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No. 71294-2-I

COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

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DANIEL DUFFUS,

*Appellant,*

vs.

CITY OF SEATTLE,

*Respondent.*

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**CITY OF SEATTLE'S RESPONSE BRIEF**

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## TABLE OF CONTENTS

	<u>Page(s)</u>
I. INTRODUCTION .....	1
II. ISSUES .....	2
III. FACTS .....	3
A. The history of Lot 7 .....	3
B. The City's land use decision .....	5
C. The LUPA appeal .....	6
IV. ARGUMENT .....	6
A. Standard of review .....	6
B. The City properly determined that the West ½ of Lot 7 did not qualify for a lot area exception pursuant to SMC 23.44.010.B.1.d .....	7
1. Appellant cannot establish that the City's interpretation of SMC 23.44.010.B.1.d was erroneous .....	7
a. The City interpreted SMC 23.44.010.B.1.d consistent with its plain meaning .....	8
b. Appellant's interpretation of SMC 23.44.010.B.1.d is contrary to the language of the Code .....	10
c. Whether the 1904 deed effected a lawful division of property is not relevant .....	12
d. Even if SMC 23.44.010.B.1.d were ambiguous, the City's interpretation would be entitled to deference .....	14
2. The City's decision properly applied the law to the facts and was supported by substantial evidence .....	15
a. The City properly applied the law to the facts, and its decision was supported by substantial evidence, under the correct interpretation of SMC 23.44.010.B.1.d .....	16

b. The Examiner correctly distinguished between establishing a separate building site “by deed” versus “by building permit.” .....18

V. CONCLUSION.....21

## TABLE OF AUTHORITIES

**Page(s)**

### **Cases**

<i>Citizens for a Safe Neighborhood v. City of Seattle</i> , 67 Wn. App. 436, 836 P.2d 235 (1992).....	15
<i>City of Spokane v. Rothwell</i> , 166 Wn.2d 872, 215 P.3d 162 (2009).....	11
<i>King County, Department of Development and Environmental Services v. King County</i> , 177 Wn.2d 636, 305 P.3d 240 (2013).....	6
<i>State v. Alvarado</i> , 164 Wn.2d 556, 192 P.3d 345 (2008).....	9
<i>Tingey v. Haisch</i> , 159 Wn.2d 652, 152 P.3d 1020 (2007).....	8, 10, 14

### **Statutes**

RCW 36.70C.130(1)(a)-(f).....	6
RCW 36.70C.130(1)(b) .....	7, 15
RCW 36.70C.130(1)(c).....	7, 15, 20
RCW 36.70C.130(1)(d) .....	7, 15, 20
RCW Chapter 36.70C.....	6
RCW Chapter 58.17.....	13

### **Seattle Municipal Code**

SMC Title 23.....	13
SMC 23.20.012 .....	13
SMC 23.44.010.A .....	5
SMC 23.44.010.B .....	6, 7, 19
SMC 23.44.010.B.1.d .....	<i>passim</i>
SMC 23.44.010.B.1.d.3 .....	20

SMC 23.44.010.B.2 .....	5
SMC 23.44.010.C .....	5

**Other Authority**

<i>Black's Law Dictionary</i> , Abridged 9 <sup>th</sup> Ed.....	9, 10
--	-------

## **I. INTRODUCTION**

Appellant seeks to develop a portion of a platted lot. The portion (called the West ½ of Lot 7) is too small to meet the minimum lot area for the applicable zone under the City of Seattle’s Land Use Code. The Code allows an exception from the minimum lot area if certain requirements are met.

The City determined that the West ½ of Lot 7 did not meet the requirement that the lot have been “established as a separate building site in the public records of the county or City prior to July 24, 1957, by deed. . . .” The City interpreted the foregoing language to mean that there must be a deed that (1) conveys the lot on its own, apart from other land, or (2) conveys land such that the remaining land retained by the conveyor consists solely of the lot. The 1904 deed relied upon by Appellant does not meet those criteria.

The City interpreted the Code consistent with its plain meaning. By contrast, Appellant asserts that a deed can establish lots as “separate building sites” even when the lots in question are not defined by the deed alone but rather by taking the lines that enclose the land conveyed by the deed and layering them over preexisting platted lot lines. This approach deprives a portion of the Code language of any meaning.

Appellant's focus on whether lots for which "separate building site" status is claimed resulted from a division of property that was lawful under the laws regulating land division at that time is simply a distraction. Not only is the existence of a lawful division not the inquiry under the code provision at issue in this case, but Appellant uses the "lawful division" concept in support of an interpretation that is contrary to the plain language of the code.

Thus, Appellant cannot carry his burden of showing that the City's interpretation of its Code was erroneous, particularly after allowing for the deference that is due the City. Moreover, under the City's correct interpretation of its Code, Appellant cannot carry his burden of showing that the City's decision is not supported by substantial evidence or is a clearly erroneous application of the law to the facts.

For these reasons, the Court must affirm the Superior Court's decision upholding the City's determination that the West ½ of Lot 7 did not qualify for a lot area exception.

## **II. ISSUES**

A. For purposes of challenging the City's determination that the West ½ of Lot 7 did not qualify for a lot area exception pursuant to SMC 23.44.010.B.1.d, can Appellant carry his burden of showing that the City's interpretation of its Code was erroneous, where the City's

interpretation of SMC 23.44.010.B.1.d was consistent with the plain meaning of that section, where Appellant's interpretation is contrary to the language of the Code, and where the City's interpretation must be given deference even if the Code were ambiguous?

B. Can Appellant carry his burden of showing that, under the correct interpretation of SMC 23.44.010.B.1.d, the City's determination that the West ½ of Lot 7 did not qualify for a lot area exception pursuant to that section is not supported by substantial evidence or is a clearly erroneous application of the law to the facts?

### **III. FACTS**

#### **A. The history of Lot 7.**

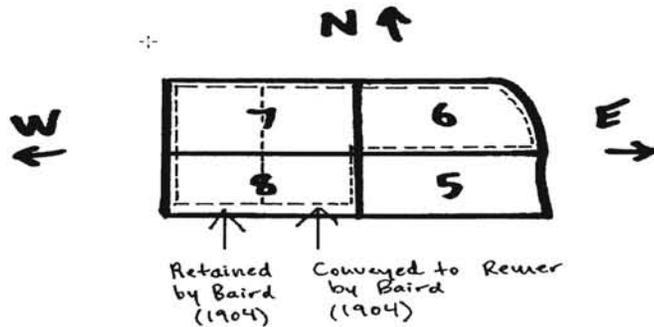
Appellant seeks to develop land consisting of a portion of a platted lot: the West ½ of Lot 7 in Block 36, Yesler's Third Addition (hereafter, the "West ½ of Lot 7"). The plat of Yesler's Third Addition to the City of Seattle is in the record at AR 00041 and 00042.<sup>1</sup> Lot 7 is marked with an arrow on the page at AR 00042.

In 1904, in a single deed, Baird conveyed Lot 6, the East ½ of Lot 7, and the East ½ of most of Lot 8 to Remer. AR 00044. Baird retained the West ½ of Lot 7 and the West ½ of most of Lot 8. AR 00003.

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<sup>1</sup> References to "AR" are to the Administrative Record that was submitted to this Court as part of the Clerk's Papers.

Because the 1904 deed is central to this case, the following diagram is provided to assist the Court in understanding the situation:



CP 410. The dark black lines in the diagram are the platted lot lines (and the numbers are the plat lot numbers). The dashed lines show what happened in the conveyance from Baird to Remer in 1904: Baird conveyed the “L” shaped area to the East while retaining the rectangular area to the West consisting of the West ½ of Lot 7 and the West ½ of most of Lot 8.

In 1905, in a single deed, Baird conveyed the West ½ of Lot 7 and the West ½ of most of Lot 8 to Moss. AR 00050. It is undisputed that the West ½ of Lot 7 has always been in common ownership with abutting property.

In 1907, a house was built on the East ½ of Lot 7 under Permit No. 49668. AR 00004. The legal description in the permit was the East ½ of Lots 7 and 8. AR 00004, 00048. The West ½ of Lot 7 remains undeveloped to this day.

**B. The City's land use decision.**

The West ½ of Lot 7 is smaller than the minimum lot area requirement for the zone in which it is located (e.g., 5,000 square feet). Thus, to be developed, the West ½ of Lot 7 would need to meet the requirements for an exception to the minimum lot area requirement pursuant to Seattle Municipal Code (SMC) 23.44.010.B.1.d, which provides:

B. Exceptions to Minimum Lot Area Requirements. The following exceptions to minimum lot area requirements are allowed, subject to the development standards for undersized lots in subsection 23.44.010.C, except as limited under subsection 23.44.010.B.2:

1. A lot that does not satisfy the minimum lot area requirements of its zone may be developed or redeveloped separately under one of the following circumstances:

...

d. 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:

...

Emphasis added.

In February, 2013, the City's Department of Planning and Development ("DPD") issued Interpretation 12-002 ("Interpretation"). AR

00003-00008. The Interpretation concluded that the West ½ of Lot 7 did not qualify for any of the lot area exceptions in SMC 23.44.010.B. AR 00006.

Appellant appealed the Interpretation to the City Hearing Examiner. On cross-motions for summary judgment, the Hearing Examiner affirmed the Interpretation. AR 00178-00182.

**C. The LUPA appeal.**

Appellant then filed an appeal under the Land Use Petition Act, RCW ch. 36.70C (“LUPA”). CP 1-7. The Superior Court affirmed the Hearing Examiner’s order and dismissed the Land Use Petition. CP 452-453.

**IV. ARGUMENT**

**A. Standard of review.**

Under LUPA, the party seeking relief has the burden of establishing that one of the standards set forth in RCW 36.70C.130(1)(a) through (f) has been met. In a LUPA case, the appellate court stands in the same shoes as the superior court. *King County, Department of Development and Environmental Services v. King County*, 177 Wn.2d 636, 643, 305 P.3d 240 (2013).

This case presents the question of whether the City erroneously interpreted its Code. Thus, Appellant has the burden of establishing that the land use decision is an erroneous interpretation of the law, after allowing for such deference as is due the construction of a law by a local jurisdiction with expertise. RCW 36.70C.130(1)(b). Appellant also has the burden of showing that the City's land use decision is not supported by evidence that is substantial when viewed in light of the whole record or is a clearly erroneous application of the law to the facts. RCW 36.70C.130(1)(c, d).

**B. The City properly determined that the West ½ of Lot 7 did not qualify for a lot area exception pursuant to SMC 23.44.010.B.1.d.**

SMC 23.44.010.B contains a variety of requirements that must be met to obtain an exception from the minimum lot area requirement for the zone. The minimum lot area exception provisions are set forth in their entirety at AR 00007-00008. However, the only portion of those provisions that is at issue in this case is SMC 23.44.010.B.1.d.

**1. Appellant cannot establish that the City's interpretation of SMC 23.44.010.B.1.d was erroneous.**

Appellant cannot meet his burden of showing that the land use decision is an erroneous interpretation of the law. RCW 36.70C.130(1)(b). The City's interpretation of SMC 23.44.010.B.1.d is consistent with the plain meaning of the code language. By contrast, Appellant's interpretation is

contrary to the code language. Moreover, even if the Code were ambiguous, the City's interpretation must be given deference.

**a. The City interpreted SMC 23.44.010.B.1.d consistent with its plain meaning.**

This case implicates standard principles of statutory interpretation:

A court's objective in construing a statute is to determine the legislature's intent. "[I]f the statute's meaning is plain on its face, then the court must give effect to that plain meaning as an expression of legislative intent." A statutory provision's plain meaning is to be 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. A provision that remains susceptible to more than one reasonable interpretation after such an inquiry is ambiguous and a court may then appropriately employ tools of statutory construction, including legislative history, to discern its meaning.

*Tingey v. Haisch*, 159 Wn.2d 652, 657, 152 P.3d 1020 (2007) (citations omitted). The key code language in this case requires that "[t]he lot . . . 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. . . ." SMC 23.44.010.B.1.d (emphasis added).

In this case, the City interpreted the foregoing language to mean that, for a lot to be established as a "separate building site . . . by deed,"

there must be a deed that (1) conveys the lot on its own, apart from other land, or (2) conveys land such that the remaining land retained by the conveyor consists solely of the lot.

The Interpretation noted that the West ½ of Lot 7 “has never, on its own, been separately . . . conveyed by a deed. . . .” AR 00005. In addition, the Interpretation focused on whether the West ½ of Lot 7 had been in common ownership with abutting property. The Interpretation extensively reviewed the ownership history of the West ½ of Lot 7 and surrounding land. AR 00003-00005. The Interpretation concluded that “[t]he west half of Lot 7 is a portion of a platted lot that has always been under common ownership with one or more of the abutting properties.” AR 00005. Of course, the fact that a lot has always been under common ownership with other land means that it was never the only land retained by a conveyor. The Hearing Examiner affirmed, stating that the historic records did not show that the West ½ of Lot 7 “was ever owned separately from all of the abutting properties.” AR 00181.

The City’s interpretation is consistent with the plain meaning of the code. When a term has a well-accepted, ordinary meaning, the court may consult a dictionary to ascertain the term’s meaning. *State v. Alvarado*, 164 Wn.2d 556, 562, 192 P.3d 345 (2008) (using Black’s Law

Dictionary); *Tingey v. Haisch*, 159 Wn.2d at 658. Black's Law Dictionary defines "deed" as follows:

1. Something that is done or carried out; an act or action.
2. *A written instrument by which land is conveyed.*
3. At common law, any written instrument that is signed, sealed, and delivered and that conveys some interest in property.

*Black's Law Dictionary*, Abridged 9<sup>th</sup> Ed., p. 374 (emphasis added).

"Separate" means "individual; distinct; particular; disconnected." *Black's Law Dictionary*, Abridged 9<sup>th</sup> Ed., p. 1167. As such, a deed establishes land as separate either by conveying that land apart from other land, or by conveying other land so that the land in question is the remainder of what the conveyor possesses. Given the meaning of "separate" and "deed," the City's interpretation straightforwardly implements the plain language of the code.

**b. Appellant's interpretation of SMC 23.44.010.B.1.d is contrary to the language of the Code.**

By contrast, Appellant's interpretation of SMC 23.44.010.B.1.d is contrary to the language of the Code. Appellant focuses on Lot 7 as depicted on the plat of Yesler's Third Addition and regards the 1904 deed as dividing that lot into two "separate building sites" because the deed resulted in the two halves of the lot being separately owned --

notwithstanding that the deed conveyed more than just the East ½ of Lot 7 and the conveyor retained more than just the West ½ of Lot 7. Brief at 11-12.

However, the 1904 deed could not establish the halves of Lot 7 as “separate building sites” for purposes of SMC 23.44.010.B.1.d under the plain meaning of that section. In essence, Appellant interprets SMC 23.44.010.B.1.d to mean that the lines enclosing the land conveyed by a deed can be “layered over” the preexisting lot lines established by the plat, with the combination of those lines establishing “separate building sites.” Thus, in this case, Appellant takes the west line of the L-shaped area conveyed by the 1904 deed (consisting of Lot 6, the East ½ of Lot 7, and the East ½ of most of Lot 8) and layers it over the plat lot lines to come up with the West ½ of Lot 7 as a “separate building site.”

This approach effectively removes the phrase “separate building site” from the Code, in violation of the rule that statutes must be construed so that all the language is given effect and no portion is rendered meaningless or superfluous. *City of Spokane v. Rothwell*, 166 Wn.2d 872, 877, 215 P.3d 162 (2009). In Appellant’s interpretation, all that is required to satisfy SMC 23.44.010.B.1.d is a lot whose lot lines are derived from a group of documents in the public records (here, a deed and a plat). In essence, this re-words SMC 23.44.010.B.1.d to simply require

that the “lot . . . was established . . . in the public records of the county or City prior to July 24, 1957. . . .” The phrase “separate building site” is given no meaning.

By contrast, the City’s interpretation gives that phrase meaning: the deed, either through what it conveys or through what the conveyor retains, defines the specific area (e.g., the lot for which “separate building site” status is claimed) as a building site separate from any other building sites.

**c. Whether the 1904 deed effected a lawful division of property is not relevant.**

Appellant places great emphasis on the idea that, in the early 1900’s (prior to the advent of laws regulating subdivisions), “a landowner could divide his own property by selling a portion to a third party. The portion conveyed would be described in a deed. . . .” Appellant’s Opening Brief (“Brief”) at 8. Thus, Appellant asserts that the 1904 conveyance was “a lawful division of property under the laws in place at that time.” *Id.*

However, whether a lot was lawfully created in the sense of resulting from a division made in compliance with any applicable subdivision regulations is not the inquiry under SMC 23.44.010.B.1.d. The City’s Land Use Code has a separate provision to prevent development of lots whose creation did not comply with applicable subdivision

requirements. Under the City’s Code, “[n]o building permit or other development permit shall be issued for any lot, tract or parcel of land divided in violation of RCW Chapter 58.17 or this subtitle, unless the Director finds that the public interest will not be adversely affected by the decision. . . .” SMC 23.20.012.<sup>2</sup>

Moreover, nothing in the language of SMC 23.44.010.B.1.d refers to the lawfulness of a division of land. Thus, whether a lot has been “established as a separate building site . . . by deed” under SMC 23.44.010.B.1.d is not equivalent to the inquiry whether a division of land complied with applicable laws (or lack thereof) regarding land division.

Ultimately, Appellant’s focus on “lawful division” is simply a distraction. At its core, Appellant’s argument is that because a deed alone could legally divide property in 1904, the 1904 deed had the effect of dividing Lot 7 into two halves. But this misses the key point. The question under SMC 23.44.010.B.1.d is whether a lot was “established as a separate building site . . . by deed.” To the extent that the concept of division of land by deed plays into this inquiry, the crucial question is: what is the property that is affected by the deed and, to the extent that the deed effects a division, how does the division relate to that property?

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<sup>2</sup> The pertinent subtitle of SMC Title 23 contains platting requirements. RCW ch. 58.17 is the state subdivision statute.

Appellant's concept is that a deed can divide a lot that is depicted in a different document and that does not fully correspond to the land owned by the conveyor of the deed, and thereby create "separate building sites" whose lot lines do not correspond to either the land conveyed by the deed or the land retained by the conveyor. As discussed above, that concept cannot be squared with the plain meaning of 23.44.010.B.1.d.

Because the existence of a "lawful division" is irrelevant to the question of code interpretation posed in this case, the cases cited by Appellant are not on point. Brief at 8. None of these cases addresses SMC 23.44.010.B.1.d. At most, these cases suggest that, in the early 1900's, one could sell and convey lots without the need for subdivision approval – but this case does not turn on that issue.<sup>3</sup> Similarly, Appellant's argument that the issuance of a building permit to Remer in 1907 "further establishes that Lot 7 was lawfully divided" is also irrelevant. Brief at 10.

**d. Even if SMC 23.44.010.B.1.d were ambiguous, the City's interpretation would be entitled to deference.**

As noted above, a provision that remains susceptible to more than one reasonable interpretation after the plain meaning inquiry is ambiguous. *Tingey v. Haisch*, 159 Wn.2d at 657. Appellant has not established that

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<sup>3</sup> By the same token, it does not matter whether Seattle could "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." Brief at 10.

SMC 23.44.010.B.1.d is ambiguous. By definition, Appellant's interpretation is not reasonable, since it is contrary to the language of the code.

However, even if SMC 23.44.010.B.1.d were ambiguous, the City's interpretation would be entitled to deference. *Citizens for a Safe Neighborhood v. City of Seattle*, 67 Wn. App. 436, 440, 836 P.2d 235 (1992) (considerable judicial deference should be given to the construction of an ordinance by those officials charged with its enforcement).<sup>4</sup>

In sum, Appellant has not carried his burden of establishing that the land use decision is an erroneous interpretation of the law, after allowing for such deference as is due the construction of a law by a local jurisdiction with expertise. RCW 36.70C.130(1)(b).

**2. The City's decision properly applied the law to the facts and was supported by substantial evidence.**

Appellant also cannot meet his burden of showing that the City's land use decision is not supported by evidence that is substantial when viewed in light of the whole record or that the decision is a clearly erroneous application of the law to the facts. RCW 36.70C.130(1)(c, d).

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<sup>4</sup> Moreover, to the extent that it is relevant to the deference inquiry, the City's interpretation in this case was not an isolated occurrence. *See* AR 00106-00115, 00133-00147.

- a. **The City properly applied the law to the facts, and its decision was supported by substantial evidence, under the correct interpretation of SMC 23.44.010.B.1.d.**

It is undisputed that there has never been a deed meeting the requirements of SMC 23.44.010.B.1.d under the correct interpretation of that section. While Appellant relies on the 1904 deed from Baird to Remer, that deed is insufficient: Baird did not convey the West ½ of Lot 7 at all, and retained both the West ½ of Lot 7 and the West ½ of most of Lot 8. AR 00003, 00044. As such, the City's determination that the requirements of SMC 23.44.010.B.1.d were not met was a proper application of the law to the facts, supported by substantial evidence. Appellant's argument to the contrary (Brief at 11-13) misses the mark, as it is based on a fundamentally incorrect interpretation of SMC 23.44.010.B.1.d.

Moreover, Appellant's contention that the 1904 deed must have established the two halves of Lot 7 as "separate building sites" because the City issued a building permit for the East ½ of Lot 7 fails both factually and legally. Brief at 11-12. As a factual matter, while there is a house on the East ½ of Lot 7, the legal description for the 1907 building permit was the East ½ of Lots 7 and 8. AR 00004, 00048. This precludes an argument that

the 1907 building permit confirmed the status of the East ½ of Lot 7 as a separate building site.

In any event, as a legal matter, City approval of construction of a house on the East ½ of Lot 7 says nothing about whether the halves of Lot 7 were established as separate building sites by the 1904 deed. Appellant marshals the 1907 building permit in support of his argument that “Lot 7 was lawfully divided” (Brief at 10), but the lawfulness of any division effected by the 1904 deed is not the issue under SMC 23.44.010.B.1.d. Thus, whether houses could have been built in various locations in 1907, purportedly confirming that a legal division of certain property had occurred, is irrelevant.<sup>5</sup>

Simply put, nothing in the language of SMC 23.44.010.B.1.d makes issuance of a building permit a relevant factor in determining whether a lot was “established as a separate building site . . . by deed.” On the contrary, Appellant relies on the 1907 building permit to support a reading of SMC 23.44.010.B.1.d that is contrary to the plain meaning of that section.<sup>6</sup>

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<sup>5</sup> By the same token, it does not matter whether Seattle could “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.” Brief at 12.

<sup>6</sup> Finally, there is no basis for any suggestion that the City, through the 1907 permit, specifically recognized the halves of Lot 7 as “separate building sites” as that phrase is used in SMC 23.44.010.B.1.d. It is undisputed that SMC 23.44.010.B.1.d did not exist in 1907.

**b. The Examiner correctly distinguished between establishing a separate building site “by deed” versus “by building permit.”**

Appellant places much emphasis on the Hearing Examiner’s statement that “[t]he historic records . . . do not show that the west half of Lot 7 was ever the subject of a separate building permit.” AR 00181. Appellant suggests that the Hearing Examiner somehow held that a building permit would need to have been issued for the West ½ of Lot 7 for that lot to have been established as a separate building site by deed. Brief at 13-14.

Appellant misconstrues the Examiner’s decision. Under SMC 23.44.010.B.1d, a lot may be “established as a separate building site in the public records of the county or City” in a number of ways: “by deed, contract of sale, mortgage, platting or building permit.” The Hearing Examiner correctly noted that the West ½ of Lot 7 had never been the subject of a separate building permit (which relates to whether a lot area exception could be granted on the basis of establishment of a separate building site “by . . . building permit”). Moreover, it makes sense that the Examiner would have made this statement given that the Interpretation

concluded that the West ½ of Lot 7 did not qualify for any of the exceptions in SMC 23.44.010.B. AR 00006.<sup>7</sup>

However, there is no indication that the Hearing Examiner thought that a building permit would need to have been issued for the West ½ of Lot 7 for that lot to have been established as a separate building site by deed. The Examiner's reason for concluding that the West ½ of Lot 7 was not established as a separate building site "by deed" was that the historic records do not show that the West ½ of Lot 7 "was ever owned separately from all of the abutting properties." AR 00181. This conclusion was correct under the plain meaning of the Code language.

In sum, there is no basis for the idea that the Examiner's resolution of the "by deed" inquiry turned on the idea that the West ½ of Lot 7 had to have its own building permit. In this situation, there is also no relevance to Appellant's contention that the Examiner erred because, in Appellant's view of the law, "separate building site" status for a lot could not turn on whether a building permit had been issued for that lot. Brief at 14.

In any event, Appellant's characterization of the law is incorrect. To qualify under SMC 23.44.010.B.1.d, a lot must have been "established

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<sup>7</sup> In this appeal, Appellant does not claim that the West ½ of Lot 7 was established as a separate building site "by building permit," but rather that the West ½ of Lot 7 was established as a separate building site "by deed," with the 1907 building permit providing factual support for Appellant's argument. Brief at 13 ("the 1904 deed is what actually established this parcel as a separate building site. . .").

as a separate building site . . . by deed . . . or building permit” and it must meet certain additional requirements. It is undisputed that those additional requirements are not at issue in this case.

Under certain circumstances, those additional requirements include that the lot “is not developed with all or part of a principal structure.” SMC 23.44.010.B.1.d.3 (AR 00008). However, the requirement that there be no principal structure refers to the situation *today* (when the exception is sought). Absence of a principal structure today is not inconsistent with the idea that issuance of a building permit prior to July 24, 1957, could support that a lot was “established as a separate building site . . . by building permit.”

In sum, Appellant cannot meet his burden of showing that the City’s land use decision is not supported by evidence that is substantial when viewed in light of the whole record or that the decision is a clearly erroneous application of the law to the facts. RCW 36.70C.130(1)(c, d).

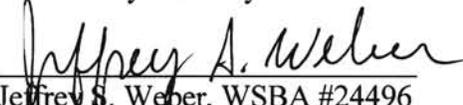
**V. CONCLUSION**

For all of the foregoing reasons, the City properly determined that the West ½ of Lot 7 did not qualify for a lot area exception pursuant to SMC 23.44.010.B.1.d. Thus, the City respectfully requests that the Court affirm the Superior Court's dismissal of Appellant's Land Use Petition.

DATED this 22<sup>nd</sup> day of May, 2014.

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**CERTIFICATE OF SERVICE**

I certify under penalty of perjury under the laws of the State of Washington that, on this day, I sent a copy of the **City of Seattle's**

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Dated this 22nd day of May, 2014.

  
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