WASHINGTON FOREST LAW CENTER

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June 29, 2016

Via electronic mail to prc@seattle.gov

Seattle Department of Construction and Inspections
ATTN: Public Resource Center or Assigned Planner
700 Fifth Avenue, Suite 2000
P.O. Box 34019
Seattle, WA 98124-4019

Re: Comments on Project No. 3024037
Project address: 3036 39th Avenue, SW, Seattle, Washington 98116

Dear Department of Construction and Inspections staff:

The Washington Forest Law Center (WFLC) submits these comments on behalf of Kathleen Nelson, Lisa Parriott, and other interested neighbors in response to the proposed construction of a single-family residence at 3036 39th Avenue, SW, Seattle, Washington 98116.

WFLC believes this project, if allowed to proceed, would violate the Seattle Municipal Code (SMC) provisions on minimum lot sizes for single-family homes. Any building permits requested or issued for this project are therefore unlawful and must be denied or rescinded. Any exceptional trees present on this lot must be preserved.

SMC 23.44.010 sets out the minimum lot size for a single-family home. In areas zoned SF 5000, which this lot is, the minimum lot size is 5,000 sq. feet. Lots may be smaller than this if the historic lot exception applies. *See* SMC 23.44.010(B)(1)(d).

The historic lot exception only permits residential development on smaller lots if the following conditions are met:

1) The lot must be at least 2,500 sq. feet; and

2) The lot must have been established as a "separate building site" in the public records of the county or city by:
   a) Deed;
   b) Platting; or
   c) Building permit.

In his January 5, 2016 letter to property owner Clifford Low, city land use planner David Graves informed Mr. Low that a portion of Mr. Low's property, Lot B, qualified for a historic lot exception. Mr. Graves based his finding on the fact that when the first house was built on the combined Lots A and B in 1930, the building permit for the house specified that the house would be built only on Lot A. The building permit was silent as to what would be done with Lot B. Mr. Graves acknowledges that neither a deed nor platting has ever treated Lot B as a standalone site, and he acknowledges that no building permit has ever been issued for Lot B. Nonetheless, Mr. Graves says that the fact that the 1930 building permit *only* requested permission to build on Lot A creates a reasonable inference that the property owner at that time intended to develop Lot B at a later date. Mr. Graves believes that if Lot B was intended to function as a yard, as it currently does, it would have been included in the 1930 building permit on Lot A:

> "While there is no deed before 1957 showing a conveyance of Lot B independent of other contiguous property, the permit to build on Lot A does not include a description of Lot B. It is therefore concluded that Lot B was maintained in its current configuration for the purpose of potential future development as a building site."

Mr. Graves's inference does not comply with the requirements of the historic lot exception. A historic lot exception not created by deed or plat can only be created by a building permit that establishes a separate building site. While Mr. Graves is correct that the 1930 permit establishes Lots A and B as separate tax parcels, his inference that the 1930 permit was specifically intended to establish them as separate building sites is not supported by any substantial evidence in the record. Tax parcels and building sites are not the same thing. In *R/L Associates, Inc. v. City of Seattle*, 61 Wn. App. 670 (1991), a developer attempted to obtain a historic lot exception by showing that a lot had been split by deed into two separate tax parcels. While the city acknowledged that the deed established a separate site, it argued, and the court agreed, that the deed did not by itself prove the existence of a separate *building* site:

> On their face, the deeds do not demonstrate whether either conveyance was made for the express purpose of establishing a "separate building site." Similarly, the Title Report, 1988 tax statement, and real estate information services documentation which R/L also relies upon, reveal nothing about the status of the property as a separate *building* site. We agree with the City that the term "building" must be presumed to have some meaning independent of the term "site."

Id. at 674 (emphasis in original).

Mr. Graves appears in his letter to have wrongfully construed the fact that Lots A and B are separate sites to mean that they must also be separate *building* sites. The two concepts are wholly distinct. Evidence of one is not evidence of the other.

Washington courts were confronted by a case similar to this one in *Duffus v. City of Seattle ex rel. Dept. of Planning and Development,* 186 Wn. App. 1002, 2015 WL 782976 (2015). In *Duffus*, a developer attempted to use a 1908 building permit issued for a house on the east half of a lot to prove that the property owner must have intended the west half of his lot also to serve as

a building site at some point in the future. The Department of Planning and Development rejected this approach and denied the developer's request for a historic lot exception. The Seattle Hearing Examiner affirmed the rejection of this approach, the King County Superior Court affirmed the Hearing Examiner, and the Court of Appeals affirmed the superior court.

The Department found that "The west half of [the lot] is a portion of a platted lot that has always been under common ownership with one or more of the abutting properties. It has never, *on its own*, been separately mortgaged, conveyed by a deed or called out on a building permit." *Id*. at 1 (emphasis added).

The Hearing Examiner, considering whether the building permit had created a separate building site, found that "The issue is whether the property was 'established' as a 'separate building site' in the public records. The historic records which have been presented by the parties, and which are not disputed, do not show that the west half of [the lot] was ever the subject of a *separate building permit*, or that it was ever owned separately from all of the abutting properties." *Id.* at 5 (emphasis added).

The situation in *Duffus* was extremely similar to this one: an old building permit for half of a lot that was silent about the other half. In the *Duffus* case, the Department refused to find a separate building site solely on the basis of a building permit's silence. The correctness of this approach was upheld during numerous appeals. The Department should adopt in the current case the same approach it adopted in *Duffus* and reject the developer's use of a silent building permit to create a separate building site.

There are many reasons why a property owner would sever a lot into two parcels. Tax optimization, obtaining mortgage financing, constructing an ADU, or building non-residential structures like chicken coops are all perfectly valid reasons to create a separate parcel. The *Duffus* case demonstrates that the city does not immediately leap to the conclusion, without any additional evidence, that severing a lot indicates a desire to build residence on both parcels. The historic lot exception requires a showing in the records of a desire to create an independent residential lot, and building permits that apply only to neighboring parcels are simply not enough evidence to establish that showing.

Like the defeated appellants in *Duffus* and *R/L Associates*, Mr. Graves appears to have wrongfully used the fact that Lots A and B are separate tax parcels, coupled with the fact that Lot A obtained a building permit 86 years ago, to conclude that Lot B was intended as the future site of a separate residence. Mr. Graves lacks substantial evidence for this finding of intent, and his approach contradicts without explanation the sensible approach the courts upheld in *Duffus* and *R/L Associates*. Mr. Graves failed to follow the procedures spelled out in SMC 23.44.010(B)(1)(d). His opinion letter must be retracted.

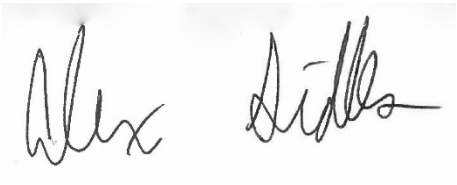
Mr. Graves's opinion letter is not only contrary to law, it is contrary to public policy. The site at issue in this case is home to a magnificent Ponderosa Pine that enjoys status as an Exceptional Tree. The proposed residential development would destroy this tree, which as the large volume of comments reveals, is beloved in the community. The Seattle Tree Code exists to serve the public interest by preserving the beauty and biological integrity of our city, and this Exceptional

Tree is clearly fulfilling that role. By permitting this development, the city is not just permitting a violation of its lot-size code, it is also harming the public good.

Thank you for your thoughtful consideration of these comments.

Sincerely,

WASHINGTON FOREST LAW CENTER



Alex Sidles
Intern supervised by staff attorney Wyatt Golding