CITY OF SPOKANE HEARING EXAMINER

Re:	Appeal by Rodney Bacon and Greer Gibson Bacon of the Planning Director's decision to approve a boundary line adjustment	)))))	FINDINGS, CONCLUSIONS AND DECISION FILE NO. Z13B0006-AP

SUMMARY OF APPEAL AND DECISION

Summary of Appeal: Rodney Bacon and Greer Gibson Bacon have filed an appeal of a decision by the City's Planning Director approving the application of Parsons Construction, Inc. for a boundary line adjustment, under File No. Z13B0006BLA, related to real estate located at 2607 S. Denver St., Spokane, Washington.

Decision: The decision of the Planning Director is upheld.

FINDINGS OF FACT
BACKGROUND INFORMATION

Appellant: Rodney Bacon and Greer Gibson Bacon
1308 E. 26th Avenue
Spokane, WA 99203-3345

Represented by: Kelly Konkright, Attorney at Law
Lukins & Annis, P.S.
717 W. Sprague Avenue, Suite 1600
Spokane, WA 99201

Respondent: Parsons Construction, Inc.
7703 E. Trent Avenue
Spokane, WA 99212-2213

Represented by: Nikalous O. Armitage, Attorney at Law
Layman Law Firm, PLLP
601 S. Division St.
Spokane, WA 99202-1335

Respondent: Planning & Developer Services
City of Spokane
808 West Spokane Falls Boulevard
Spokane, WA 99201

Represented by: James Richman, Attorney at Law
City of Spokane, Legal Department
808 West Spokane Falls Boulevard
Spokane, WA 99201

Authorizing Ordinances: SMC 17G.050.010 et seq.; SMC 17G.080.010 et seq.

Zoning: The zoning is RSF (Residential Single Family).

Comprehensive Plan Land Use Designation: The property is designated as Residential 4-10 in the City's 2012 Comprehensive Plan.

Date of Decision being Appealed: April 7, 2013

Date of Appeal: April 12, 2013

Hearing Date: May 23, 2013

Testimony:

Kelly Konkright, Attorney at Law
Lukins & Annis, P.S.
717 W. Sprague Avenue, Suite 1600
Spokane, WA 99201

James Richman, Attorney at Law
City of Spokane, Legal Department
808 West Spokane Falls Blvd.
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Nikalous O. Armitage, Attorney at Law
Layman Law Firm, PLLP
601 S. Division St.
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David Parsons
Parsons Construction, Inc.
7703 E. Trent Avenue
Spokane, WA 99212-2213

Lori Patrick
City of Spokane, Current Planning
808 West Spokane Falls Blvd.
Spokane, WA 99201

Greer Gibson Bacon
1308 E. 26th Avenue
Spokane, WA 99203-3345

Exhibits:

1. Request for Appeal
2. Letter dated 04-22-13 to parties setting the hearing date
3. Notice of Appearance filed by Nikalous Armitage, Attorney for Parsons Construction, Inc.
4. Email dated 02-24-11 to Nikalous Armitage, Attorney at Law
5. Notice of Appearance filed by James A. Richman, Assistant City Attorney
6. Appellant's Brief
   - 6a Declaration of Kelly E Konkright
   - 6b Declaration of Greer Gibson Bacon
7. City's Pre-Hearing Response to the Appeal Parsons Construction, Inc.'s Brief in Opposition to Appeal
8. Parsons Construction, Inc.'s Brief in Opposition to Appeal
   - 8a Declaration of Nikalous O. Armitage in support of Parsons Construction, Inc.'s Brief in Opposition to Appeal
   - 8b Declaration of Wanda Clark

A Exhibits received at the hearing, submitted by Nikalous Armitage, Attorney at Law

A-1 Declaration of Greer Gibson Bacon
A-2 Statutory Warranty Deed of Tax Parcel No. 35294-2302

FINDINGS AND CONCLUSIONS

A. Introduction

This appeal concerns the Planning Director's approval of a boundary line adjustment pertaining to the real property located at 2607 S. Denver Street. The application for the boundary line adjustment was made on behalf of the property owner, Parsons Construction, Inc. Historically, the property had been used for one, single-family residence, which was constructed decades prior. Parsons Construction, Inc. proceeded to demolish that residence, and thereafter intended to construct new residences on each of the three platted lots that together formed the whole property, and which were previously used collectively as the site for one residence.

The neighboring landowners, Rodney Bacon and Greer Gibson Bacon, objected to the proposed development and use of the property. Accordingly, they filed an appeal of the Planning Director's decision to approve the boundary line adjustment, contending that the short plat process should have been followed in order to approve the proposed uses of the property. The appeal was timely filed, and therefore a hearing on the appeal was scheduled.

A hearing was held on the appeal on May 23, 2013, in the City Council Briefing Center on the Lower Level of Spokane City Hall. At that time testimony and arguments were presented and exhibits were entered into the record. The Appellants were represented by Kelly Konkright, Lukins & Annis, P.S.. Parsons Construction, Inc. was represented by Nikalous O. Armitage, Layman Law Firm, PLLP. The City was represented by James Richman, Attorney at Law.

Based upon the record, the testimony at the hearing, and the appeal statements submitted by the Appellants with responses by the City and Parsons Construction, Inc., the Hearing Examiner by this decision makes the following findings and conclusions.

B. Standard of Review

Review of an administrative decision by the Hearing Examiner is governed by SMC 17G.050.320. Subsections B and C of that section state:

> B. The Hearing Examiner may affirm, modify, remand or reverse the decision being appealed. In considering the appeal, the Examiner must act in a manner that is consistent with the criteria for the appropriate category of action being appealed.
>
> C. The original decision being appealed is presumptively correct. The burden of persuasion is upon the appellant to show that the original decision was in error and relief sought in the appeal should be granted.

C. Background Facts

On or about January 24, 2013, Parsons Construction, Inc. ("Parsons") acquired certain real property located at 2607 S. Denver Street (the "Denver Property") from Numerica Credit Union. See Exhibit 6a (Statutory Warranty Deed attached as Exhibit "A" to Declaration of K. Konkright). The conveyance was made by statutory warranty deed recorded on January 30, 2013, under instrument no. 6172006. See id.

The legal description of the Denver Property is as follows:

> Lots 6, 7, and 8, Block 5, MCREA AND MERRYWEATHER'S ADDITION TO MANITO PARK, as per plat recorded in Volume "I" of Plats, page 28, records of Spokane County;
>
> Situate in the City of Spokane, County of Spokane, State of Washington.

See id.

According to the original plat, the Denver Property consists of three platted lots. See Exhibit 6b (Declaration of G. G. Bacon ¶ 4); see also Exhibit 6a (Declaration of K. Konkright ¶ 4). The plat creating these lots has not been vacated. Testimony of L. Patrick. Thus, the Denver Property currently consists of three platted lots. See Exhibit 8b (Declaration of W. Clark ¶ 3).

When Parsons acquired the Denver Property, there was a residence at the site. That residence was constructed in approximately 1944, over sixty years ago. See Exhibit 6b (Declaration of G. G. Bacon ¶ 5). The residence was constructed across two of the lots, and touched or was close to the internal lot line of the third lot. See Exhibit 6b (Declaration of G. G. Bacon ¶ 5 and Exhibit D attached); see also Exhibit 8b (Declaration of W. Clark ¶ 5). There were no other houses constructed at the Denver Property. Testimony of G. G. Bacon.

After Parsons purchased the Denver Property, Parsons demolished the residence. See Testimony of D. Parsons. The demolition project was approved by city permit[1]. See Exhibit 8b (Declaration of W. Clark ¶ 5).

Although there are three platted lots, the Denver Property is assigned a single tax parcel number. See Exhibit 8b (Declaration of W. Clark ¶ 3). The tax parcel number of the Denver Property is 35294.2302. See id. It is common in Spokane County for multiple platted lots under a single ownership to be designated under one tax parcel number. See Exhibit 8b (Declaration of W. Clark ¶ 4). This is done for administrative efficiency and convenience, both for local government and the property owner. See id.

On or about February 7, 2013, Matthew Collins, on behalf of Parsons Construction, Inc., submitted an application (the "Application") for a boundary line adjustment ("BLA") of the Denver Property. See Exhibit 1 (Reciept and Application).

The Application states a current address of 2607 S. Denver Street. See Exhibit 1 (Application). The Application also references Parcels A, B, C, with new addresses on South Denver Street, numbered 2605, 2906, and 2613. See id.

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[1] The demolition permit was not challenged and is not the subject of this appeal.

There were two maps submitted with the Application. The maps appear to be portions of final plats. The first map, marked "before," shows Lots 6, 7, and 8, shaded to suggest a single parcel, although the lot lines between the three lots are clearly shown. See Exhibit 1 (Application). The second map, marked "after," shows the same three lots, except the lot lines between Lots 6, 7, and 8 are marked as heavier lines, and each of the three lots are also labeled "A," "B," and "C." See id.

The proposed boundary line adjustment was pursued in order to segregate the property into three tax parcels. Testimony of L. Patrick; see also Exhibit 8b (Declaration of W. Clark ¶ 5). The BLA had no effect on the underlying plat, which already established three legal lots for title purposes. See id. No new lots were created by the BLA. See id. No lot lines were modified by the proposed BLA. Testimony of L. Patrick.

On April 7, 2014, Planning & Development Services issued a Certificate of Approval of Boundary Line Adjustment (the "Certificate") to Mr. Collins. See Exhibit 1 (Certificate). The City did not require Parsons to apply for a short plat, or follow the procedures applicable for short plats, in order to use or develop the Denver Property as three lots. Testimony of L. Patrick; see also Exhibit 8b (Declaration of W. Clark ¶ 5).

According to the Certificate, the legal description of the Denver Property **before** the BLA is as follows: "Manito Pk McCrea&Mer L6-8 B5." See Exhibit 1 (Certificate). The Certificate references the property under a single parcel number, Assessor's Parcel No. 35296.2302, and the site is identified by the address 2607 S. Denver Street. See id. However, the legal description is for three lots.

The Certificate also includes a legal description of the Denver Property **after** the BLA, as follows:

> Segregation A (addressed as 2605 S. Denver St.):
> Manito Pk McCrea&Mer L6 B5
> Segregation B (addressed as 2609 S. Denver St.):
> Manito Pk McCrea&Mer L7 B5
> Segregation C (addressed as 2613 S. Denver St.):
> Manito Pk McCrea&Mer L8 B5

See id. According to the Certificate, new addresses are assigned by the city. The legal description has been re-arranged into three separate lines, but in essence is the same. In other words, the legal description after the BLA remains Lots 6-8, Block 5, of McCrea & Merryweather's Addition to Manito Park.

On April 12, 2013, Rodney Bacon and Greer Gibson Bacon (the "Appellants") filed a Request for Appeal or Reconsideration application with Planning & Development Services. See Exhibit 1 (Receipt and Application). Pursuant to this appeal, the Appellants challenged the decision of the Planning Director approving the BLA for the Denver Property. See Exhibit 1 (Request for Appeal). The Appellants requested that the Planning Director's decision be reversed, and that Parsons be required to follow the short plat process in order to divide the Denver Property into three lots. See id.

D. Discussion of Facts and Law

A single, legal issue is before the Hearing Examiner: Were the three lots originally created pursuant to a 1907 plat, and now owned by Parsons, merged into a single lot by operation of law when the previous owner constructed a single family residence across the internal boundary lines separating the three lots? For the reasons that follow, the Hearing Examiner concludes that no merger took place, and that this answer is dispositive of the appeal.

The Appellant's theory is that because the City of Spokane allowed a prior owner to construct a house across the internal boundary lines of three lots of an "antiquated plat", the three lots merged by operation of law into a single lot for land use purposes. See e.g. Appellant's Brief, pp. 1 & 3. As a result of the merger, the Appellant insists, the current owner cannot develop the property as originally platted (i.e. as three lots) without first applying for a short plat of the property. See id. According to the Appellants, by approving the Parsons' application for a boundary line adjustment, the City allowed the owner to "re-establish" the "extinguished 1907 plat lines," in effect "re-dividing" the Parsons Property into three separate lots. See Appellant's Brief, p. 6. Appellants ultimately contend that Parsons should have been required to follow the more rigorous procedures for approval of a short plat, and that the failure to do so deprived the Bacons of notice and an opportunity to be heard, i.e. their due process rights were violated. See Appellant's Brief, p. 6.

The linchpin of Appellants' appeal is the premise that a legal merger of lots took place, some sixty years ago, when the prior owner constructed a residence across internal boundary lines. The assertion that a merger occurred is a legal conclusion, reached by applying a proposed rule of law to the undisputed fact that a house was constructed across the lot lines of an old plat. Before that legal conclusion can be sustained on appeal, however, the Appellants must first identify the legal authority in Washington which supports application of such a rule. This the Appellants have not done. The Appellants have not shown, in their original appeal or in subsequent briefing, that any Washington authority has adopted or applied the proposed merger rule, directly or indirectly. In the absence of such authority, the Hearing Examiner has no legal footing for granting the requested relief.

To establish that a merger rule should apply, the Appellants cite to a Connecticut case, namely Iannucci v. Zoning Board of Appeals, 25 Conn.App. 85, 592 A.2d 970 (1991). In that case, as the Appellants recounted, the appellate court determined that when the owner constructed a residence across the boundary line of two platted lots, by legal implication the two lots merged into one. See Iannucci, 25 Conn.App. at 89-90; see also Appellant's Brief, p. 5. There are a number of other jurisdictions, in addition to Connecticut, that follow a similar rule. In some jurisdictions, the rule originates in the common law. See e.g. Mauri v. Zoning Board of Appeals of Newton, 83 Mass.App.Ct. 336, 983 N.E.2d 742 (2013) (applying a common law rule that undersized lots held in common ownership will normally be treated as a single lot for zoning purposes in order to minimize nonconformities); see also Remes v. Montgomery County, 387 Md. 52, 874 A.2d 470 (2005) (discussing Maryland's "zoning meger rule" in detail). In other jurisdictions, the merger rule arises from statute or ordinance. See e.g. Sutton v. Town of Gilford, 160 N.H. 43, 992 A.2d 709 (2010) (upholding the automatic merger of two lots because the applicable zoning ordinance mandated the merger of substandard, contiguous, undeveloped lots in common ownership). That said, the Hearing Examiner, like the superior court that previously considered the issue in another context, can find no authority in Washington that adopts or applies this rule of law.

The Appellants are requesting that the Hearing Examiner sustain their appeal by applying a legal rule that, by all indications, has no foundation in Washington law. The suggested rule is not part of Washington's common law. The state legislature has not incorporated the rule into Washington's subdivision law. See RCW 58.17.010 et seq. The municipal code does not incorporate the doctrine, in the subdivision code or elsewhere to the knowledge of the Hearing Examiner. See e.g. SMC 17G.080.010 et seq. (governing subdivisions). There is no case, statute, ordinance, or regulation in Washington that adopts this rule, or, if there is any such authority, it has not been cited by any of the parties in this appeal.

With respect to the proposed merger rule, Mr. Konkright put it succinctly: "There is no Washington law." To fill the alleged gap in the law, the Appellants invite the Hearing Examiner to make new law, as the city correctly pointed out. However, the Hearing Examiner does not have jurisdiction to create or adopt the doctrines that will be applied in a given case. There is no "judge-made" law at this administrative level. The Hearing Examiner only has the authority granted to the office by statute or ordinance. See HJS Development v. Pierce County, 148 Wn.2d 451, 471, 61 P.3d 1141 (2003) (holding that hearing examiner had authority to revoke a preliminary plat under the applicable ordinance); see also King County v. King County Hearing Examiner, 135 Wn.App. 312, 144 P.3d 345 (2006) (holding that, under the applicable ordinances and regulations, the hearing examiner lacked authority to conditionally deny an appeal). The Hearing Examiner does not have jurisdiction to borrow a rule of law from another state and apply it to the instant proceedings.

Moreover, there is no particular reason why the Hearing Examiner should adopt Connecticut law, versus the law of any other state, in order to fill the alleged gap in the law. The Hearing Examiner concludes that zoning merger is not the law of this state. Therefore, a property owner is allowed to utilize or develop his or her property in accordance with the plat of record. The fact that Connecticut follows a different rule does not establish that there is a gap in Washington law. It only shows that Washington law is different than Connecticut law. There may be legitimate policy reasons that Washington *should* adopt a rule of zoning merger. However, that is something for legislative bodies or the courts to address. The Hearing Examiner has no authority to create a common law rule or enact legislation.

Although there is no law on zoning merger in Washington, there is some guidance in Washington on the claim that Parsons should be required to follow the short plat process. The only case that appears to lend theoretical support to the position of the Appellants is R/L Associates, Inc. v. Klockars, 52 Wn.App. 726, 732, 763 P.2d 1244 (1988). In that case, the Court of Appeals held that a change in the boundaries between two lots was so "drastic" as to create "two essentially new lots." See R/L Associates, Inc. v. Klockars, 52 Wn.App. 726, 732, 763 P.2d 1244 (1988). Even though there would be two lots before and two lots after the proposed boundary line adjustment, the Court of Appeals still concluded that the owner's proposal was not a "minor" change and would require approval through the subdivision process. See Klockars, 52 Wn.App. at 733-34. As a result, the Court of Appeals affirmed a lower court decision to deny the requested BLA. See id., at 735.

However, the decision in Klockars cannot provide any support to Appellants, for at least two reasons. First, the reasoning of Klockars was specifically aborgated in Seattle v. Crispin, 149 Wn2d 896, 71 P.3d 208 (2003). In Crispin, the Washington Supreme Court held that the substantial reconfiguration of the lot lines between three parcels could properly be accomplished by boundary line adjustment, and did not require approval through the subdivision process. The Court concluded that the mere adjustment in boundaries, without creating any

new lots, was expressly exempt from the subdivision statutes per RCW 58.17.040(6). See Crispin, 149 Wn2d at 903 (citing its own decision in Island County v. Dillingham Development Co., 99 Wn.2d 215, 662 P.2d 32 (1983)). In reaching this conclusion, the Court recognized that the subdivision statute does not condition boundary adjustments on the degree of the change, in stark contrast to the holding in Klockars. See Crispin, 149 Wn2d at 903-4. The critical factor, rather, was whether any new lots were created. See id. If no new lots are created, the BLA proposal is exempt from the subdivision statutes. See id.

Second, even if Klockars was still good law, the case is clearly distinguishable from the situation presented by the Appellants. In Klockars, the Court of Appeals concluded that a "drastic" change in the boundaries required the use of the plat process, rather than a BLA. In this case, the BLA application does not change or modify the boundaries in the slightest. The only reason for the BLA application is to facilitate the assignment of three tax parcel numbers, one for each of the platted lots. Given that there is no change to the lot lines at all, the holding of Klockars does not support the contention that Parsons is required to apply for a short plat.

The Appellants contend that the respondents, by following a BLA procedure to "divide" the lots, tacitly admitted that the platted lots were extinguished by merger. See Appellant's Brief, p. 6 n.1. This argument has some surface appeal, because it would seem that if the original plat establishes the lot boundaries, a boundary line adjustment to confirm the exact same boundary lines is wholly unnecessary. From this apparent incongruity, the Appellants infer that the BLA process must have been used to divide one larger lot into three. However, the city and Parsons have provided a reasonable explanation, supported by substantial evidence, to demonstrate why the BLA process was followed.

There was no formal aggregation of the three lots, at any time after the 1907 plat. The plat was not vacated at any time. At some point, for administrative convenience, a single tax parcel number was assigned to three lots, undoubtedly because those lots were under common ownership. The BLA process was utilized in order to segregate the property into three tax parcels. See Exhibit 8b (Declaration of W. Clark ¶ 5). This procedure was authorized by the municipal code, which provides as in pertinent part as follows:

> **Where more than one adjoining lot is in the same ownership**, the ownership may be separated as follows: ...If all requirements of this chapter will be met after separation, including lot size, density and parking, **the ownership may be separated through either a boundary line adjustment or plat**, as specified under chapter 17G.080 SMC, Subdivisions.

See SMC 17G.110.200(D) (emphasis added). There was no claim or argument that the lots, before or after the BLA, did not meet the minimum lot size or other requirements. There was no claim that the three lots were nonconforming, or were restricted from development in any way because of such a status. Although the plat may be "antiquated," the plat legally created three lots and those lots have sufficient area, to the Hearing Examiner's understanding, to conform to the current code. The BLA did not actually "adjust" the existing lot lines at all. The BLA, in essence, did nothing other than provide a formal basis upon which to accomplish a tax segregation, a process which does not affect the platted boundaries or the underlying title.

The Appellants assert that because the short plat process was not followed by the respondents, they were deprived of notice and an opportunity to be heard regarding the planned subdivision of the Denver Property. See Appellant's Brief, p. 6. The Appellant rely upon the

SMC 17G.060 (land use application procedures) and SMC 17G.080 (subdivisions) to establish such rights. The Appellants reliance on these provisions is misplaced. Boundary line adjustments are specifically excluded from the land use application procedures. See SMC 17G.060.030(A); see also RCW 58.17.040(6) (exempting boundary line adjustments from the subdivision process). The respondents were explicitly authorized to follow the BLA process to separate adjoining lots under a single ownership, as noted above. See SMC 17G.110.200(D). The BLA process is ministerial, and required no notice to the Appellants. See SMC 17G.080.030(A) (describing the procedures to accomplish a boundary line adjustment, which do not include public notice). There is no evidence in this record that the respondents did not properly adhere to the code requirements to process and approve the BLA.

Moreover, the Appellants' argument necessarily assumes that a short plat application is required in order to divide the Denver Property into three lots, a conclusion that only follows if a legal merger took place. If a merger took place, then a short plat would have been needed to "re-divide" the land into three lots. The fundamental premise of the due process claim fails. Because no merger took place, the notice and hearing procedures for short plats have no application here. The Hearing Examiner agrees with the superior court, which reached the same conclusion in the context of a request for injunctive relief:

> So I can't find at this point any authority for the proposition that the lines have been extinguished or that the three lots have now been merged into one lot, at least not under Washington law. **So for that reason, the Bacons don't have a clear legal right to due process where there's no new lots created**. And it follows, then, that they don't have a clear legal right. It also follows that then there would be no right that could be possibly invaded, and thus no irreparable harm.

See Exhibit 8a (Court's Oral Ruling, p. 8, attached as Ex. 4 to Declaration of N. Armitage (emphasis added)). There is no authority in Washington that supports the theory of merger. As a consequence, it follows that a subdivision under RCW 58.17 and the subdivision code of the City of Spokane was not necessary. The Appellants had no rights to due process which could have been violated.

DECISION

Based upon the findings and conclusions above, as well as the fact that the Director's decision is presumptively correct, the Hearing Examiner finds that the Planning Director's decision was correct and therefore should stand.

DATED this 5th day of June 2013.

Brian T. McGinn
City of Spokane Hearing Examiner

NOTICE OF RIGHT TO APPEAL

Appeals of decisions by the Hearing Examiner are governed by Spokane Municipal Code 17G.060.210 and 17G.050.

Decisions by the Hearing Examiner regarding administrative appeals are final. They may be appealed by any party of record by filing a Land Use Petition with the Superior Court of Spokane County. **THE LAND USE PETITION MUST BE FILED AND THE CITY OF SPOKANE MUST BE SERVED WITHIN TWENTY-ONE (21) CALENDAR DAYS OF THE DATE OF THE DECISION SET OUT ABOVE.** The date of the decision is the 5th day of June 2013. **THE DATE OF THE LAST DAY TO APPEAL IS THE 26th DAY OF June 2013.**

In addition to paying any Court costs to appeal the decision, you may be required to pay a transcript fee to the City of Spokane to cover the costs of preparing a verbatim transcript and otherwise preparing a full record for the Court.