SUPERIOR COURT OF WASHINGTON IN AND FOR KING COUNTY

BENDARE DUNDAT, INC, a Washington Corporation, Plaintiff, v. The CITY OF SEATTLE, a municipal corporation, Defendant.	No. COMPLAINT FOR DECLARATORY JUDGMENT

PLAINTIFF BENDARE DUNDAT, INC hereby complains and avers as follows:

I. PARTIES

1.1. Plaintiff Bendare Dundat, Inc. is a Washington corporation in the business of developing housing in the City's Lowrise zones. Plaintiff was previously identified in the records of the Department of Construction and Inspections (DCI) as Restructure, LLC, an entity previously owned by Kirk Van Landeghen, the Director of Bendare Dundat, Inc.

1.2. Defendant City of Seattle is a municipal corporation operating as a first class city under a home rule charter and subject to Article XI, section 11 of the Washington State Constitution, which limits the City's authority to make and enforce local regulations to those regulations that "are not in conflict with general laws."

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II. JURISDICTION AND VENUE

2.1. This Court has jurisdiction pursuant to RCW 2.08.010 (original jurisdiction), and RCW 7.24.010 (declaratory judgment).

2.2. Venue is proper pursuant to RCW 4.12.010 (where the real property is located); RCW 4.12.020(2) (county where the cause of action accrued); RCW 4.12.025 (brought where the defendant resides); and RCW 7.24.010 (declaratory judgment).

III. FACTS

3.1. On September 20, 2015, Ordinance 124843 took effect.

3.1.1. Section 9 of this ordinance amended SMC 23.41.004 to add a new subsection A.8 that reads: "Except for development with [sic] the boundaries of a Master Planned Community, design review pursuant to Section 23.41.014 is required for a development proposal if the proposal is (a) for three or more attached or detached dwelling units or 2,000 square feet or more of non-residential gross floor area; and (b) on a lot that is abutting one or more qualifying lots and the combined size of development proposals on the subject lot and abutting qualifying lot or lots exceeds thresholds in Table A or Table B to Section 23.41.004. For purposes of the preceding sentence, a "qualifying lot" is a lot for which, on the day a complete application is submitted for a development proposal on the subject lot: (a) a complete Master Use Permit or building permit application for a development proposal that does not exceed thresholds in Table A or B to Section 23.41.004 is or has been submitted; and (b) a certificate of occupancy for the development has not been issued or, for a project where no certificate of occupancy is required, the final inspection pursuant to any issued building permit has not been completed. If complete applications for development proposals are submitted for the subject lot and qualifying lot on the same day, design review is required for both development proposals."

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3.1.2. Pursuant to this new subsection, when an owner of land zoned Lowrise 2 or Lowrise 3 submits an application for a Master Use Permit (MUP) to build three or more residences, but fewer than eight residences, and the owner of an adjoining lot also submits an application for a MUP to build residences, so that the total number of residences on the two lots equals eight or more, the Department of Construction and Inspections (DCI) will only accept a MUP application from whichever property owner first persuades DCI that its application is complete. The lot for which the application is deemed complete then becomes the "qualifying lot," and DCI will not accept an application from the owner of the abutting lot until that owner submits to the full Design Review process in SMC 23.41.014.

3.1.3. This full Design Review Process does not allow an owner to submit a MUP application until after one or more Early Design Guidance (EDG) meetings before the Design Review Board.

3.1.4. The development on the abutting lot also becomes subject to SEPA as a result of the application of SMC 23.41.004.A.8, even though the development on the abutting lot would otherwise be categorically exempt as minor new construction, because projects subject to design review require a "land use decision that is not exempt under subsection 25.05.800.F" of the City's SEPA rules, and therefore are not exempt from SEPA pursuant to SMC 25.05.800.A.1.

3.1.5. For example, in the Lowrise 3 zone, a proposal is categorically exempt from SEPA if it comprises eight or fewer dwelling units, but a proposal for more than two dwelling units will become subject to SEPA when Design Review is required under SMC 23.41.004.A.8.

3.1.6. In other words, an applicant in the Lowrise 2 or Lowrise 3 zones who would otherwise be exempt from Design Review and SEPA will have to comply with

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both processes if DCI determines that an abutting lot is a "qualifying lot" pursuant to SMC 23.41.004.A.8.

3.2. SMC 23.41.004.A.8 imposes significant fees and charges on an applicant by requiring an applicant to comply with the Design Review and SEPA processes because of development proposed on a "qualifying lot" .

3.2.1. It can take months just to schedule an EDG public meeting, and the Design Review Board can require more than one EDG meeting, adding additional months to the process.

3.2.2. The City's own documents help demonstrate such fees and charges. DCI's TIP No. 201 estimates that the EDG process will take 2-4 months and cost $3750 – 6250 in fees paid to DCI, and that the remainder of the Design Review Process will take another 6-12 months and cost an additional $16,250-17,500 in fees paid to DCI.

3.2.3. Such estimates of fees paid to DCI do not include the significant costs an applicant must pay its architect to go through the Design Review Process, nor the carrying costs for the project during the 8 to 16 months that DCI estimates it takes to complete the process, nor the cost of hiring consultants to prepare a SEPA checklist.

3.3. DCI is applying SMC 23.41.004.A.8 to Plaintiff Bendare Dundat, Inc., and is requiring Plaintiff to complete the Design Review process for Plaintiff's four proposed stand-alone dwelling units.

3.3.1 On February 5, 2016 DCI determined to be complete an application to develop the lot to the south of Plaintiff's lot with six dwelling units, Project No. 3023229. This lot to the South of Plaintiff's lot thus became the "qualifying lot" under SMC 23.41.004.A.8.

3.3.2 The address of this "qualifying lot" is 5029 Delrdidge Way SW. As stated in DCI's records, the Owner of this qualifying lot, as well as the Financially Responsible Party for its development, is "Oleg Afichuk, Westcost Homes, LLC" ("Westcost").

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3.3.3 Westcost has no relationship, financial or otherwise, with Plaintiff, and is a business competitor of Plaintiff's. The only relationship between the Westcost development and Plaintiff's development is that they are on abutting lots.

3.3.4 Westcost's intake appointment took place on January 28, 2016, well after Plaintiffs' intake appointment, but DCI deemed Westcost's application to be complete and Plaintiffs not complete, even though there are no code criteria for determining completeness for purposes of SMC 23.41.004.A.8.

3.4. Plaintiff's proposed development is at the street address of 5021 Delridge Way SW, on the lot immediately north of what is now the Westcost "qualifying lot."

3.4.1 Plaintiff first applied for a Preliminary Zoning Analysis letter on July 17, 2015, and DCI issued this letter on August 5, 2015, confirming that the four dwelling units that Plaintiff intends to build can take access off of Delridge Way SW rather than the alley to the west.

3.4.2 Plaintiff conducted its intake appointment with DCI on December 22, 2015. DCI deemed its application to be incomplete for purposes of SMC 23.41.004.A.8 because DCI determined that a small area of the lot qualifies as a steep slope, thereby triggering SEPA review even though DCI approved "relief" from this small area of steep slope on January 4, 2016.

3.4.3 While Plaintiff was preparing its SEPA checklist, DCI determined Westcost's application to be complete on January 28, 2015.

3.5. Plaintiff estimates that the time it will take Plaintiff to complete the Design Review process, and the fees that Plaintiff will have to pay DCI, will be consistent with DCI's estimates described in section 3.2.2 above.

3.5.1 In addition, Plaintiff's carrying costs for the land that is the subject of its application are $ 2,200 per month.

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3.5.2 In addition, Plaintiff estimates that the architectural fees to complete the Design Review process may exceed $30,000, perhaps substantially, although Plaintiff will not be able to determine the full extent of the cost of re-designing and potentially re-engineering the project until after the EDG meeting. In addition, the architectural and engineering fees that Plaintiff already has expended designing and permitting the project may be largely wasted.

IV. CAUSES OF ACTION

A. Declaratory Judgment

4.1. Plaintiff incorporates herein the averments set forth above.

4.2. There is a justiciable controversy between Plaintiff and the City.

4.2.1 The facts set forth above demonstrate an actual, present, existing dispute, or the mature seeds of one, between Plaintiff and the City.

4.2.2 Plaintiff and the City have genuine and opposing interests, which are direct and substantial and not merely potential, theoretical, abstract, or academic.

4.2.3 A judicial determination of the legality of SMC 23.41.004.A.8, both on its face and as applied to Plaintiff, will be final and conclusive and will terminate the dispute.

4.3. SMC 23.41.004.A.8 imposes fees and charges, both direct and indirect, on development of lots that abut "qualifying lots," and the City cannot establish that such fees and charges are "reasonably necessary as a direct result of the proposed development" on the lot that abuts the qualifying lot, in violation of RCW 82.02.020.

4.3.1 Development on a lot that abuts a qualifying lot incurs these fees and charges because of what is happening on the qualifying lot, even when the owner of the abutting lot has no control over or responsibility for what is happening on the qualifying lot.

4.3.2 The impact of development on a qualifying lot cannot be "a direct impact that has been identified as a consequence of a proposed development" on an abutting lot, and even if development on a qualifying lot could be such a direct impact, SMC

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23.41.004.A.8 does not provide for the individualized determination of impact that the statute requires the City to demonstrate that the fee or charge is reasonably necessary as a direct result of such development on a qualifying lot.

4.4. SMC 23.41:004.A.8 also effects a taking of property without compensation in violation of Article I, section 16 of the Washington State Constitution and the doctrine of unconstitutional conditions. This takings clause of the Washington State Constitution is given the same effect as the Fifth Amendment to the United States Constitution, and pursuant to *Koontz v. St. Johns River Water Management District*, 133 S. Ct. 2586 (2013), the City is unable to demonstrate that there is nexus and rough proportionality between the development of a qualifying lot and the fees, charges, and other exactions imposed by SMC 23.41.004.A.8 on an abutting lot.

4.5. SMC 23.41.004.A.8 also violates the substantive due process rights of the owner of an abutting lot as protected by Article I, section 3 of the Washington State Constitution. SMC 23.41.004.A.8 fails all three prongs of the test for a violation of substantive due process:

4.4.1. it is not aimed at achieving a legitimate public purpose;

4.4.2. even if one assumes a legitimate public purpose, it does not use means that are reasonably necessary to achieve that purpose; and

4.4.3. it is unduly oppressive on the owner of an abutting lot.

V. REQUEST FOR RELIEF

5.1. Plaintiff incorporates herein the averments set forth above.

5.2. Pursuant to the Uniform Declaratory Judgment Act, Chapter 7.24 RCW, Plaintiff asks this Court to declare that SMC 23.41.004.A.8 is invalid both facially and as applied to Plaintiff, for the reasons stated above.

5.3. Plaintiff asks this Court to grant such other relief as may be just and equitable.

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DATED this 11th day of April, 2016.

FOSTER PEPPER PLLC

By /s/ Patrick J. Schneider
/s/ Jacqueline C. Quarre

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