BEFORE THE HEARING EXAMINER
CITY OF REDMOND

In the Matter of Appeal of LARRY HOOPER	No. APP 112816 HOOPER SUPPLEMENTAL HEARING BRIEF

This Supplemental Hearing Brief is submitted on behalf of Larry Hooper regarding his appeal of the City of Redmond's denial of his request to be issued a building permit to rebuild and restore in the same footprint a portion of his property that was destroyed by fire on or about May 6, 2016. The property is located at 14609 NE 91st Street. The Hearing Examiner heard the testimony on February 15, 2017 and requested this supplemental briefing.

Innocent Purchaser

RCW 58.17.210 can be applied by analogy and provides some duties on the part of the City to identify whether the owner is to be penalized as an innocent purchaser. It states in part:

> No building permit, ……, shall be issued for any lot, tract, or parcel of land divided in violation of this chapter or local regulations adopted pursuant thereto unless the authority authorized to issue such permit finds that the public interest will not be adversely affected thereby. The prohibition contained in this section shall not apply to an innocent purchaser for value without actual notice.

The Hooper property was purchased in 2004, almost 30 years since the construction of the wooden structure. They are innocent purchasers. They had no notice of any issues. In State

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ex. Re. Craven v. Tacoma, 63 Wn.2d 23, 385 P.2d 372 (1963) the Court in addressing the issue of whether a municipality could deny a building permit to an innocent purchaser of an illegally subdivided lot stated:

> But the statute does not suffer the city to visit the sins of the grantor upon the grantee. Both the provisions for fixing a penalty and granting injunctions in the foregoing statute are directed against the owner of land, or his agent, who transfers or sells it before the plat or map of the subdivision in which it lays has been approved. They are not directed against a bona fide purchaser, and failure of the grantor to comply with the platting statutes and ordinances does not give the city grounds to refuse his bona fide grantee a building permit.

Craven, supra, at 26-27.

Also, as noted in our prior memorandum, The Redmond Zoning Code, under 21.76.100F, requires that any elimination of a nonconforming use be "fair and orderly as possible and *with justice to property owner(s) and business operator(s)*. Hooper, being an innocent purchaser, is entitled to the justice as that property owner.

Imputed Knowledge of the City of Redmond and Nonconforming Structure

The cases that discuss either imputed knowledge or whether City or County personnel knew or should have known of certain situations come under the line of cases addressing the Public duty Doctrine.

In Halvorson v. Dahl, 89 Wn.2d 673, 574 P.2d 1190 (1978), our Supreme Court reversed a CR 12(b)(6) decision that dismissed the City of Seattle from a tort case where a man died in a fire. The Plaintiff had alleged that the City had failed to enforce the building codes in connection with a fire. In finding that a viable claim had been made against the City, the Court stated:

> Appellant must also demonstrate culpable neglect regarding, or indifference to, that noncompliance. That requirement is adequately met in this case by appellant's allegations that the City had been aware of the deficiency in the structure for 6 years, and had undertaken to force compliance on several occasions but had never followed through. Because of these allegations, we find it unnecessary to consider whether neglect falling short of actual and long-standing knowledge of noncompliance would support a claim for relief.
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> We conclude that appellant states a claim upon which relief can be granted under the Seattle Housing Code, and based on the city's long-term knowledge of, and inadequate

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> response to, the inadequacy of the hotel's compliance with that code. This case is reversed and remanded for trial.

Dahl, supra, at 677-678.

The evidence and testimony provided overwhelmingly showed that various City Officials from the Building and Fire departments visited the site and there was at least annual and follow up visits for fire inspections by the Redmond Fire Department. Larry Hooper, as he testified, would walk the entire property with any City personnel. The wooden structure was there in the open on all occasions prior to the fire.

The City reiterated in its testimony the only item preventing their approval of the Hoopers building as a legal nonconforming use in the same foot print was that the City could not locate a building permit from over 40 years ago. However, the testimony from the City was, prior to the fire, that there has never been any finding that this almost 40 plus year old building (the wooden structure) was a nuisance or that it disrupted the orderly development of the City, or that it was a health hazard. There was zero evidence by the City that the public interest would be adversely affected by allowing the structure to be rebuilt under its original footprint.

Further, there was no dispute that under the codes on setbacks as existed in the mid 1970s that the wooden structure's setbacks were legal. The City was unable to deny that they were not legal setbacks at that time. The best evidence of the building of the structure is the 1976 concrete marker, which was Exhibit C to the Hooper Memorandum.

The City did not provide any rebuttal evidence from any persons with actual knowledge of how building permits were handled in the 1970s. The most any City witness could testify to would go back to 1997, more then 20 years after the fact. The testimony was that the City had no knowledge whether or not the permit was mishandled. They could not guarantee that all records were entered correctly into the system. The City, as the party that easily has the resources to provide more accurate evidence of the building department and its procedures in the 1970s,

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failed to do so. The testimony was that King County gets the records from Redmond. The City then, in its testimony, speculated that in the 1970s that the building permits were delivered to the County from Redmond by courier, perhaps a few times per month. They could not testify at all regarding how the files were handled or mishandled at that time.[1] The City could not guarantee the permit was not lost. They only default to a position of denial because they could not locate a 40 plus year old permit from the pre-digital age which was done by hand and handled by couriers or others unnamed. This is an unjust and unfair application of the facts to the Hoopers.

The City acknowledges that it is aware of the current King County system and that it can easily see the wooden structure in the photograph of the building on the King County Website. It may not rise to recordation notice, but when added in with the fire and building inspection in the records and the records the City admits were purged from their database because of their 6 year rule, and that in the August 2016 meeting, the City personnel made it clear to Mark Hooper that they had been aware of that structure for quite sometime, the City, at all material times, certainly knew of the structure. The Examiner can find from the entire testimony that the City was aware of the use that the setback was legal when it was built, and that the use of the structure was never abandoned. The City is not in a position to say the permit was not issued or lost, only that they cannot find it from their old record system.

The City admitted that it only makes determinations on any potential invalid structure if someone makes a complaint. They implied that if a city official (fire inspector or building inspector) sees a violation that they have no obligation or responsibility to notify the owner of the potential problem. Here, with the numerous visits to the property by city personnel, all being aware of the wooden structure all these many years, none of them went beyond their narrow purpose at that time or thereafter to notify the Hoopers that the wooden structure may be

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[1] Mark Hooper testified to a lost building permit on another property when dealing with Redmond.

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improper. This deliberate ignorance denied the Hoopers the opportunity to seek the equivalent of an "as built construction" listing or conditional use before the fire in 2016. This deliberate ignorance (or plausible deniability) has led to the Hoopers current situation where the City is denying the ability to rebuild in the same footprint of the wooden structure.

Equitable Estoppel

The City of Redmond is estopped from claiming ignorance of the wooden structure. The doctrine of equitable estoppel is applicable against a state acting in its governmental as well as proprietary capacity when necessary to prevent a manifest injustice, and the exercise of governmental powers will not thereby be impaired. Shafer v. State, 83 Wash. 2d 618, 622, 521 P.2d 736 (1974).

The elements of equitable estoppel are: (1) an admission, statement, or act inconsistent with the claim afterward asserted; (2) action by the other party on the faith of such admission, statement, or act; and (3) injury to such other party from allowing the first party to contradict or repudiate such admission, statement, or act. Finch v. Matthews, 74 Wash. 2d 161, 171 n.3, 443 P.2d 833 (1968).

With all the visits to the property with the wooden structure present at all times over these many years the City's position that it was not aware of the property is an act inconsistent with their claim that they were not aware of the property simply because now they cannot locate a building permit from over 40 years ago. The Hoopers not being told of the problems with the wooden structure did not know to request from the City some type of "as built" construction listing with the City or some similar conditional approval before the building was destroyed by fire. The injury is clear in not being able to rebuild in the same footprint. Larry Hooper testified as to the significant monetary losses they would suffer not being able to rebuild on the same footprint.

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Conclusion

Given the requirement in RZC 21.76.100F to have this done fair and orderly as possible with justice to the property owner and business owner, and given that zoning codes are not only to be given reasonable construction, but also reasonable application (*See, Washington v. Bellingham, 25 Wn. App. 33 (1979)*), the facts as presented, given the City's inability to explain (without speculating) how the permits were handled in the mid 1970s, the duration of this structure and it being in plain sight and checked numerous times by City officials, and that its use was continuous, it is not a nuisance, that it would not disrupt the orderly development of the City, or that it was a health hazard, is that it should be presumed to be a legal nonconforming use.

We ask the Examiner to reverse the Letter decision of November 16, 2016 issued by Robert G. Odle, which is Exhibit D to the City's materials. The Hoopers should be able to restore the property destroyed by the fire in the same footprint as before under the same setbacks.

Respectfully submitted,

Dated this 24th day of February 2017.

By _____

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