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

LISA PARRIOTT Petitioner, v. CITY OF SEATTLE, a Washington municipal corporation, Respondent.	No. LAND USE PETITION AND COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

I. PARTIES

1. Petitioner Lisa Parriott. Lisa Parriott ("Petitioner") is a citizen of Washington and resides at 3005 39th Ave SW, Seattle, WA 98116.

2. Petitioner's Attorney Peter Goldman and Rule 9 law student Alex Sidles.

Petitioner may be contacted by and through the undersigned attorney and law student:

Peter Goldman
Washington Forest Law Center
615 2nd Ave., Suite 360
Seattle, WA 98104

3. Respondent City of Seattle. The City of Seattle is a Washington municipal corporation. The Office of the City Attorney of Seattle may be contacted at 701 5th Ave,

Suite 2050, Seattle, WA 98104-7097. This Land Use Petition and Complaint concerns a decision by the Seattle Hearing Examiner ("the Decision") and an Order Determining Land Use Decision Type Being Appealed and Order of Dismissal ("the Dismissal Order"). Copies of the Decision and the Dismissal Order are attached as Exhibits 1 and 2, respectively.

4. Nehem Properties LLC to be made party. Pursuant to RCW 36.70C.070(5), Nehem Properties LLC ("Nehem") is hereby named as a person to be made a party under RCW 36.70C.040(2). On information and belief, Nehem may be contacted by and through its attorney, Sam Jacobs of Helsell Fetterman, 1001 4th Ave. #4200, Seattle, WA 98154.

II. JURISDICTION AND VENUE

6. This Court has jurisdiction over this matter pursuant to RCW 36.70C.030. Venue is proper in King County pursuant to RCW 4.12.025.

III. STANDING

7. Petitioner is aggrieved by the land use Decision and Dismissal Order for the following reasons: Petitioner resides across the street and a few doors down from the property at issue in this case. If construction is allowed to proceed in accordance with the Decision, a large, exceptional tree on the property that brought Petitioner much pleasure for many years will be destroyed. In addition, the added density in the neighborhood occasioned by the construction will result in more traffic and noise close to Petitioner's home. Petitioner's interests are protected by Seattle Municipal Code SMC 23.88.020(A), which grants any person the right to appeal a Type I decision, and SMC 23.76.022(C)(2), which grants any person significantly affected or interested in a permit the right to appeal a Type II decision. If the Decision is reversed, destruction of the exceptional tree and construction on the property will be halted, thereby preserving Petitioner's interests.

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Petitioner has exhausted her administrative remedies by requesting a code interpretation and appealing to the Hearing Examiner per SMC 23.88.020(A).

III. FACTS

8. On January 5, 2016, the Seattle Department of Construction and Inspections ("the Department") issued a Legal Building Site Letter to Mr. Clifford Low of Nehem regarding Nehem's recently acquired property ("the Property") at 3038 39th Ave SW. The Legal Building Site Letter stated the Department's preliminary finding that the Property was eligible to take advantage of an exception to the SF 5000 zoning of this neighborhood called the Historic Lot Exception, SMC 23.44.010(B)(1)(d). The Department reasoned that a 1930 building permit for a house on the southern portion of the Property that did not include the northern portion of the Property in the permit's description of the Property was sufficient to establish the existence of a Historic Lot Exception on the northern half of the Property.

9. Nehem then applied for a Master Use Permit ("MUP") to build a second house on this Property. The address of this proposed second house will be 3030 39th Ave SW. The portion of the Property to be occupied by this proposed second house is currently home to a large ponderosa pine that is an exceptional tree under SMC 25.11.020. Removal of this exceptional tree is prohibited by the Seattle Tree Code, SMC 25.11.040, unless the lot is a Historic Lot Exception, in which case, the tree may be removed. The Department granted Nehem's MUP application on October 6, 2016.

10. Because the proposed lot of the second house was under 3,200 square feet in area, the construction of the house was subject to Type II review under SMC 23.44.010(B)(3). Because the decision to issue a MUP for this house was a Type II decision, the Department was required to provide notice of the proposed house

construction and opportunity for public comment per SMC 23.76.012(A)(2). Many neighbors raised objections to the proposed house during the comment period.

11. Petitioner filed an appeal of the MUP as a Type II decision in front of the Seattle Hearing Examiner on October 18, 2016. Petitioner filed a request for a Code Interpretation of the MUP with the Department that same day. Requesting a Code Interpretation and then appealing that Code Interpretation to the Hearing Examiner is the only means available for appealing a Type I decision, per SMC 23.88.020. The Hearing Examiner consolidated Petitioner's appeal of the Type II with Petitioner's request for a Code Interpretation.

12. On November 21, 2016, the Hearing Examiner issued the Order of Dismissal on the grounds that granting the MUP was a Type II decision, not a Type I decision. This Order of Dismissal left Petitioner's request for a Code Interpretation as the sole remaining avenue of appeal.

13. On December 9, 2016, the Department issued its Code Interpretation, ratifying its earlier preliminary finding of a Historic Lot Exception on the Property on the same grounds as in the Legal Building Site Letter. Petitioner then appealed the Code Interpretation as part of the previously consolidated appeal before the Hearing Examiner.

14. On January 25, 2017, the Hearing Examiner issued the Decision affirming the Department's finding of a Historic Lot Exception on the Property as outlined in the Code Interpretation.

IV. STATEMENT OF ERRORS

19. Violation of SMC 23.44.010(B)(1)(d), the Historic Lot Exception. Respondent's reading of the Historic Lot Exception in the Decision constitutes an error of law. The Historic Lot Exception requires that a proposed lot be "established as a separate

building site in the public records of the county or City prior to July 24, 1957, by deed, platting, or building permit." SMC 23.44.010(B)(1)(d). Nehem's proposed building site was never established in the records by deed or plat or building permit. The only relevant building permit, from 1930, is silent as to whether any construction was contemplated on the proposed building site. As a matter of law, a building permit that is utterly silent about a piece of property cannot be said to "establish in the public records" a building site on that piece of property.

20. Violation of SMC 23.44.010(B)(3), Special Exception Review. Respondent's finding in the Order of Dismissal that the granting of the MUP was a Type I decision constitutes an error law. "A special exception Type II review as provided for in Section 23.76.004 is required for separate development of any lot with an area less than 3,200 square feet that qualifies for [a Historic Lot Exception]." SMC 23.44.010(B)(3). Under this provision, Respondent should have reviewed Petitioner's appeal under the Type II standard, not the Type I standard.

21. Arbitrary and capricious disregard for evidence. In the course of the hearing, Respondent disregarded or discounted evidence Petitioner raised tending to show that there was never intended to be a separate building site on the Property. Such evidence included but was not limited to tax records, the selling price of the house, the continuity of ownership as one lot, and an encroaching porch and retaining wall. Failure to give due consideration to all the facts and circumstances of a case is arbitrary and capricious under *Abbenhaus v. Yakima*, 89 Wn.2d 855, 858–859, 576 P.2d 888 (1978).

22. Arbitrary and capricious deference to Department practice. Respondent granted deference to the Department's claimed practice of finding Historic Lot Exceptions by omission. Petitioner provided evidence showing that the Department does not have a

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consistent practice regarding the finding of lots by omission. It was arbitrary and capricious to grant deference to an inconsistent practice.

V. PRAYER FOR RELIEF

WHEREFORE, Petitioner respectfully prays for the following relief:

A. For equitable relief in the form of a declaratory judgment finding that a Historic Lot Exception has not been established in this case;

B. For equitable relief in the form of a declaratory judgment finding that the decision to grant a MUP in this case was a Type II decision;

C. For equitable relief in the form of an injunction against Respondent ordering Respondent to rescind its MUP;

D. For judgment awarding the statutory attorneys' fees and costs incurred by Petitioner in this lawsuit;

E. For an order enjoining cutting of the exceptional ponderosa pine tree and construction of the proposed house during the pendency of this action.

F. For such other relief as the Court may deem just or equitable.w

DATED this 14th day of February, 2017.

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Respectfully submitted,

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Seattle, WA 98104

Attorneys for Petitioner

By _____
Peter Goldman, WSBA #147889
Attorney at Law

By _____
Alex Sidles
Rule 9 law student

Petitioner's Exhibit

Hearing Examiner's Decision

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

In the Matter of the Appeal of	Hearing Examiner Files: **MUP-16-019(SE)**
LISA PARRIOTT, ET AL.	**S-16-007**
from a Decision and Interpretation issued by the Director, Department of Construction and Inspections	Department References: **3024037** **3026248**

Introduction

The Director issued a decision approving a special exception to allow development of a substandard lot. Ms. Parriott and others appealed the decision and also appealed the Director's interpretation that the subject property qualified for a historic lot exception from minimum lot size. The special exception appeal was dismissed prior to the hearing.

The interpretation appeal hearing was held on January 12, 2017 before the Hearing Examiner. The Appellants were represented by Peter Goldman, attorney-at-law, and Alex Sidles, Rule 9 Intern. The Applicant, Nehem Properties, LLC, was represented by Branden S. Gribben, attorney-at-law, and the Director, Department of Construction and Inspections ("Department"), was represented by William K. Mills, Senior Land Use Planner. The record was held open until January 19, 2016 for the Examiner's site visit and submission of the parties' written closing arguments.

For purposes of this decision, all section numbers refer to the Seattle Municipal Code ("SMC" or "Code") unless otherwise indicated. Having considered the evidence in the record, the Examiner enters the following findings of fact, conclusions, and decision on the appeal.

Findings of Fact

Background

1. The subject property is addressed as 3038 39th Avenue SW and is owned by the Applicant. It is zoned Single-family 5000, with a minimum lot size of 5000 square feet. The property is composed of two parcels, referred to by the parties as "Parcel A" and "Parcel B." Parcel B is directly north of Parcel A. "Parcel C" refers to the property directly north of Parcel B, addressed as 3030 39th Avenue SW.

2. Parcel A is legally described as the South 8 1/3 feet of Lot 15, and Lot, 16, Block 1, J. Walther Hainsworth's 1st Addition to West Seattle. Parcel B is legally described as the South 16 2/3 feet of Lot 14 and the North 16 2/3 feet of Lot 15, Block 1, J. Walther Hainsworth's 1st Addition to West Seattle. Parcel C is legally described as Lot 13 and the North 8 1/3 feet of Lot 14, Block 1, J. Walther Hainsworth's 1st Addition to West Seattle.

3. Lots, 13, 14, 15 and 16 were established by the J. Walther Hainsworth's 1st Addition to West Seattle in 1906. Each lot was 25 feet wide and 95 feet long, with a total area of 2, 375 square feet.

4. Prior to July 15, 1930, Lots 13, 14, 15 and 16 were owned by Robert and Mary Alice Coulthard. On that date, the Coulthards received a building permit to construct a residence on "Lot, 16 and the South 8 1/3 feet of Lot 15," i.e., on the southern one-third of the Coulthard property, Parcel A.[1]

5. In December of 1930, the Coulthards conveyed Lot 13 and the North 8 1/3 feet of Lot 14 to Sadie Arkell, who subsequently received a building permit to construct a residence on the property, which is Parcel C and addressed as 3030 39th Avenue SW.[2]

6. Parcels A and B, the subject property, have been held as separately described parcels under common ownership since at least 1930. The Department's permit history shows that Parcel B has never been included as part of the site description for any permits issued for Parcel A.

7. A 1928 City sewer card and a 1931 City sewer plat each show Parcel A and Parcel B as separate building sites.

8. The City's first minimum lot area standards for single-family zones were adopted in 1952 and included an exception for historic lots of record.[3]

9. The City first adopted a process for dividing land via the short subdivision process in 1972.[4]

10. On November 15, 2015, the Applicant requested a legal building site letter from the Department confirming the status of Parcel A and Parcel B as separate building sites. The Department issued the letter on January 5, 2016, confirming that under the Code's Historic Lot Exception to minimum lot size, Parcels A and B are separate legal building sites.[5]

11. When the Department issued a decision approving a special exception to allow development of Parcel B, the Appellants requested an interpretation of the application of the Historic Lot Exception to the property. As noted, they appealed the special exception decision and the requested interpretation, and the special exception appeal was dismissed.

12. The Department issued its interpretation on December 9, 2016.[6] The interpretation reviews the conveyance history of the property and the evolution of the City's regulatory scheme for property division and treatment of historic lots. It also examines the adopted Comprehensive Plan, which includes Land Use Policy ("LU") 67. LU67 states that exceptions to minimum lot size requirements should be permitted "to recognize building sites created in the public records under

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[1] Exhibit 5.
[2] Exhibit 6. *See* Exhibit 2 at 2.
[3] *See* Exhibit 13 at 2.
[4] *See* Exhibit 12.
[5] Exhibit 4.
[6] Exhibit 1

previous codes ... to provide housing opportunity through the creation of additional buildable sites which are compatible with surrounding lots and do not result in the demolition of existing housing."

13. The Department concluded that Parcel B had been "carved out" as a separate building lot in 1930 when the Coulthards secured a permit to build a residence on only Parcel A and in the same year, sold the northern third of their property, Parcel C, to a different owner. The Department noted that in 1930, there was no formal process for short subdividing land, and that the Coulthards had used the processes available at that time: a building permit that included Parcel A but not Parcel B; and a deed for Parcel C that also did not include Parcel B.[7] The Department considered the 1928 sewer card and 1931 sewer plat merely as confirmation that the City had long recognized Parcels A and B as separate building sites.

14. At hearing, the Department offered several examples of Historic Lot Exception building site opinion letters from 2013 and 2014 that were consistent with its interpretation in this case.[8] The senior planners and the land use planner supervisor who testified on behalf of the Department confirmed that these opinion letters, as well as the interpretation at issue here, were consistent with the Department's longstanding position on the meaning and application of the Historic Lot Exception.

Applicable Law

15. The Historic Lot Exception to minimum lot size is found in SMC 23.44.010.B.1.d and reads as follows:

> B. Exceptions to minimum lot area requirements. The following exceptions to minimum lot area requirements are allowed, subject to the requirements in subsection 23.44.010.B.2, and further subject to the requirements in subsection 23.44.010.B.3 for any lot less than 3,200 square feet in area:
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> 1. A lot that does not satisfy the minimum lot area requirements of its zone may be developed or redeveloped under one of the following circumstances:
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> . . . .
>
> d. The Historic Lot Exception. The historic lot exception may be applied to allow separate development of lots already in existence if the lot has an area of at least 2,500 square feet, and was established as a separate building site in the public records of the county or City prior to July 24, 1957, by deed, platting, or building permit.

The remainder of this subsection includes additional refinement of the criteria for the Historic Lot Exception. For example, if two contiguous lots are developed together such that a principal structure extends over or onto both lots, neither lot qualifies for the exception. But if "minor features that do not contain enclosed interior space, including but

[7] Exhibit 39.
[8] Exhibits 21, 22 and 23.

not limited to eaves and unenclosed decks," are removed from the principal structure, the abutting lot will again qualify for the exception. SMC 23.44.010.B.1.d.3.

Conclusions

1. The Hearing Examiner has jurisdiction over this appeal pursuant to Chapter 23.88 SMC. Appeals of interpretations are "considered de novo, and the Examiner's decision is to be made upon the same basis as was required of the Director." However, the Director's interpretation, an interpretation of law, is to be given substantial weight, and "the burden of establishing the contrary shall be upon the appellant." SMC 23.88.020.G.5. Thus, the Appellant bears the burden of proving that the Director's interpretation was "clearly erroneous." *Brown v. Tacoma*, 30 Wn. App. 762, 637 P.2d 1005 (1981). This is a deferential standard of review, under which the Director's decision may be reversed only if the Examiner, on review of the entire record, is left with the definite and firm conviction that a mistake has been made. *Moss v. Bellingham*, 109 Wn. App. 6, 13, 31 P.3d 703 (2001).

2. The Appellants contend that the phrase, "established as a separate building site in the public records" in SMC 23.44.010.B.1.d means that "there must be some affirmative evidence in the record showing unequivocally that a building owner intended to establish a separate building site and this establishment is affirmatively documented and clear in the historical record."[9] But there is no evidence in the record, or in the Code itself, that the City Council intended to set such a high bar for the recognition of historic lots. Further, the Appellants' suggested definition for "establish" disregards the fact that the Code has included an accommodation for historic lots since 1952, and contravenes the statement in Comprehensive Plan Policy LU67, that exceptions to minimum lot size requirements should be permitted "to recognize building sites *created in the public records* under previous codes."[10]

3. Local ordinances are interpreted in the same manner as statutes,[11] and the objective in interpreting both is to determine the legislative body's intent.[12] When an ordinance or code does not define a term, it is to be given its usual and ordinary meaning.[13] A word's usual and ordinary meaning can be found in a standard dictionary.[14] The Merriam Webster New International Dictionary defines "establish" as "to institute (as a law) permanently by enactment or agreement;" "to make firm or stable;" "to introduce and cause to grow and multiply;" "*to bring into existence (as to found or bring about)*; "to put on a firm basis;" "to make (as a church or national or state institution);" and "to put beyond doubt (as to prove innocence)."[15]

4. The dictionary definition of "establish" that aligns most closely with both the City's recognized accommodation of historic lots and the legislative intent expressed in Policy LU67 is "to bring

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[9] Appellant Parriott's Posthearing Brief at 4.
[10] Emphasis added.
[11] *Sleasman v. City of Lacey*, 159 Wn.2d 639, 643, 151 P.3d 990 (2007)
[12] *Department of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 9, 43 P.3d 4 (2002).
[13] *Christensen v. Ellsworth*, 162 Wn. 2d 365, 173 P.3d 228 (2007).
[14] *Guest v. Lange*, 195 Wn. App. 330, 335-36, 381 P.3d 130 (2016) (court "may use an ordinary dictionary to discern the meaning of a non-technical term.")
[15] Emphasis added.

into existence". This conclusion is reinforced by the Department's longstanding interpretation of the Historic Lot Exception. Contrary to the Appellants' claim, the Department demonstrated with past opinion letters that its interpretation of "establish" in this case is "part of a pattern of past enforcement, not a by-product of current litigation."[16]

5. The Appellants assert that the Department's interpretation conflicts with a 2015 legal building site letter issued to Thor Sunde.[17] Nonetheless, the Department's analysis in that case was consistent with its analysis here. The different outcome was the result of different facts. In that Sunde case, building permits were issued prior to July 24, 1957, for parcels to the north and south of a third parcel. With that configuration, the Department could have considered the third parcel to be a legal building site established by permit. However, a portion of the third parcel was then sold to the owner of the north parcel, and Mr. Sunde, the owner of the remainder of the third parcel, sought legal building site status for it. Because it was not established by historic permits, the remainder did not qualify as a legal building site under that option.[18]

6. The Appellants also argue that in determining whether Parcel B met the requirements for a historic lot exception, the Department should have considered tax records for Parcels A and B, the common ownership of the two parcels, and the potential market price of each parcel. But none of these factors are listed in SMC 23.44.010.B.1.d as criteria to be used in determining historic lot status. Finally, the Appellants suggest that because a retaining wall and part of the porch that is attached to the residence on Parcel A extend across the property line and onto Parcel B, the Department should assume that the owner who constructed them considered the two parcels as one lot. Again, the Code does not require that the Department speculate about a prior owner's intent. Instead, it expressly provides that this type of minor structural features may be removed to allow a property to qualify for a Historic Lot Exception.[19]

7. The Appellants have not met their burden of proving that the Department's interpretation was clearly erroneous, and it should therefore be affirmed.

Decision

The Director's interpretation is **AFFIRMED.**

Entered this 25th day of January, 2017.

Sue A. Tanner
Hearing Examiner

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[16] *Sleasman v. City of Lacey supra* at 646.
[17] Exhibit 17.
[18] The opinion letter also addresses the remainder's potential for historic lot status by deed and by platting.
[19] SMC 23.44.010.B.1.d.3.

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. In accordance with RCW 36.70C.040, a request for judicial review of the decision must be commenced within twenty-one (21) days of the date the decision is issued unless a motion for reconsideration is filed, in which case a request for judicial review of the decision must be commenced within twenty-one (21) days of the date the order on the motion for reconsideration is issued.

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.

Appellant:
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c/o Peter Goldman
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Applicant:
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c/o Brandon S. Gribben
1001 Fourth Avenue, Suite 4200
Seattle, WA 98154

Department Director:
Nathan Torgelson, Director, DCI
700 Fifth Avenue, Suite 1900
Seattle, WA 98104

BEFORE THE HEARING EXAMINER
CITY OF SEATTLE

CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on this date I sent true and correct copies of the attached **Findings and Decision** to each person listed below, or on the attached mailing list, in the matter of **Lisa Parriott et al.** Hearing Examiner Files: **MUP-16-019 (SE) & S-16-007** in the manner indicated.

Party	Method of Service
Lisa Parriott et al. c/o Peter Goldman Washington Forest Law Center pgoldman@wflc.org Alex Sidles asidles@wflc.org	☐ U.S. First Class Mail, postage prepaid ☐ Inter-office Mail ☒ E-mail ☐ Fax ☐ Hand Delivery ☐ Legal Messenger
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Dated: January 25, 2017

TK

Tiffany Ku
Legal Assistant

Petitioner's Exhibit

Hearing Examiner's
Order of Dismissal

BEFORE THE HEARING EXAMINER
CITY OF SEATTLE

In the Matter of the Appeals of

LISA PARRIOTT, ET AL. and
SEATTLE GREEN SPACES COALITION

from a decision issued by the Director,
Department of Construction and Inspections

Hearing Examiner Files:
MUP-16-019 & MUP-16-020

Department Reference:
3024037

ORDER DETERMINING LAND USE DECISION TYPE BEING APPEALED, and ORDER OF DISMISSAL

Facts

In January of 2016, the Department of Construction and Inspections ("Department") issued an opinion letter determining that property adjacent to a residence addressed as 3038 39th Avenue SW qualified as a separate legal building lot under the "historic lot exception" to the Land Use Code's minimum lot requirements.[1] The lot is less than 3,200 square feet in area. The Department's letter was represented as the "preliminary opinion of the Department" and was subject to challenge through the Land Use Code interpretation process until a building permit is issued.[2]

On October 6, 2016, the Department issued a decision pursuant to SMC 23.44.010.B.3, approving a special exception to allow development of the lot ("decision"). Notice of the decision was published in the City's October 8, 2016 Land Use Information Bulletin.[3] Seattle Green Spaces Coalition ("SGSC") and Lisa Parriott and others ("Parriott") each appealed the decision.

SGSC's appeal, which incorporates an attached legal brief, asks the Hearing Examiner ("Examiner") to conclude that the Department's determination that the subject property qualified for a historic lot exception under SMC 23.44.010.B.3 was incorrect, and that the Department's determination constituted a "Type II" land use decision that could be appealed to the Examiner.[4] Parriott's appeal, together with her opening brief, also argues that the Department's application of the historic lot exception to the subject property was legal error and constituted a Type II land use decision that could be appealed directly to the Examiner. Nonetheless, recognizing that the Department considered its determination on the historic lot exception to be a Type I decision, Parriott sought a Land Use Code interpretation on the validity of the determination, in accordance with SMC 23.88.020.A.3.c.

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[1] "Petitioner's Opening Brief" (on behalf of Perriott), Exhibit A.
[2] *Id.* at 2.
[3] Attachment to SCDI's Response to SGSC's Supplemental Memorandum.
[4] SGAC's brief states the issue presented to the Examiner as "Did the Land Use Planner err in rendering a decision on the Master Use Permit (MUP) application where none of the three criteria for the historical lot exception were met? SGSC Appeal Brief dated 10/19/16 at 2.

The parties agreed to further briefing on the issue of whether the decision being appealed to the Examiner is a Type I or a Type II land use decision. All briefs were timely filed., and the Examiner has reviewed them as well as all other documents in the case file.

Standard of Review

Rule 3.02(a) of the Hearing Examiner Rules of Practice and Procedure ("HER") provides that an appeal "may be dismissed without a hearing if the Hearing Examiner determines that it fails to state a claim for which the Hearing Examiner has jurisdiction to grant relief or is without merit on its face, frivolous, or brought merely to secure delay."

Applicable Code

SMC 23.44.010 regulates lot area requirements. SMC 23.44.010.A addresses "Minimum lot area." SMC 23.44.010.B covers exceptions to minimum lot area requirements and reads, in pertinent part, as follows:

> B. Exceptions to minimum lot area requirements. *The following exceptions to minimum lot area requirements are allowed*, subject to the requirements in subsection 23.44.010.B.2, and further *subject to the requirements in subsection 23.44.010.B.3 for any lot less than 3,200 square feet in area:*
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> > 1. A lot that does not satisfy the minimum lot area requirements of its zone may be developed or redeveloped under one of the following circumstances:
> >
> > ...
> >
> > d. "The Historic Lot Exception." The historic lot exception may be applied to allow separate development of lots already in existence if the lot has an area of at least 2,500 square feet, and was established as a separate building site in the public records of the county or City prior to July 24, 1957, by deed, platting, or building permit. The qualifying lot shall be subject to the following provisions:
> >
> > ...
> >
> > 3. Special exception review for lots less than 3,200 square feet in area. *A special exception Type II review* as provided for in Section 23.76.004 *is required for separate development of any lot with an area less than 3,200 square feet that qualifies for any lot area exception* in subsection 23.44.010.B.1. *The special exception application shall be subject to the following provisions*:

> a. The depth of any structure on the lot shall not exceed two times the width of the lot. If a side yard easement is provided according to subsection 23.44.014.D.3, the portion of the easement within 5 feet of the structure on the lot qualifying under this provision may be treated as a part of that lot solely for the purpose of determining the lot width for purposes of complying with this subsection 23.44.010.B.2.c.
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> b. Windows in a proposed principal structure facing an existing abutting lot that is developed with a house shall be placed in manner that takes into consideration the interior privacy in abutting houses, provided that this provision shall not prohibit placing a window in any room of the proposed house.
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> c. In approving a special exception review, additional conditions may be imposed that address window placement to address interior privacy of existing abutting houses.

Emphasis added.

SMC 23.88.020.A explains that a "decision by the Director as to the meaning, application or intent of any development regulation in Title 23 ... as it relates to a specific property... is known as an 'interpretation.' An interpretation may be requested in writing by any person or may be initiated by the Director. ... *A request for an interpretation, and a subsequent appeal to the Hearing Examiner if available, are administrative remedies that must be exhausted* before judicial review of a decision subject to interpretation may be sought." Emphasis added. SMC 23.88.020.C.3.c provides detailed information on how to seek an interpretation.

A Type II land use decision is a discretionary decision made by the Department Director and is subject to an administrative appeal before the Examiner. SMC 23.76.004.B. A decision on a special exception application is a Type II decision. SMC 23.76.006.C.2.d.

A Type I decision is a Department Director's decision that may not be appealed to the Examiner unless a land use interpretation is first requested and appealed pursuant to SMC 23.88.020. SMC 23.76.004; Table A for 23.76.004. A determination "that a proposal complies with development standards" is a Type I decision. SMC 23.76.006.B.1.

Analysis

The courts interpret local ordinances as they do statutes.[5] The reviewing body's fundamental objective is to ascertain and carry out the intent of the legislative body.[6] A statute or code section

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[5] *Sleasman v. City of Lacey*, 159 Wn.2d 639, 643, 151 P.3d 990 (2007).
[6] *Agrilink Foods, Inc. v. Department of Revenue*, 153 Wn.2d 392, 396, 103 P.3d 1226 (2005).

is to be read as a whole, so that no clause, sentence or word is "superfluous, void or insignificant".[7] Where the plain language of a statute is unambiguous, and legislative intent is therefore apparent, it is to be given effect.[8]

When subsections B.1 and B.3 of SMC 23.44.010 are read together, giving effect to every clause, sentence and word, their meaning is clear, and there is no need to look to extrinsic materials.[9] Subsection B.1 addresses exceptions to minimum lot area requirements. Nothing is this subsection mentions "special exceptions". Subsection B.1 begins with the statement that the listed exceptions to minimum lot area, including the historic lot exception, "are allowed". That blanket allowance is then qualified: 1) The listed exceptions to minimum lot area are allowed subject to the requirements in subsection B.2, which does not apply in this case; and 2) they are allowed "subject to the requirements in subsection B.3 for any lot less than 3,200 square feet in area." Because the lot in question is less than 3,200 square feet, the requirements of subsection B.3 must be met.

Subsection B.3 addresses "Special exception review for lots less than 3,200 square feet in area." It states that if a lot qualifies for one of the minimum lot area exceptions listed in subsection B.1, but has a lot area less than 3,200 square feet, then a "special exception Type II review ... is required" to develop the lot. Subsection B.3 then goes on to list the three provisions on structure depth and window placement that are to be addressed in the special exception Type II review.

The Department's determination that the lot in question met the requirements for an exception to minimum lot area constituted a Type 1 decision. It was clearly a determination "that a proposal complies with development standards". SMC 23.76.006.B.1. It could be appealed only through a request for a Land Use Code interpretation pursuant to SMC 23.88.020.C.3.c.

The only issue raised in SGSC's sole appeal issue is whether the lot in question complies with the development standards for a historic lot exception under SMC 23.44.010.B.1. But SGSC did not request a Land Use Code interpretation in conjunction with its appeal. Although SGSC argues that it was not given notice that an interpretation was required, the notice of decision attached to the Department's Response to SGSC's Supplemental Memorandum included clear instructions on seeking an interpretation, and the attached distribution list shows that the notice was sent to several members of SGSC, including its representative in this appeal.

SGSC relies on *Kate v. Seattle*[10] to argue that a code interpretation is not required to exhaust administrative remedies. SGSC acknowledges that the portion of the court's opinion it references is dicta and, in any event, the facts of the case are distinguishable from those in this case. The court determined that the neighbors in *Kate* did not have notice of their right to seek a code interpretation, whereas in this case, SGSC did have such notice.

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[7] *Ralph v. Department of Natural Resources*, 181 Wn.2d 242, 248, 343 P.3d 342 (2014), *citing State ex rel. Baisden v. Preston*, 151 Wash. 175, 177, 275 P. 81 (1929).
[8] *Griffin v. Thurston County*, 165 Wn.2d 50, 55, 196 P.3d 141 (2008).
[9] SMC 23.44.010.B.2 relates to development of substandard lots containing environmentally critical areas. It does not appear from the record that it applies to the lot in question here.
[10] 44 Wn. App. 754, 723 P.2d 493 (1986).

Finally, SGSC argues that the state and federal constitutions prohibit a requirement for someone to seek a code interpretation when doing so is costly. However, the Examiner has no jurisdiction over constitutional issues.[11] Because SGSC did not seek a code interpretation of the only issue raised in its appeal, and the issue concerns a Type I land use decision, the Examiner has no jurisdiction over SGSC's appeal. It must therefore be dismissed.

As noted, Parriott's appeal also asserts that the Department's application of the historic lot exception to the subject property was legal error and constituted a Type II land use decision. Parriott focuses on materials outside SMC 23.44.010.B, including the Department Director's report to the City Council associated with its consideration of the ordinance adopting the special exception requirement now found in SMC 23.44.010.B.3. As discussed above, SMC 23.44.010.B is clear on its face, and there is no need to consult extrinsic materials to ascertain its meaning. In any event, Parriott has not shown that the Director's report reflects the Council's intent in adopting subsection B.3, and the report language relied on[12] is consistent with the Examiner's analysis of SMC 23.44.010.B above. It simply summarizes the content of SMC 23.44.010.B.3. The Examiner would normally dismiss Parriott's appeal. However, Parriott submitted a request to the Department for an interpretation of the application of the historic lot exception in SMC 23.44.010.B.1 to the subject property, and included an appeal of the interpretation within its appeal. Therefore, the appeal will not be dismissed in total.

Decision

SGSC's appeal is **DISMISSED**. All parts of Parriott's appeal other than the appeal of the Department Director's interpretation are **DISMISSED** as a matter of law. The interpretation appeal will be heard as scheduled on January 12, 2017.

Entered this 21st day of November, 2016.

Sue A. Tanner, Hearing Examiner
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Phone: (206) 684-0521
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[11] *Chaussee v. Snohomish Cy.*, 38 Wn.App. 630, 635-639, 689 P.2d 1084 (1984)

[12] "Developing lots under 3,200 s.f. would require a special exception review, a Type II approval requiring public notice and providing an opportunity for an appeal to the Hearing Examiner. Additional structure height and depth restrictions would also apply to lots under 3,200 s.f. ..." Attachment to Appellant Parriott's Brief Regarding Decision Type at p. 6.

BEFORE THE HEARING EXAMINER
CITY OF SEATTLE

CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on this date I sent true and correct copies of the attached **Order Determining Land Use Decision Type Being Appealed and Order of Dismissal** to each person listed below, or on the attached mailing list, in the matter of **Lisa Parriott et al. and Seattle Green Spaces Coalition** Hearing Examiner Files: **MUP-16-019 (SE) & MUP-16-020 (SE)** in the manner indicated.

Party	Method of Service
Lisa Parriott et al. c/o Peter Goldman Washington Forest Law Center pgoldman@wflc.org Alex Sidles asidles@wflc.org	☐ U.S. First Class Mail, postage prepaid ☐ Inter-office Mail ☒ E-mail ☐ Fax ☐ Hand Delivery ☐ Legal Messenger
Mary Fleck SGSC maryflecws@gmail.com	☐ U.S. First Class Mail, postage prepaid ☐ Inter-office Mail ☒ E-mail ☐ Fax ☐ Hand Delivery ☐ Legal Messenger
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Dated: November 21, 2016

TK

Tiffany Ku
Legal Assistant

CERTIFICATE OF SERVICE

I certify that on this date, I electronically filed a copy of this Land Use Petition and Complaint for Declaratory and Injunctive Relief with the King County Superior Court using its e-filing system.

I also certify that on this date, I delivered a copy of this Land Use Petition and Complaint for Declaratory and Injunctive Relief to the City of Seattle Clerk's Office at 600 Fourth Avenue, Third Floor, Seattle, WA 98104.

I also certify that on this date, a copy of the same document was sent to the following parties and their representatives listed below by mail:

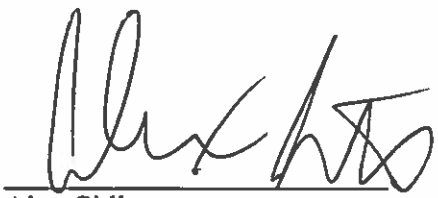
Clifford Low
3038 39th Ave SW
Seattle, WA 98116

Sam Jacobs
Helsell Fetterman, LLP
1001 Fourth Ave., Suite 4200
Seattle, WA 98154

Nehem Properties LLC
4616 SW Brandon St.
Seattle, WA 98136

The foregoing being the last known addresses of the above-named parties.

DATED this 14th day of February, 2017, at Seattle, Washington.



Alex Sidles