# Superior Court for the State of Washington
# in and for the County of King

Susan J. Craighead
JUDGE

KING COUNTY COURTHOUSE
Seattle, Washington 98104-2381

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RE: Jackson Place Alliance for Equity v. City of Seattle, et al. 11-2-14930-7 SEA

Counsel,

I want to begin with an apology. I know this is an urgent matter of great concern to the parties, and my ruling has taken entirely too long. An event in my personal life diminished the time I had available to complete large projects such as this one during the Fall, and that is the reason for the delay. Please accept my apologies.

Before me is a challenge pursuant to the Land Use Petition Act of a decision by the City of Seattle to issue a building permit for the Crisis Solutions Center to be operated by the Downtown Emergency Services Center (DESC). For the reasons set forth below, the challenge is denied and the petition is dismissed.

Jackson Place Alliance for Equity, a neighborhood group, filed this LUPA petition after the City approved DESC's plans to convert a warehouse/business support space off of Rainier Avenue South into a facility that will provide mental health and substance abuse treatment to individuals diverted from hospitals and jails. The facility is designated by the City as a "hospital" as defined in the Seattle Municipal Code, and thus permitted outright. Jackson Place challenges this designation. Jackson Place also challenges the City's approval of a work around that will wall off 15 feet of the building that lies on land zoned for residential uses. Finally, Jackson Place contends that these plans are subject to SEPA review.

This case is very important both to the Jackson Place community and to the larger communities of Seattle and King County. From the briefing submitted by Jackson Place, it is apparent that the Crisis Solution Center's prospective neighbors are concerned that City and County leaders are so supportive of the Center that they influenced the City's Department of Planning and Development (DPD) to designate the Center as a hospital. Had DPD concluded that the Center was substantially similar to a work release facility, as defined by the Seattle Municipal Code, a public hearing before the Hearing Examiner resulting in detailed factual and legal findings would have occurred, culminating in a vote by the City Council.

There is no question that City and County leaders are supportive of the Center. King County sought proposals for a diversion facility after a long process designed to improve services and reduce costs associated with chronically mentally ill and/or substance abusing individuals. Two-thirds of the people who find themselves in the King County Jail most frequently are mentally ill. The King County Jail is now the State's second-largest mental hospital. Some two-thirds of the seriously mentally ill inmates in the jail were detained for misdemeanors and non-violent offenses. The 600 highest users of Harborview's Emergency Room account for ten percent of all emergency cases. See *Mental Illness and Drug Dependency Action Plan – Phase III*, p. 35, 43. The costs -- both in dollars and in human misery--of a system that does not adequately treat people with mental illness are enormous. Jackson Place acknowledges the need for a place like the Center; the neighborhood's concern is with locating the Center at 1600 S. Lane Street.

These policy concerns are important to City and County leaders, as well as to the community as a whole, but in and of themselves they are not relevant to this Court's decision. I include them in this ruling to illustrate that, as with many controversial decisions related to zoning, here a public good is pitted against the negative impacts its neighbors anticipate.

Historically, the law did not permit restrictions on how a property owner wished to use his property, no matter how negative the consequences on his neighbor. Property owners had, and still have, a due process right under our Constitution to use their property as they see fit; it was only just over 100 years ago that communities began to plan for future development by adopting zoning codes. In 1926, the Supreme Court of the United States held that zoning codes do not impermissibly infringe on the due process rights of property owners as long as they are not arbitrary or unreasonable. Village of Euclid v. Ambler Realty Co. 272 U.S. 365 (1926). For purposes of the Jackson Place LUPA petition, the key lesson of Euclid and its progeny is that it is property owners (or their tenants) who have due process rights to fair application of land use laws, not their neighbors.

With this background in mind, let me turn to the issues in this case.

The Standard of Review: When considering a LUPA petition, this Court sits in its appellate capacity, reviewing the certified administrative record. This court does not find facts. RCW

36.70C.130. The burden is on the petitioner to establish one or more of the grounds for relief set forth in RCW 36.70C.130(1). For purposes of this petition, the relevant grounds are as follows:

(a) The body or officer that made the land use decision engaged in an unlawful procedure or failed to follow a prescribed process, unless the error was harmless;
(b) 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;
(c) The land use decision is not supported by evidence that is substantial when viewed in light of the whole record before the court; [or]
(d) The land use decision is a clearly erroneous application of the law to the facts.

These provisions and the case law interpreting them make clear that a judge reviewing a land use decision should defer to the expertise of the governmental entity where such expertise was called upon in rendering the challenged permit. See e.g. Timberlake Christian Fellowship v. King County, 114 Wn. App. 174 (2002). Under the "clearly erroneous" standard in RCW 36.70C.130(1)(d), a reviewing court may only reverse an administrative determination when, after considering the entire record, the court is left with the "definite and firm conviction that a mistake has been made." Woodinville Water Dist. v. King County, 105 Wn. App. 897 (2001). A substantial evidence challenge under RCW 36.70C.130(1)(c) will be sustained only where the challenger can demonstrate that there was not "evidence [in the record] in sufficient quantum to persuade a fair minded person of the truth of the declared premise." Id. at 904-905.

The Facts: For the reasons already explained, King County developed a plan to create a facility to divert mentally ill individuals from the jail and Harborview's emergency room. The goal was to provide better care for mentally ill individuals while at the same time reducing costs. The County issued a Request for Proposals (RFP). The RFP required services including psychiatric evaluation, medication management and stabilization, mental health counseling, chemical dependency evaluation, and case management linking patients with benefits such as housing, ongoing mental health and substance abuse treatment, and medical care. The staff was to be entirely clinical – including mental health and chemical dependency professionals, registered nurses, and psychiatric nurse practitioners and/or a psychiatrist on call 24/7. The facility would be required to be licensed by the State as an Adult Residential Treatment facility.

The RFP indicated that "[i]ndividuals suspected of a crime may be brought to the [Crisis Diversion Facility (CDF)]. Any person in mental health or substance abuse crisis and suspected of a minor non-violent crime and a limited and non-violent history may be considered for diversion from the jail to the CDF. Police officers may suspend the arrest of a consumer favoring diversion to the CDF…CDF staff will follow up appropriately with police on the status of consumers sent to the CDF. If a consumer admitted to the CDF in lieu of arrest demands to leave before their crisis is stabilized or resolved, staff may contact police for disposition." AR 01541. A memorandum prepared by the King County Prosecutor's Office attached to the RFP explains that individuals who are brought to the CDF by the police could only be held for up to

48 hours under the threat of continued prosecution without running afoul of constitutional protections. Individuals may be diverted from the hospital if they are in good behavioral control and willing to co-operate with the CDF, as long as they do not have a disqualifying medical condition. It is unknown what proportion of the residents will be diverted from the jail rather than the hospital; the parties disagree on this point and, until the Crisis Solutions Center opens, it will be impossible to know.

Initially a site was chosen in Tukwilla, but that city balked at the idea and took steps to thwart the plan. The County then approached the City of Seattle; the City Council and the City Attorney expressed strong support for the idea and some members of the Council communicated that support to DPD staff. Some of these communications suggested that it was important to permit the facility as quickly as possible – and that would mean avoiding a proceeding before a Hearing Examiner. Before a new Request for Proposals went out, DPD needed to determine how the facility would be treated under Seattle's Land Use Code; this was important guidance for agencies submitting proposals. In April, 2010 DPD determined that the facility would be classified as a "hospital" under the Land Use Code's definition. Eventually, the County accepted DESC's proposal for the Crisis Solutions Center.

The DESC's proposal met all of the requirements set forth in the County's RFP as described about. The Crisis Solutions Center is designed to have three components. The first is a 16 bed Crisis Diversion Facility; the second is a Mobile Crisis Team, consisting of mental health professionals on duty day and night to respond to calls from the police to assist with people in mental health and chemical dependency crisis. The third component is a Crisis Diversion Interim Services Facility that the County had awarded to DESC under an earlier RFP; this part of the Center will provide up to two weeks of additional respite housing, a referral to community services for homeless people who have spent the maximum of 72 hours allowed in the CDF but need additional care. The Center 's plans call for cubicle-like bays for residents, to allow some privacy while at the same time enabling staff to observe the residents. There will be a sally port for police to be able to deliver residents out of view of the public. There will be a locked quiet room. Doors leading out of the Center will be equipped with time-release locks, allowing staff to intervene if residents try to leave and to follow them and call the police if they do leave. This practice is designed to ensure that residents do not linger in the Jackson Place neighborhood, but also highlights that at least residents diverted from the jail are likely to face a return to the jail if they leave the Center.

DESC and its architect met with DPD staff before submitting its application for a building permit; according to the City, this is standard procedure. The building at 1600 S. Lane had been used partly as a warehouse and partly for business support services. A tricky land use issue arose during this pre-application process. The building straddles a line separating a commercial zone from a multi-family residential zone. It is apparently very unusual for a building (rather than a piece of land) to be so situated. After research and consultation, DPD staff concluded that DESC could wall off the 15 feet of the building that is located in the multi-family zone.

Eventually it was decided that a required egress door could be located on the multi-family zone side of the building; DPD allowed this egress on the grounds that SMC 23.42.030 permits pedestrian access to one zone across another zone.

On April 6, 2011, DPD issued a Code Interpretation in response to a request made by neighbors of the Center. This interpretation was drafted by Andrew McKim, who had been involved in the process of approving the building permit described above. The building permit issued the same day. This LUPA action followed.

Consideration of the Crisis Solutions Center as a Hospital:

Jackson Place argues that the Center cannot be a hospital because it will not be licensed as a hospital, it provides limited services and excludes people with common medical problems, because residents will be brought there by the police under conditions that must be described as coercive, and that they are not free to leave. There is no question that the Center differs from the mental image one might conjure up of a hospital. But what matters here is the definition of "hospital" in Seattle's Land use Code. That definition is:

> an institution that provides accommodations, facilities and services over a continuous period of twenty-four hours or more, for observation, diagnosis and care of individuals who are suffering from illness, injury, deformity or abnormality or from any condition requiring obstetrical, medical, or surgical services, or alcohol or drug detoxification. This definition excludes nursing homes.

SMC 23.84A.018. This definition is much broader than a dictionary definition of the word. The City may have adopted such a broad definition of the term "hospital" and allowed hospitals to be permitted outright in commercial zones because there is social utility in ensuring that treatment facilities of all types are available throughout the City. In any case, this definition of "hospital" does not require state licensure, it does not require that a broad range of medical services be provided, and it says nothing about how patients get to the institution or whether they can leave.

Jackson Place argues that rather than qualifying as a "hospital," the Center is substantially similar to a "work release facility." The City's Land Use Code defines a "work release facility" as:

> A use providing an alternative to imprisonment, including pre-release and work/training release programs that are under the supervision of a court, or a federal, state or local agency. This definition excludes at-home electronic surveillance.

Jackson Place contends that the Center is substantially similar to a "work release facility" because its genesis was the criminal justice system, a majority of its residents will be diverted from jail, and the Center will function as an alternative to imprisonment – at least as to those residents referred by law enforcement. Jackson Place cites a 1993 DPD decision involving an older version of the Code that characterized McNeil House, an alternative to juvenile detention, as being a "work release center" because its residents would otherwise be in detention. Under the 1993 version of the code, it was necessary to distinguish between a "halfway house" (which no longer exists under the Code) and a "work release center." The question before DPD at that time was not whether the McNeil House was more like a "hospital" or more like a "work release center;" there was no intention that psychiatric treatment would be provided to the residents of McNeil House. In short, despite its superficial applicability, the 1993 decision sheds little light on the issue before the Court in this case.

This Court cannot say that the City's determination that the Center falls under the Land Use Code's definition of "hospital" is clearly erroneous. While there are some similarities between the Center and a "work release facility," no resident of the facility will, in fact, be under the supervision of a court or an agency. While it is true that the police will be called if a resident diverted from the jail leaves, this is not supervision akin to a court's supervision pre-trial or, for example, the supervision provided by the Department of Corrections for persons being released from prison. Ultimately, the residents of the Center are there to receive psychiatric and substance abuse treatment on a 24-hour-a-day basis. The City's designation of the Center as a "hospital" for land use purposes is not clearly erroneous and it is supported by substantial evidence.

Approval of the "Wall Off" Plan:

As noted above, during the process of developing the plans for the building, it was discovered that the building straddles two different zones. Most of it lay on land zoned C-2, or commercial (where a hospital is permitted outright), but about 15 feet of the building lay on land zoned L-1, for residential uses. It is very unusual for a building to straddle two zones; without apparent incident, the entirety of this building had, in the past, been used for non-residential uses, such as business support and a warehouse. However, it is not clear that DPD ever formally interpreted the code to determine whether non-residential use of the15 foot segment is permitted under the Land Use Code. The City has been unable to identify any other lot where a similar problem has been addressed by DPD.

In light of this background, it appears to the Court that the City's application of the Land Use Code to this anomaly must be reviewed *de novo* because I cannot say that DPD's interpretation is a matter of agency policy, thus entitled to deference under LUPA. Sleasman v. City of Lacey, 159 Wn.2d 639 (2007).

In this case, DPD worked with DESC's architects to devise a solution to the regulatory dilemma the S. Lane building posed. Jackson Place is troubled by the level of co-operation displayed by DPD, since the consequence of not finding a solution acceptable to DPD would have been a hearing before a Hearing Examiner, including a public comment period. In particular, Jackson Place argues that DPD helped DESC contrive a solution that, in its view, is preposterous. The solution they reached required DESC to "wall off" the 15 foot portion of the building and not use it for the provision of services. Additionally, the DPD interpretation letter allowed a section of that portion of the building to be used as a means of emergency egress (a door and a stairway) on the grounds that SMC 23.42.030 states pedestrian and vehicular "access may be provided to a use in one zone across property in a different zone...." The reasoning, essentially, is that anyone who would use this door would be a pedestrian.

Jackson Place derides DPD's characterization of the users of this door as "pedestrians," but the term is not defined in the Code. Merriam Webster defines "pedestrian" as "going or performed on foot" or, as a noun, as one who does so. Similarly, Jackson Place criticizes the "wall off" solution as a contrivance designed to avoid a hearing before the Hearing Examiner. The "walled off portion" will, in fact, be used, Jackson Place argues, as a means of egress. Still, it will be used in the manner that perhaps a sky bridge or pedestrian underpass would be used – in this case, to enable people to leave the permitted use. To be sure, the "wall off" idea is novel and unprecedented. But it is a practical solution to enable DESC, which as a tenant stands in the shoes of the property owner, to use the building for the purpose it intended, a use permitted outright. Nothing in the Code prohibits such an arrangement.

To the extent DPD was interpreting the City's Land Use Code, it did so consistent with Washington law by construing the Code in favor of the landowner. Morin v. Johnson, 49 Wn. 2d 275 (1956). The two cases relied upon most heavily by Jackson Place, Sleasman and Cowiche Canyon v. Bosley, 118 Wn.2d 801 (1992), both protect the rights of the landowner against efforts to regulate how the landowners were to use their land.

I cannot find that DPD's application of the law was erroneous, and I am not left with the definite and firm conviction that a mistake has been made with respect to the wall-off issue.

SEPA:

Jackson Place contends that SEPA review is required, even though DPD concluded that it was not. This project involves interior remodeling and does not involve changing the uses of existing buildings. While Jackson Place is correct that the practical impact of the change of occupants of this building may be significant for the neighborhood, this is not the test for requiring SEPA review. Under the Director's Rule, SEPA review is not required if the use-intensity category under the rule remains the same. Here, part of the building used to be used for business support services (retail sales and service uses) listed in Category 1 to major institutions (hospital) also listed in Category 1. With respect to the portion of the building changing from warehouse

(Category 3) to major institution (hospital) in Category 1, SEPA review is not required because the change in use is less than 12,000 feet in size. Director's Rule 17-2008 C-2 and C-4. SEPA review is not required for this project.

Conclusion:

Jackson Place's Land Use Petition Act challenge is denied. The parties may present a formal order.

Sincerely,

Susan J. Craighead
Judge