BEFORE THE HEARING EXAMINER FOR THE CITY OF REDMOND

In the Matter of Appeal of:	)	Appeal No. LAND-2016-02140
	)	
LARRY HOOPER	)	CITY OF REDMOND'S
	)	SUPPLEMENTAL BRIEFING
	)	

I. INTRODUCTION

At the conclusion of the Hooper Appeal hearing on February 15, 2017, the Hearing Examiner requested that the parties provide supplemental legal briefing. The inquiry from the Hearing Examiner initially focused on the concept of "innocent purchasers" and then included concepts of equity with specific citations to case law. The end request to the parties was for legal authority that would assist the Hearing Examiner with the issues presented during the hearing.

II. FACTS

As directed by the Hearing Examiner and agreed to by the parties, no additional facts are included in this briefing. The factual record was opened at 10 am on the 15th and was closed that same day at the conclusion of the hearing.

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III. LEGAL ARGUMENT

3.1 Mr. Hooper failed to meet his burden at the hearing.

Mr. Hooper is appealing the City's final letter decision issued by Mr. Odle on November 16, 2016. *See* City's Exhibit D (Admitted into the record at the hearing). That letter provides Mr. Hooper an opportunity to appeal the decision under RZC 21.76.060(I) by filing an appeal with the Redmond Hearing Examiner. *Id.*

RZC 21.76.060(I)(4) clearly outlines the standard of review and burden of proof for Mr. Hooper's appeal. "The Hearing Examiner may grant the appeal or grant the appeal with modifications if the Examiner determines that the appellant has carried the burden of proving that the Type I or II decision is not supported by a preponderance of the evidence or was clearly erroneous." RZC 21.76.060(I)(4). Based on this code section it was Mr. Hooper's burden at the hearing to prove that the City's final decision was not supported by a preponderance of the evidence or was clearly erroneous. The preponderance of the evidence standard requires that the evidence establish that the proposition at issue is more probably true than not true. *Mohr v. Grant*, 153 Wn.2d 812, 822, 108 P.3d 768 (2005); *Washington Pattern Jury Instructions--Civil* 21.01 (6th ed.); *In re Welfare of Sego*, 82 Wn.2d 736, 739 n. 2, 513 P.2d 831 (1973). A decision is clearly erroneous only if, after reviewing all of the evidence, the Hearing Examiner is left with the definitive and firm conviction that a mistake has been committed. *Wenatchee Sportsmen Ass'n v. Chelan Cty.*, 141 Wn.2d 169, 176, 4 P.3d 123 (2000); *Anderson v. Pierce County*, 86 Wn. App. 290, 302, 936 P.2d 432 (1997). In reviewing Mr. Hooper's appeal, the Hearing Examiner shall accord substantial weight to the decision of the department director (Type I) or Technical Committee (Type II). RZC 21.76.060(I)(4). Therefore, the Hearing Examiner is required to afford substantial weight to the City's final letter decision and only if Mr. Hooper can

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prove that his version of the facts is more probably true than not true, or that the decision was clearly erroneous, can he prevail. Mr. Hooper failed to meet this burden.

Mr. Hooper's primary contention is that the building permit for the wood structure was issued by the City but must have been either lost or destroyed at some point before the County assessor collected its data and before the file was microfilmed. There was no testamentary evidence or documentary evidence presented at the hearing to support this contention and the only evidence presented supports a contrary conclusion. The City presented evidence that it searched all relevant files searching for the building permit, that the square footage for the concrete structure only, as listed in its building permit, matches the County Assessor's listed square footage for the parcel showing that the county never received any building permit for the wood structure as well. No other testimony or evidence suggests or proves the wood structure was permitted. Mr. Hooper claimed that he made a request for different document from different property file but the City could not locate the requested document. There is no way to know how this anecdotal story might impact the issue before the Hearing Examiner because no evidence supporting or evidencing this claim was submitted. But, the fact that the City may not have been able to locate a different document is not probative of whether a building permit was ever issued by the City for the wooden structure. At most this is an improper propensity allegation without any evidentiary support.

Case law is clear that unsupported conclusional statements alone are insufficient to prove the existence or nonexistence of issues of fact. *Hash by Hash v. Children's Orthopedic Hosp.*, 49 Wn. App. 130, 133, 741 P.2d 584 (1987), aff'd and remanded sub nom. *Hash by Hash v. Children's Orthopedic Hosp. & Med. Ctr.*, 110 Wn.2d 912, 757 P.2d 507 (1988); *Brown v. Child*, 3 Wn. App. 342, 343, 474 P.2d 908 (1970); *Mansfield v. Holcomb*, 5 Wn. App. 881, 491 P.2d

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672 (1971). Mr. Hooper's unsupported conclusional statements are insufficient to meet the burden set forth in the code for this appeal. And to be certain, those unsupported conclusional statements do not transfer the burden to the City. The code does not require and Mr. Hooper has not identified any authority for the proposition that the City must definitively prove the non-existence of the building permit - that would be impossible and would be a clear shift of the burden. The City's reasonable investigation and the process it took in drafting the final letter decision was beyond adequate and Mr. Hooper has failed to carry his burden of proving that it was not supported by a preponderance of the evidence or was clearly erroneous.

3.2 The City can deny a permit to rebuild if the prior structure was an illegal nonconforming structure.

The City's position here is supported by the Court's decision in *Miller v. City of Bainbridge Island*, 111 Wn. App. 152, 155, 43 P.3d 1250 (2002). In *Miller* the petitioner sought a permit to rebuild their business and pier after fire destroyed the structures. *Id.* The property was zoned residential, but Miller claimed that the property enjoyed a legal nonconforming use at the time of the fire. *Id.* The City of Bainbridge Island denied the permit, claiming the original nonconforming use (concrete casting and supply) had lapsed. *Id.* While the *Miller* case differs in that it involved a question of *use* while the Mr. Hooper's appeal deals with a question of the *structure*, the procedure to deny the permit and the review of such denial is the same. Miller faced the same hurdle that Mr. Hooper faces here; it was Miller's burden to prove that the use at the time of the fire was a lawful nonconforming use. *Id.*, at 164. Similarly, Mr. Hooper must establish that the wood structure was a lawful nonconforming structure at the time of the fire. Only after establishing legal nonconformity could either Miller or Mr. Hooper rebuild under the prior standards.

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In *Miller*, the City denied the permit to rebuild because the use had lapsed thereby converting the legal nonconforming use to an illegal nonconforming use. The Hearing Examiner in that case found that Miller was unable to sustain his burden in establishing that the use was lawful and upheld the City's denial of the permit. The Hearing Examiner's decision was upheld by the Court of Appeals. "At the hearing, the initial burden was on Miller to prove his use at the time of the fire was a lawful nonconforming use in 1969. Substantial evidence in the record clearly supports the hearing examiner's determination that Miller failed to sustain his burden on this issue, and it is affirmed." *Miller v. City of Bainbridge Island*, 111 Wn. App. 152, 165, 43 P.3d 1250, 1256 (2002).

Miller supports the City's position here that it is entitled to deny a permit if the proposed structure is not a legal nonconforming structure. Further, *Miller* accurately states that the initial burden is on the appellant to establish that the City was wrong in determining that the structure was an illegal nonconforming structure. In the present case, not one of Mr. Hooper's witnesses (Mr. Larry Hooper and Mr. Mark Hooper) stated that they ever saw a building permit, ever spoke to anyone who saw or was involved with a building permit, or could even testify as to any corroborating fact that a building permit actually ever existed - at best they testified as to their assumption that one existed. The Hoopers further offered no documentary evidence referencing the building permit, corroborating the additional square footage, or showing any official notice of the building permit. To address the gaping evidentiary hole, Hooper's case focuses entirely on an unsubstantiated guess that the building permit must have been lost. However, as noted above, unsupported conclusional statements alone are insufficient to prove the existence or nonexistence of issues of fact. *Hash by Hash*, 49 Wn. App. at 133; *Brown*, 3 Wn. App. at 343; *Mansfield* , 5 Wn. App. 881.

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It is important to note that the *Miller* court did not conduct any sort of equity analysis nor did it apply any *known or should have known* theory that would relieve the petitioner from an otherwise proper permit denial.

3.3 Additional case law and legal theories.

The Hearing examiner requested that the parties review and comment on certain cases and legal concepts and to provide any legal analysis that may assist the Hearing Examiner in this appeal.

3.3.1 The Noble Manor case.

The Noble Manor case referenced by the Hearing Examiner dealt exclusively with subdivisions and the application of the vested rights doctrine. The Court held that the vested rights doctrine applied to plat applications and is intended to give the party filing an application a vested right to have that application processed under the land use laws in effect at the time of the application. *Noble Manor Co. v. Pierce Cty.*, 133 Wn.2d 269, 278, 943 P.2d 1378 (1997). The issue raised in the Hooper appeal does not involve a plat application nor involves the vested rights doctrine in the context discussed in this case.

3.3.2 The Chelan County case.

The Chelan County case referenced by the Hearing Examiner is understood to be *Chelan Cty. v. Nykreim*, 146 Wn.2d 904, 908, 52 P.3d 1 (2002). *Nykreim* is a case where Chelan County sought a declaratory judgment action challenging the propriety of a boundary line adjustment granted by its own planning director. The County won at the trial court and on appeal but was overturned by the Supreme Court. The Supreme Court applied LUPA to the decision and held that the County missed the 21-day appeal deadline. Because the Court ruled against the County, the court did not reach the damages claim which would have involved an analysis of the *knew or*

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should have known standard, an issue briefly brought up at the Hooper hearing. As such, the Hooper appeal does not involved the issues brought forth in *Nykreim*. To the extent that the Hearing Examiner was referencing another Chelan County case, none was found to be on point for the purposes of this supplemental briefing.

3.3.3 Innocent Purchaser Theory.

The innocent purchaser theory gives certain leeway to individuals seeking permits for a lot that was illegally created when that individual was not at fault or aware of the lot issue. This theory is outlined in RCW 58.17.210. It is clear that "the Legislature intended to give municipalities the authority to deny building and other development permits for any lot which was illegally created, with the exception that the municipality could not deny permits to an innocent purchaser for value without actual notice." *Crown Cascade, Inc. v. O'Neal*, 100 Wn.2d 256, 261, 668 P.2d 585 (1983). The innocent purchaser theory, as outlined in RCW 58.17.210, does not apply to the Hooper appeal. There is no other relevant application of the innocent purchaser theory outside of the subdivision statute.

The City conducted a search for additional legal authority relevant to the issues before the Hearing Examiner. Based on this search, we are unaware of any case law that would support conducting an equity analysis that could excuse the illegal nonconforming nature of the wood structure.

Further, to our knowledge there is no authority supporting Mr. Hooper's theory that the mere presence of a fire or electrical inspector imputes knowledge on the City for a separate building permit issue. As noted in the hearing through testimony and argument, City inspectors are trained in specific areas (electrical, fire, structural, etc.) and are on-site for a very specific reason that is within the scope of their expertise. A fire inspector would never be responsible for

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building code compliance. Certainly a glaring issue with a rotting support beam in a roof may catch a fire inspector's eye causing that inspector to report it back to the City. But, the complete scope of the building code, including all the nuanced aspects of the code, is not within the scope of the fire inspector's training or task.

Importantly, there was no evidence put into the record that any inspector that entered the Hooper property would have seen something onsite during an unrelated inspection that would have caused concern. The only issue associated with the wooden structure that is in the record is that there was no building permit associated with the structure. Building permits are located in the City's file, perhaps even in archives, and no on-site inspector would have had the benefit of knowing what is in that file during an unrelated inspection. The mere existence of the structure means nothing without knowledge of what approvals are in the file. Knowledge of the structure's existence and other unrelated city inspections do not change the illegal nonconforming status of the structure.

IV. CONCLUSION

The city code is clear that an illegal nonconforming structure is not allowed to be rebuilt without full compliance with the regulations as they are at the time of the new building permit application. The City conducted a reasonable inspection to determine whether the wood structure was permitted and concluded, based on all available information, that there was no building permit. The city's final letter decision is afforded substantial weight on appeal. In his appeal Mr. Hooper had the burden of proving that the decision was not supported by a preponderance of the evidence or was clearly erroneous.

Mr. Hooper's primary argument that the building permit for the wood structure must have been lost or destroyed is mere conjecture. The evidence of the City's reasonable search coupled

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with the lack of any evidence of a building permit anywhere substantially overwhelms the conjecture and unsupported claims of improper document retention. Unsupported conclusionary statements are insufficient to overcome the burden. As such, Mr. Hooper failed to overcome his burden.

Further, Mr. Hooper claims that because City inspectors entered the two buildings they knew the wood structure was nonconforming, yet did nothing, and the illegal nonconforming status of the structure should be stripped by way of implied consent. This theory has no legal basis. The only way for an inspector (from any department) to know of the illegal nonconforming status of the wood structure would be through an inspection of the archived file to see if there was a building permit associated with that portion of the property. There is no evidence that there was anything inherent in the structure itself that would inform any on-site inspector of the illegal nonconforming status of the structure. The existence of the structure and of inspectors on-site simply does not alter the illegal nonconforming nature of the structure.

Mr. Hooper's appeal should be denied and the City's final letter decision should be upheld.

DATED this 24th day of February, 2017.

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