and scale compared to those in the his preferred proposal. As noted, the parties assumed in the hypothetical scenarios that the houses would be Craftsman-style homes of approximately 1800 square feet plus a 500 square-foot garage. The record indicates that the construction cost for each home, together with sales tax, architectural costs, construction interest, and selling costs would be approximately $443,215. (Exhibit 29, Scenario 7; Exhibit 24; Testimony of Chamberlain, Partin, and Lawless) The sales price for the homes would be approximately $780,000 each, and the gross profit on each would be $216,433 after deducting construction and holding costs. The gross profit on the house would be approximately $18,000. (Exhibit 29; Exhibit 24)

50. Mr. Chamberlain testified that there is significant demand across the entire spectrum of the market for homes of the style and price range envisioned in Scenario 7, and that this type of development could create something unique and very desirable in the marketplace. Because the homes would be "spec houses," this scenario involves more risk than the previous two, but it would also result a higher gross profit, and a higher profit on equity. (Exhibit 29; Testimony of Partin)

Applicable Law

51. On appeal from the denial of a certificate of approval by the Board, the Hearing Examiner is to receive evidence and make findings on the factors specified in SMC 25.12.750. SMC 25.12.760. The applicable factors read as follows:

> A. The extent to which the proposed alteration or significant change would adversely affect the specific features or characteristics specified in ... the designating ordinance;
> B. The reasonableness or lack thereof of the proposed alteration or significant change in light of other alternatives available to achieve the objectives of the owner and the applicant;
> ....
> D. *Where the Hearing Examiner has made a decision on controls and economic incentives*, the extent to which the proposed alteration or significant change is necessary or appropriate to achieving for the owner

> or applicant a reasonable return on the site, improvement or object, taking into consideration the factors specified in Sections 25.12.570 through 25.12.600 and economic consequences of denial; provided that, in considering the factors specified in section 25.12.590 for purpose of this subsection, references to times before and after the imposition of controls shall be deemed to apply to times before or after the ... denial of a certificate of approval;

(Emphasis added.)

52. SMC 25.12.580 states that "in no event shall ... any proceedings under or application of this chapter deprive any owner of a site, improvement or object of a reasonable economic use of such site, improvement or object."

53. The Secretary's Standards pertain to historic buildings ... [and] also encompass related landscape features and the building's site and environment...." (Exhibit 40, "Standards" at page 1 of 3) Standard 9 states that "New additions, exterior alterations, *or related new construction* shall not destroy historic materials that characterize the property. *The new work* shall be differentiated from the old and *shall be compatible with the massing, size, scale and architectural features to protect the historic integrity of the property and its environment.*" (Exhibit 40, "Standards" at page 3 of 3, emphasis added)

54. The Secretary's Standards contain additional guidance on building sites. "Retaining the historic relationship between buildings and the landscape" is recommended, whereas "introducing new construction onto the building site which is visually incompatible in terms of size, scale, design, materials, color, and texture, which destroys historic relationships on the site" is not recommended. (Exhibit 40, "Building Site" at pages 2 through 8 of 8).

Conclusions

1. The Hearing Examiner has jurisdiction over this matter pursuant to SMC 25.12.740. The Examiner's review is de novo, and no deference is given to the Board's decision.

2. Chapter 25.12 SMC, the Landmarks Preservation Ordinance, does not establish a burden of proof on appeal. Hearing Examiner Rule 3.17(c) provides that in the absence of a code requirement on burden of proof, "the Department must make a prima facie showing that its decision or action complies with the law authorizing the decision or action." However, the burden of proof remains with the Appellant. The standard of proof is a preponderance of the evidence. Hearing Examiner Rule 3.17(d).

3. The issues before the Examiner in this case are as follows: 1) whether, and to what extent the Appellant's proposed alterations for the Satterlee property would adversely affect the features and characteristics specified in the designating ordinance; 2) whether there are other alternatives available to achieve the Appellant's objectives; 3) if other

alternatives are available, the reasonableness of the Appellant's proposal in light of those alternatives; and 4) whether denial of the Appellant's application for a certificate of approval deprives the Appellant of a "reasonable economic use" of the property. SMC 25.12.750 A and B; SMC 25.12.580.

Issue 1

4. The height, scale and massing of Appellant's proposal would adversely affect the features and characteristics specified for the property in the designating ordinance because it fails to retain the historic relationship of the Satterlee residence to the sweeping front lawn. The proposal would destroy the residence's "prominence of spatial location," and "contrasts of siting, age and scale" that make it an "easily identifiable visual feature of its neighborhood and contributes to the distinctive quality or identity of such neighborhood". (Exhibit 3)

5. Because the Appellant's proposal fails to retain the historic relationship of the Satterlee residence to the site, it was not shown to be "compatible with the massing, size, [and] scale" of the landmark, and it fails to "protect the historic integrity of the property and its environment." Consequently, the Appellant's proposal does not comply with the Secretary's Standard 9.

Issues 2, 3 and 4

6. The Appellant suggests that the Examiner analyze the appeal under SMC 25.12.750 D, which requires an examination of the extent to which a proposed alteration "is necessary or appropriate to achieving for the owner a reasonable rate of return" on the property, taking into account the factors listed in SMC 25.12.590. However on its face, SMC 25.12.750 D applies only if "the Hearing Examiner has made a decision on controls and economic incentives" for the property. There is no evidence in this record that the Hearing Examiner played a part in imposing controls on the Satterlee property; in fact, the evidence indicates that they were imposed through an agreement with the property owner at the time of designation. SMC 25.12.750 D does not apply here.

7. The Appellant correctly points out that the Examiner lacks jurisdiction over the constitutional aspects of "reasonable economic use" and again suggests that the Examiner substitute an analysis of "reasonable rate of return" under SMC 25.12.590 for the "reasonable economic use" standard required under SMC 25.12.580. This approach would ignore the clear distinction in the Code between applications to alter landmarks for which there are agreed controls, and those for which the controls were recommended by the Hearing Examiner. A legislative body is presumed not to use nonessential words. *State v. Lundquist,* 60 Wn.2d 397, 403, 374 P.2d 246 (1962). And when a legislative body uses different words within the same ordinance, a different meaning is intended. *State v. Beaver,* 148 Wn.2d 338, 343 (2002). In this case, the Examiner must follow the Code's guideline for applications brought under controls agreed to by the property owner and determine, from the economic implications of the various scenarios for using the

property, whether the Board's action deprives the Appellant of a reasonable economic use of the property.

8. Under the scheme of the Landmarks Ordinance, issues surrounding the economic impact of controls on landmark property are resolved during the negotiations leading up to an agreement between the owner and the Board on those controls. They are not revisited every time the owner or a subsequent purchaser applies for a certificate of approval to make alterations to the landmark.

9. Mr. Satterlee knew before, during, and after the designation process that a consequence of the designation would be the requirement for a certificate of approval from the Board before an owner could make alterations to the exterior of the house or the entire site. His testimony to the contrary reflects a failing memory and was contradicted by credible evidence in the record.

10. The landmark is clearly defined in the designating ordinance as the house and the entire site, not just the site on which the house is located. The Appellant was put on notice of this fact when he purchased the property, it is stated expressly in the view easement that he approved at the time of his purchase, and he conceded at hearing that he knew the landmark designation was potentially broader than the view easement.

11. The view easement simply protects public views of the Satterlee residence. It has no bearing on the Board's decision under SMC 25.12.750, on whether to approve the Appellant's proposal to make significant alterations to the Satterlee property.

12. The Appellant contends that he is entitled to develop the property with a specific proposal that will enable him to earn a gross profit that would be expected by a developer, i.e., at least 15% per year for each year that he has owned the property. This is not correct; the development potential of the property does not change with the status of the person who owns it.

13. When the Appellant purchased the property, he "stepped into the shoes" of Mr. Satterlee; he is entitled to use the property only as Mr. Satterlee would have been permitted to use it. A different conclusion would make a mockery of the landmark process. It would allow an owner to agree to landmark controls on a property which could later be set aside by a new owner who found them inconsistent with his subjective expectations of developing the property for a builder's profit.

14. SMC 25.12.580 does not define a reasonable economic use in terms of a specific rate of return on investment. A party who purchases property subject to agreed landmark controls cannot thwart those controls by defining his objectives under SMC 25.12.750 B entirely in terms of the return he desires to make on the property.

15. To the extent that the Appellant's objectives are to make a predetermined developer's return on the property, there may be no other alternative development schemes available, although that is not clear from the evidence. Development of a site that was landmarked

at the time of purchase undoubtedly requires a degree of flexibility and creativity that has not been shown on this record. In any event, the Board has demonstrated that there are other alternatives available to achieve the reasonable objectives of a person in the Appellant's position as a purchaser of landmarked property subject to agreed controls.

16. The alternative of retaining the property, as the Appellant has done, and selling it as a residential estate, involves very low risk. The evidence shows that this would provide a positive return on the Appellant's purchase price and on the amount he has invested in the property. Thus, it is a reasonable economic use of the property that continues to be available to the Appellant after the Board's denial of the certificate of approval.

17. Although the Appellant observes that the property has not sold after being on the market for approximately two years, the evidence in the record demonstrates that the property has not been marketed effectively, that the Appellant has not repaired defects in the house that affect its marketability, and that he has listed it for an amount that exceeds its fair market value by at least $650,000.

18. The alternative of selling the house in its existing condition, and finishing and selling the three westerly lots for future development that would be consistent with existing landmark controls would provide a positive return on the Appellant's purchase price and on the amount he has invested in the property. Therefore, this is a reasonable economic use of the property that continues to be available to the Appellant after that Board's denial of the certificate of approval.

19. The alternative of selling the house in its existing condition, and constructing and selling three homes that would be compatible with the landmark would provide a positive return on the Appellant's purchase price and on the amount he has invested in the property. Therefore, this is a reasonable economic use of the property that continues to be available to the Appellant after the Board's denial of the certificate of approval.

20. The Appellant's proposal is not reasonable in light of the alternatives available that would not adversely affect the landmark and would provide him with a reasonable economic use of the property.

Decision

The Landmarks Preservation Board's December 18, 2007 decision denying the Appellant's application for a certificate of approval for preliminary design for proposed construction of three new residences on the Satterlee property is **AFFIRMED**.

Entered this 28th day of April, 2008.

Sue A. Tanner
Hearing Examiner

Concerning Further Review

NOTE: It is the responsibility of the person seeking to appeal a Hearing Examiner decision to consult Code sections and other appropriate sources, to determine applicable rights and responsibilities.

The decision of the Hearing Examiner in this case is the final decision for the City of Seattle. A request for judicial review of the decision must be commenced within twenty-one (21) days of the date the decision is issued, as provided by RCW 36.70C.040.

The person seeking review must arrange for and initially bear the cost of preparing a verbatim transcript of the hearing. Instructions for preparation of the transcript are available from the Office of Hearing Examiner. Please direct all mail to: PO Box 94729, Seattle, Washington 98124-4729. Office address: 700 Fifth Avenue, Suite 4000. Telephone: (206) 684-0521.

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