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No. 71294-2-I

(King County Superior Court
No. 13-2-24020-3 SEA)

COURT OF APPEALS
DIVISION I
OF THE STATE OF WASHINGTON

DANIEL DUFFUS,

Appellant,

vs.

CITY OF SEATTLE,

Respondent.

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STATE OF WASHINGTON
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APPELLANT'S OPENING BRIEF

John M. Groen, WSBA # 20864
GROEN STEPHENS & KLINGE LLP
10900 NE 8th Street, Suite 1325
Bellevue, WA 98004
Telephone: (425) 453-6206
Attorneys for Appellants

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INTRODUCTION

This case involves determining whether a separate building site was created by certain actions that took place in 1904-1907. Appellant, Daniel Duffus, contends that a 1904 deed conveying one half of an existing lot to a third party (while the other half was retained by the owner), was a lawful division of land under the rules in place *at that time*. Accordingly, the remainder parcel retained by the seller became a separate parcel, and remains so today.

ASSIGNMENTS OF ERROR AND ISSUES RELATING TO ASSIGNMENTS OF ERROR

The trial court erred in affirming the City of Seattle Hearing Examiner decision that ruled that the subject property was not a separate building site created under the historical rules.

The issue pertaining to this assignment of error is whether the undisputed facts satisfy the criteria in Seattle Municipal Code (SMC) 23.44.010 B.1.d., which recognizes that lots established as a separate building site in the public records by deed or building permit, are grandfathered and qualify as an exception to the current minimum lot size requirements.

STATEMENT OF THE CASE

The zoning on the subject site is SF 5000¹. This means that the minimum parcel size for a lot is 5000 square feet. However, an exception to the current minimum lot size requirement is provided by Seattle Municipal Code (SMC) 23.44.010 B.1.d. This provision grandfathers historical parcels as legally established separate building sites if such lots were recognized in certain historical public records. Specifically, the relevant portion of the code provision recognizes a separate building site for lots not meeting current size requirements in the following situation:

The lot has an area at least 50 percent of the minimum required under section 23.44.010.A, and was established as a separate building site in the public records of the county or City prior to July 24, 1957, **by deed**, contract of sale, mortgage, platting **or building permit**, and falls into one of the following categories...

SMC 23.44.010 B.1.d (emphasis added).

The background facts begin in 1890 when Yesler's Third Addition to the City of Seattle was filed and recorded. AR 37. This plat created numerous lots, including Lot 7 of Block 36. AR 41-43. The parcel is near the Leschi marina, at the corner of Jefferson and Erie Streets.

¹ The Clerk's Papers identify Sub No. 56 as the Certified Administrative Record from before the Hearing Examiner. However, the pages within the Administrative Record (AR) were not re-numbered by the clerk to have corresponding Clerk's Papers numbers. Accordingly, citation to the Administrative Record below will be by the designation "AR", followed by the referenced page number.

In 1904, E.C. Baird owned Lot 7. He then conveyed by deed the “east ½ of Lot 7” to Anna Remer. AR 44. Baird retained separate ownership of the west ½ of Lot 7.

On May 8, 1907, the City of Seattle issued Anna Remer a building permit for construction of a house on the east ½ of Lot 7. AR 179, ¶8. That house was constructed and still stands today.

When the building permit was issued to Remer, the west ½ of Lot 7 was separately owned by Converse. This is because Baird sold the west ½ of Lot 7 to Moss in January, 1905. AR 38, ¶9. One year later, in January 1906, Moss sold to Converse. AR 38, ¶10.

Accordingly, at the time the City of Seattle issued a building permit to Remer for construction of a house on east ½ of Lot 7, the west ½ of Lot 7 was owned by a separate third party.

A number of years later, in 1914, Converse sold the west ½ of Lot 7 to Remer. AR 39, ¶11.

The issue in this appeal is whether these actions concerning Lot 7 created a situation where the west ½ of Lot 7 was recognized in the public records by deed, or by building permit, as a separate building site from the east ½ of Lot 7. Duffus contends that the public records clearly support establishment of a separate building site and the terms of SMA 23.44.010 B.1.d are satisfied.

Not at issue in this appeal is whether the minimum size requirement to qualify for the exception is satisfied under SMC 23.44.010 B.1.d. That requirement is clearly satisfied and the City of Seattle does not contend otherwise. This is because the west ½ of Lot 7 is more than the required 50 percent of the minimum required under the current zoning. Specifically, the current zoning (SF 5000) requires a 5000 square foot minimum lot size. Lot 7 is 6600 square feet. AR 179, ¶3. Accordingly, the west ½ of Lot 7 is 3300 square feet, thus exceeding the required 2500 square feet required under the 50 percent rule. Seattle does not dispute that this criteria under SMC 23.44.010 B.1.d is satisfied.

Nor is there any dispute concerning other portions of SMC 23.44.010. Specifically, the west ½ and the east ½ of Lot 7 came into common ownership in 1914 (when Converse sold the west ½ to Remer) and remains in common ownership today. Accordingly, the situation fits squarely within one of the categories anticipated by the Seattle code provision. Specifically, one of the applicable categories for the exception is subsection 3 which states:

3) The lot is or has been held in common ownership with a contiguous lot after January 17, 1987 and is not developed with all or a part of a principal structure, but only if no portion of the lot is required to meet the least restrictive of lot area, lot coverage, setback or yard requirements that were in effect for a principal structure

on the contiguous lot at the time of construction of the principal structure.

SMC 23.44.010 B.2.d.3. This category precisely describes the case at bar. The west ½ of Lot 7 remains undeveloped, the east ½ and the west ½ of Lot 7 are contiguous, they were held in common ownership after 1987, and no portion of the west ½ of Lot 7 was needed to meet setbacks or lot area or coverage requirements for the construction of the house on the east ½ of Lot 7. Quite simply, in 1907, there were no applicable setbacks or lot area coverage limitations that were in place. Accordingly, the City of Seattle issued the building permit for a house on the east ½ of Lot 7 and no portion of the west ½ (that was retained in separate ownership by Baird) was needed to meet non-existent setbacks. The City does not dispute this position.

Accordingly, the issue before the Court is fairly narrow. That is, does the 1904 conveyance of the east ½ of Lot 7 to Remer, followed by the 1907 issuance of a separate building permit for a house on the east ½ of Lot 7, meet the criteria set forth in SMC 23.44.010 B.1.d for a separate building site for the west ½ of Lot 7 ? As will be shown, the answer is clearly ‘yes,’ the criteria are satisfied.

Upon review of the record, the Court may notice that much of the briefing below concerned an argument that the County tax records also

support recognition of the west ½ of Lot 7 as a separate parcel from the east ½ of Lot 7. While Duffus contends those tax records are consistent with his position, Duffus also recognizes that the City of Seattle amended its code provision to remove “property tax segregation” as a basis for the exception in SMC 23.44.010 B.1.d. *See* Ordinance 123978 (September 20, 2012). Rather than debating the vesting doctrine in this context, Duffus is appealing by relying on the 1904 deed and the 1907 building permit to establish the lawful division of Lot 7 into two separate ownerships and parcels.

The procedural posture is straight forward. Daniel Duffus requested a City interpretation of the issue which resulted in DPD Interpretation No. 12-002. Duffus appealed that interpretation to the Seattle Hearing Examiner. The Hearing Examiner ruled on cross motions for summary judgment that the west ½ of Lot 7 was not a separate building site from the east ½ of Lot 7.

Duffus then sought judicial review under the Land Use Petition Act (LUPA), RCW Chapter 36.70C. The trial court ruled in favor of the City of Seattle and this appeal followed.

ARGUMENT

I.

STANDARD OF REVIEW

This case turns on the interpretation of Seattle code provision, SMC 23.44.010 B.1.d. Statutory construction is a question of law that is reviewed *de novo*. *Belleau Woods II, LLC v. City of Bellingham*, 150 Wn. App. 228, 240, 208 P.3d 5 (2009). Courts interpret local ordinances the same as statutes. *Sleasman v. City of Lacey*, 159 Wn.2d 639, 643, 151 P.3d 990 (2007).

Under LUPA, the decision of the Hearing Examiner should be reversed because it is not supported by evidence that is substantial when viewed in light of the whole record, and the decision is a clearly erroneous application of the law to the facts. RCW 36.70C.130.

II.

THE WEST ½ OF LOT 7 SHOULD BE RECOGNIZED AS A SEPARATE BUILDING SITE UNDER SMC 23.44.010 B.1.D.

The beginning point of the analysis is with the 1904 conveyance by Baird to Remer of the east ½ of Lot 7. This conveyance is recognized in the public record, recorded at AF 297880. AR 44.

A. The 1904 conveyance of the east ½ of Lot 7 to Remer was a lawful division of property under the laws in place at that time.

It is important to recognize that at the turn of the century, there were no laws precluding an owner from selling a portion of his property to a third party. At that time, the Washington statute governing the division of private property had not yet been enacted. The Subdivision Map Act did not come into being until 1937. Chapter 186, Laws of 1937.

Prior to that time, a landowner could divide his own property by selling a portion to a third party. The portion conveyed would be described in a deed, the deed was recorded, and the new owner took that portion so conveyed *as a separate parcel*.

A review of turn of the century case law in Washington demonstrates that real property was often apportioned out and sold by deed to third parties. *See Muerling v. Colsen*, 79 Wash. 54, 55, 139 P. 616 (1914); *Robison v. Barnhart*, 117 Wash. 218, 219, 200 P. 1076 (1921); *Johnston v. Mortensen*, 155 Wash. 547, 285 P. 438 (1930); *Tindolph v. Schoenfeld Bros.*, 157 Wash. 605, 606, 289 P. 530 (1930). This is due to the fact that, “[a]s late as 1928, only a few states had legislation imposing any substantial design or infrastructure requirements upon subdividers.”

R. CUNNINGHAM, W. STOEBUCK & D. WHITMAN, *Law of Property* § 9.15

(2d ed. 1993). Of course, Washington held out even longer, not passing its legislation on subdivisions until 1937.

Dividing his property by deed is precisely what Baird did in 1904 with his conveyance to Remer. By deed, Baird conveyed the “east ½ of Lot 7” to Remer.² There was no question that Remer thereby owned the east ½ as a **separate ownership** from the west ½. By being separately owned, there indisputably was a division of the previous Lot 7. In other words, *after 1904, Lot 7 no longer existed*. Rather, **it was divided into two halves, each owned by a different person, and each being a separate parcel from the other half**.

Today, property cannot be divided in this manner. Any division of land must now be pursuant to the procedures and requirements of RCW Chapter 58.17 (Subdivision Map Act). Indeed, creation of even a single additional lot requires filing a short plat and meeting the requirements of the statute. RCW 58.17.030.

Interestingly, in 1937, the Subdivision Map Act only regulated the creation of **five** or more lots. Chapter 186, Laws of 1937, § 15 (RCW 58.17.020). A division of land to create **four** or fewer parcels was not regulated by the Subdivision Map Act until later, and indeed, the City of Seattle did not adopt its code provisions concerning short plats (4 or fewer

² In the same deed, Baird also conveyed Lot 6 and the east half of Lot 8 to Remer. AR 44. For purposes here, it is the conveyance of the east ½ of Lot 7 that is relevant.

parcels) until 1972. In short, in 1904, the City of Seattle and the State of Washington did not have laws precluding a landowner from dividing his land by conveying a portion by deed to a third party. Indeed, thousands of properties were created during these early decades in precisely this manner.

In its responding brief, Seattle will not be able to cite any law, regulation, or case precedent that would otherwise establish that the 1904 conveyance by Baird to Remer of the east ½ of Lot 7 was an unlawful division of land.

B. The issuance of a building permit to Remer in 1906 further establishes that Lot 7 was lawfully divided.

The facts are not disputed that Seattle issued a building permit to Remer in 1907 for construction of a house on the east ½ of Lot 7.

Indeed, for Seattle to now contend that the conveyance to Remer was somehow an unlawful division of property would be completely inconsistent with the issuance of a building permit to Remer. Quite simply, Seattle could not issue a building permit to Remer if Seattle did not consider the east ½ of Lot 7 to be a separate building site. Seattle did not object to the building permit application because the 1904 conveyance to Remer was completely legal. Accordingly, Seattle issued the building permit.

C. The Hearing Examiner analysis on this issue is not supported by substantial evidence and is a clearly erroneous application of the law to the facts.

The relevant portion of the Hearing Examiner decision is in paragraphs 22 and 23 of the Order, found at AR 181. The Hearing Examiner states:

The historic records which have been presented by the parties, and which are not disputed, **do not show that the west half of Lot 7 was ever the subject of a separate building permit**, or that it was ever owned separately from all of the abutting properties. At best, those records leave open the possibility that the site could have been considered a separate building site by the County.

AR 181, ¶23.

This analysis is woefully inadequate to defeat the plain language of SMC 23.44.010 B.1.d. First, the Hearing Examiner and the City simply do not come to grips with the 1904 conveyance from Baird to Remer.

As set forth above, the language of SMC 23.44.010 B.1.d. states that the exception applies to a lot “established as a separate building site in the public records ... by deed ... or building permit.” Here, we have a 1904 deed that divides Lot 7. The result is two separate parcels. Of course, it only takes **one deed** to create the division. These parcels were separately owned.

Nor is there any question that the west ½ and the east ½ must be separate building sites from each other. Obviously, the east ½ owned by

Remer must have been a separate building site because the City issued a permit for constructing a house on that site. Well, this begs the question. What was the east ½ “separate” from? Obviously, it was a separate from the west ½.

Just as the east ½ of Lot 7 qualified as a separate building site, it follows that Baird’s deed also must have established the west ½ as a separate building site. As discussed above, at that time, the City of Seattle did not have restrictions concerning setbacks and lot area coverage as we now have. There was nothing in place that would have precluded Baird from doing exactly the same as Remer and applying for a permit to construct a house on the west ½ of Lot 7.

In its responding brief, the City of Seattle will not be able to identify any 1904 code provision that would have precluded Baird from constructing a house on the west ½ of Lot 7, just as Remer did on the east ½ of Lot 7. Accordingly, the 1904 deed established both halves of Lot 7 as separate and legal building sites. There is no evidence or law to the contrary. Rather, there is extremely strong and undisputed evidence that these lots were separate building sites because the City issued a building permit to Remer for construction of a house. The refusal to recognize the west ½ of Lot 7 as also being a separate building site established by deed

in the public record is not supported by any evidence and is a clearly erroneous application of the law to the facts.

With respect to the building permit, the Hearing Examiner reasoned that under SMC 23.44.010.B.1.d, the west ½ of Lot 7 must have had **its own** building permit in order to be established as a separate building site. But the plain language of SMC 23.44.010 B.1.d. does not go that far. First, under the facts here, the 1904 deed is what actually established this parcel as a separate building site. Even if there was no building permit issued in 1907, the 1904 deed splitting the parcel into two halves had already accomplished what was required under SMC 23.44.010 B.1.d.

Second, under the facts of this case, the relevance of the issuance of the building permit is to show that the resulting parcels (the east and west halves) were buildable sites under the codes in place at that time. The subsequent conduct by Seattle to issue a building permit to Remer is extremely strong evidence that Seattle recognized the east ½ of Lot 7 was a building site. Indeed, the house remains on the site to this day. Given the identical dimensions of the two halves, and the same applicable codes and regulations, there is no basis in the record or the law to conclude that the west ½ of Lot 7 did not enjoy the same buildable status as the east ½ of Lot 7.

Finally, the notion expressed by the Hearing Examiner that there had to be a building permit issued for the west ½ of Lot 7 is contrary to the express language of the code provision. Under SMC 23.44.010 B.1.d., the grandfather exception is applicable only in certain categories of fact patterns. The applicable category here is subsection 3, that is, SMC 23.44.010 B.1.d.3. Under that code requirement, the lot seeking the exception status must be “not developed” with a principal structure. Obviously, the concern of the Hearing Examiner that a building permit had not previously been issued for the west ½ of Lot 7 is unfounded. Not only is a building permit not required, but to qualify the west ½ for the grandfathered exception, the parcel needs to be not developed with a principal structure. That means there must not be a building permit for the west ½ of Lot 7. Of course, that is the case here.

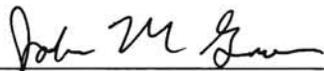
CONCLUSION

This appeal has been reduced to its core issue. Under Washington law, the 1904 deed that conveyed a portion of Lot 7 to Remer had the legal effect of dividing Lot 7 into two distinct and separate parcels. Lot 7 no longer existed. Rather, the east half belonged to Remer as one separate parcel. The west half belonged to Baird as another separate parcel. Both of these parcels were established building sites as a result of this deed. That conclusion is conclusively established by the subsequent conduct of

the City of Seattle in issuing a building permit in 1907 to Remer to construct a house on the east half. In the same manner, the west half also was a separate building site under the rules in place in 1904. The City will not be able to cite any code provision that will show otherwise. Under these circumstances, the west ½ of Lot 7 should be recognized as meeting the criteria set forth in SMC 23.44.010B.1.d. Accordingly, the trial court should be reversed and relief should be granted recognizing that the west ½ of Lot 7 meets the criteria of SMC 23.44.010 B.1.d and therefore qualifies for the grandfathered exception to the current minimum lot size requirement.

RESPECTFULLY submitted this 23th day of April, 2014.

GROEN STEPHENS & KLINGE LLP

By: 

John/M. Groen, WSBA #20864
10900 NE 8th Street, Suite 1325
Bellevue, WA 98004
(425) 453-6206
Attorneys for Appellants

DECLARATION OF SERVICE

I, Linda Hall, declare:

I am a citizen of the United States, a resident of the State of Washington, and an employee of Groen Stephens & Klinge LLP. I am over twenty-one years of age, not a party to this action, and am competent to be a witness herein.

On April 23, 2014, I caused a true and correct copy of the foregoing document to be served on the following person via the following means:

Jeffrey S. Weber, Esq.	<input type="checkbox"/> Legal Messenger
Seattle City Attorney's Office	<input checked="" type="checkbox"/> First Class U.S. Mail
600 4th Avenue, Floor 4	<input type="checkbox"/> Federal Express Overnight
Seattle, WA 98104-1850	<input type="checkbox"/> E-Mail:

Mark A. Clausen	<input type="checkbox"/> Legal Messenger
Morgan R. Blackburn	<input checked="" type="checkbox"/> First Class U.S. Mail
Clausen Law Firm PLLC	<input type="checkbox"/> Federal Express Overnight
701 Fifth Avenue, Suite 7230	<input type="checkbox"/> E-Mail:
Seattle, WA 98104	

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Executed this 23rd day of April, 2014 at Bellevue, Washington.



Linda Hall