Hearing Examiner Ryan Vancil
May 29, 2018

BEFORE THE HEARING EXAMINER
CITY OF SEATTLE

In the Matter of the Appeal of: David Moehring, a Neighbor to 3641 22nd Ave West, to the Short Subdivision to Create two parcels of land from the lot at 3641 22nd Avenue West	Hearing Examiner File: MUP-18-001 Department Reference: 3028431 APPELLANT'S MOTION FOR APPLICANT'S POST-HEARING BRIEF

The Appellant, David Moehring, respectfully moves for the Hearing Examiners' reconsideration of the decision on MUP-18-001 issued on 16th of May, 2018. This request is timely per Hearing Examiner Rules of Practice and Procedure (HER) 3.20 (b) given the Memorial Day weekend qualifies the filing within 10 days after the date of the Hearing Examiner's decision considering the Memorial Day weekend.

Per HER 3.20 (a), this motion for reconsideration is made for two reasons: (1) Irregularity in the proceedings by which the moving party was prevented from having a fair hearing; and (2) a clear mistake was made as to a material fact.

I. Reconsideration due to Irregularity in the Proceedings

The Hearing Examiner should grant a party's motion for reconsideration of the Hearing Examiner decision if there was an irregularity in the proceedings by which the moving party was prevented from having a fair hearing. This is the case with this appeal as the Appellant, a party to the hearing, who was excluded from providing testimony at the hearing. As such, all of the supporting evidence - including several submitted exhibits that were not presented and entered into the record - could not be provided as evidence thereby resulting in an unfair hearing.

HER 2.14 (d) states that "although Hearing Examiner hearings are open to the public, those who are *not parties* are generally not permitted to testify in appeal hearings unless called as witnesses by a party." To the contrary, the appellant, representing himself, is a party to the hearing but was ruled by the Hearing Examiner at the request of the Applicant to be excluded from this right to testify. The appellant is indeed a party of the appeal as reiterated in HER 2.02 (t) which defines "Party" - the person, organization, or other entity that has *filed an appeal* or application or is granted a hearing automatically by law; the person, organization, or other entity granted

party status through intervention; the Director who made the decision or took the action that is the subject of the hearing or appeal; the person, organization, or other entity who filed the application, request, or petition for a permit or other type of City authorization or action that is the subject of the hearing or appeal; the owner of the property subject to the City decision or other action." (Emphasis added.) Being the entity that had filed the appeal, the Appellant, David Moehring, had filed the appeal and submitted his profile as a registered architect with the understanding from the Hearing Examiner Rules that he embodied all of the credentials to testify.

The right for the Appellant to testify has been further reiterated in the published "Public Guide to Appeals and Hearings before the Hearing Examiner." (Hereafter, the "Public Guide".) The Public Guide clarifies that the Appellant is a participant and party to the hearing with the right to provide testimony. It defines the party who appeals is the "appellant" and the City agency responsible for the decision is a "respondent," i.e., the one who must respond to the issues raised in the appeal. The Public Guide specifically states that "Parties have certain rights in the hearing process, including the right to notice and participation (*presenting evidence* and questioning witnesses)." (Emphasis added.) This party's right to present evidence was denied.

The Public Guide also states that the "Hearing Examiner is required to make decisions on appeals based on the record made at hearing. The decision must be based on facts and the applicable law." A decision cannot be made if facts are withheld from the hearing. Nor can the Hearing Examiner exclude any party from the opportunity to testify. As the Public Guide continues to state that "*only the parties to the appeal*, and persons called by the parties as witnesses, have the opportunity to testify." (Emphasis added). The appellant is a party to the appeal and should not have been denied the right to testify.

The Public Guide also reiterates all parties being able to provide their own testimony. The Public Guide states: "Preparing may simply involve figuring out what you want to say in *your own testimony*, or it may be more complicated, requiring that a number of lay witnesses and experts be organized and coordinated so that each covers a different part of the presentation." (Emphasis added.)

Finally, the Public Guide goes on to confirm the Appellant's right to testify, regardless of any prior declaration as a party also being a witness. It states: "As mentioned above, unlike a "public hearing" where anyone who wishes to speak has that opportunity, only a limited number of persons have a right to speak at an appeal hearing. The participants, or "parties", and those persons called by the parties as witnesses, have the opportunity to speak during the hearing. A representative of each party sits at the table, coordinates the party's presentation, introduces and asks questions of the party's witnesses, taking care to avoid repetitive testimony, asks questions of the other parties' witnesses at the appropriate time, and talks with the examiner about procedural concerns if any arise during the hearing. *If you are representing yourself in the appeal, you are the party representative. When it's your turn to present evidence, you can give testimony yourself, as well as asking others to appear as witnesses.* (Emphasis added).

Per HER 2.11, the "Examiner conducting a hearing has the duty to ensure a fair and impartial hearing, to take all necessary action to avoid undue delay in the proceedings, to gather facts

necessary for making the decision or recommendation, and to maintain order. The Examiner has all powers necessary to these ends including, but not limited to the following:

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(e) Rule on procedural matters, objections and motions;
(f) Question witnesses and request additional exhibits;
(g) Permit or require oral or written argument, briefs, proposed findings of fact and conclusions, or other submittals the Examiner finds appropriate, and determine the timing and format for such submittals;
(h) Regulate the course of the hearings and the conduct of the parties and others so as to maintain order and provide for a fair hearing."

It is evident that by withholding the appellant's testimony that proposed findings of fact were excluded and a fair hearing was not provided. The only way to rectify this irregularity in the proceedings by which the moving party was prevented from having a fair hearing is to reopen the case and allow testimony in the matter.

II. Reconsideration due to Clear Mistake to the Material Fact

The Hearing Examiner should grant a party's motion for reconsideration of a Hearing Examiner decision if a clear mistake was made as to a material fact. This is the case with this appeal in the review of the 'Findings and Decision of the Hearing Examiner', as the Hearing Examiner has not included all Findings of Fact. Partially, the findings was incomplete due to submitted exhibits that could not be presented due to the restrictions on allowing the appellant party to provide evidence and testimony. Moreover, however, the Hearing Examiner has excluded their evaluation of the evidence of the testimony that demonstrated the Decision by the Department was clearly erroneous.

The Department's decision concluded that this "short subdivision will provide pedestrian and vehicular access (including emergency vehicles, and public and private utilities)," and that "there does not appear to be any reasonable alternative configuration of this plat that would better maximize the retention of existing trees than the proposed plat." The application for short plat subdivision and the testimony and cross examination of the witnesses demonstrated that the vehicular access provisions and the evaluation of alternative configurations required for the Department to make their decision was in error and incomplete.

Applicable Laws:
A. The Hearing Examiner has cited the criteria SMC 23.24.040.

- Does this law apply? Yes.
- Was evidence provided to indicate this law was violated? Yes.

As indicated by Figure 2, page 8, in the Appellant's Response to the 'Applicant's Post-Hearing Brief & the SDCI Closing Statement' dated 24 April 2018, Figure 2 of the Director's conclusion clearly states that "The short subdivision will provide pedestrian and vehicular access (including emergency vehicles), and public and private utilities." Yet, this statement clearly contradicts and is in error of the short plat application which identifies in multiple locations that "no curbcuts or vehicular access from 22nd Avenue W. will be granted for any future development permits associated with proposed Parcel A." This particular excerpt is from the case Exhibit 4, sheet 1 of

5- Note 4 on the Legal Description. As such and contrary to cited SMC 23.24.040, the proposed street-fronting Parcel A does not have the required vehicle access as indicated in the record and as suggested in the Applicant's Post-Hearing brief. The cited code section states that "Proposed new lots shall have sufficient *frontage on the alley* to meet access standards for the zone the property is located or provide an *access easement from the proposed new lots to the alley* that meets access standards for the zone in which the property is located." (Emphasis added.) Since Parcel A does not have any frontage on the alley and Parcel B does not provide an easement from the proposed new Parcel A to alley, the evidence clearly indicates that the criteria of SMC 23.24.040 has not been achieved and that the decision is erroneous.

Applicable Laws:
B. The Hearing Examiner has cited the vehicular access criteria of SMC 23.53.005 and 23.53.025.

- Does this law apply? Yes.
- Was evidence provided to indicate this law was violated? No.

The rear Parcel B requirements have been met given there is an alley and that 5-foot wide pedestrian access has been identified on the short plat application.

Applicable Laws:
C. The Hearing Examiner has cited the lot definition in SMC 23.84A.024.

- Does this law apply? Yes.
- Was evidence provided to indicate this law was violated? Yes.

The rear Parcel B requirements has not met this criteria that requires "A lot shall abut upon and be accessible from a private or public street sufficiently improved for vehicle travel or abut upon and be accessible from an exclusive, unobstructed permanent access easement." Even if there was a vehicular access easement shown, the application documents state in multiple locations that "no curbcuts or vehicular access from 22nd Avenue W. will be granted for any future development permits associated with proposed Parcel A." (Case Exhibit 4, sheet 1 of 5- Note 4 on the Legal Description). No easement may be provided for Parcel B through Parcel A given the application bars vehicular access by Parcel A to the street.

Applicable Laws:
D. The Hearing Examiner has cited the criteria SMC 23.24.040.A.6.

- Does this law apply? Yes.
- Was evidence provided to indicate this law was violated? Yes.

Despite the risk of permanent damage from underground utility easements to three (3) on-site trees and two (2) trees of the property as testified by both expert witness arborists, there remains no evidence to support the Departments due diligence that the proposed short plat subdivision will maximize the retention of existing trees. In their published decision, the Department states that "There does not appear to be any reasonable alternative configuration of this plat that would maximize the retention of existing trees that the proposed plat." Yet, the cross-examination revealed that the Department only visually looked at the proposed application site plan. They testified that they did not pencil alternatives. They identified that they did not consult with others in the department. They identified that they did not request the Applicant to identify alternatives of the utility easement location or subdivision locations. In essence, they literally ignored the potential impacts of the proposed short plat utility easements shown in the application crossing critical root feeder zones of all of the existing trees. The reconsideration to the Examiner includes

including all Findings of Fact relative to the Department's recorded testimony and cross-examination by the Appellant. This testimony, as referenced from the hearing recordings by the footnotes of the 'Appellant's Response to the Applicant's Post-Hearing Brief & SDCI Closing Statement', demonstrate the Department erroneous decision being void of considering any reasonable alternative configuration.

The Appellant, by cross examination and relative recent Seattle examples, had met the burden of proof by demonstrating that at least three (3) alternatives were possible to maximize the retention of existing trees:

i. Firstly, combining the two five-foot Seattle City Light and Utilities Easement into one ten-foot wide easement – likely along the southern property line - in order to retain Exhibit 10's marked Tree '1'.

ii. Secondly, locating the proposed division line between Parcels A and Parcels B to the west at approximately 35 to 37 feet from the alley right of-way would result in the short plat division being near centered on the marked Tree '3'. The resulting parcels of 1,850 and 4,150 square feet could be easily developed as done in numerous instances within LR1 zones. LR1 lot sizes as small 1,600 square feet on 50-foot wide lots is quite common in Seattle.

iii. Thirdly, it was offered to split the lot longitudinally into two 25-foot by 120-foot lots – as was recommended by Mr. Oxman – in order to provide the ability to retain at least two existing trees. In this scenario, both lots would have street frontage and thereby eliminate the need for Seattle City Light and Utility Easements to a rear lot that risk tree removal. [Each lot of 3,000 square feet is allowed up to two dwellings per LR1 zoning code, thereby a reasonable Short Plat alternative.]

As such, the Hearing Examiner does not have the authority to dismiss such evidence as Statements of Fact in this appeal. Moreover, prohibiting the Appellant from offering explicit testimony in this regard further promotes the need to reconsider the merits of the appeal.

III. Concluding Reconsideration Actions

Within the provisions of the authority of the Hearing Examiner, the Appellant moves for a reconsideration made for key two reasons: (1) Irregularity in the proceedings by which the moving party was prevented from having a fair hearing; and (2) a clear mistake was made as to a material fact.

This should include reopening the case and allowing all parties to provide testimony as identified in the Hearing Examiner Rules and the Public Guide. The Hearing Examiner should carefully review the Department's testimony in the recorded proceedings as referenced in the closing documents. Per HER 2.26, the "recordings of hearings are part of the official case record". We understand that all parties shall have an opportunity to review and comment on the transcript of such recording. We also understand that the Hearing Examiner shall resolve conflicts as to form and content of the transcript, and shall provide a certification when such disputes are resolved and the Examiner is satisfied that the transcript provides a reliable record of the proceeding.

Should the Hearing Examiner determine that the reconsideration does not have merit, then a likely request will follow for the Office of the Hearing Examiner to prepare records of the case

per HER 2.30 including (1) Department's decision or action being appealed; (2) Appeal statement; (3) Evidence received or considered; (4) Findings, conclusions and decision of the Hearing Examiner; and (5) Recording of the hearing with certified transcripts.

Sincerely,

David Moehring
Appellant, Neighbor to 3641 22nd Avenue West
3444 23rd Ave West
Seattle WA 98199

Dated May 29, 2018

Certificate of Service

I certify under penalty of perjury under the laws of the State of Washington that on this date I, David Moehring, the Neighbor to 3641 22nd Ave West, sent true and correct copies via e-mail, of the attached **Appellant Response to the Applicant's Post-Hearing Brief** to every person listed below, in the matter of the **LAND USE DECISION APPEAL** to the Short Subdivision to create two parcels of land from 3641 22nd Avenue West lot**,** Hearing Examiner File No. MUP-18-001.

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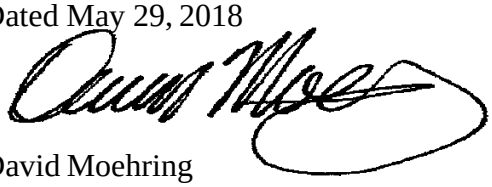
Dated May 29, 2018



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