Hearing Examiner Ryan Vancil

BEFORE THE HEARING EXAMINER
CITY OF SEATTLE

In the Matter of the Appeal of: DAVID M. MOEHRING, from a decision issued by the Director, Department of Construction and Inspections.	Hearing Examiner File: MUP-18-001 Department Reference: 3028431 3641 22nd Avenue West SOUND EQUITIES' RESPONSE IN OPPOSITION TO MOEHRING'S MOTION FOR RECONSIDERATION

COME NOW the applicant and property owner, Sound Equities Incorporated ("Sound Equities"), by and through its undersigned attorney, Brandon S. Gribben of Helsell Fetterman LLP, and submits the following response in opposition to the appellant, David Moehring's, Motion for Reconsideration of the Hearing Examiner's Findings and Decision.

I. INTRODUCTION AND RELIEF REQUESTED

The land use appeal hearing in this matter took place on April 12, 2018 before Hearing Examiner Ryan Vancil. On May 16, 2018, Examiner Vancil issued his Findings and Decision that upheld SDCI's Decision approving the Short Plat. Moehring then filed a motion asking Examiner Vancil to reconsider his Findings and Decision due to (a) irregularity in the proceedings, and (b) clear mistake of a material fact. Moehring's motion

HELSELL FETTERMAN
Helsell Fetterman LLP
1001 Fourth Avenue, Suite 4200
Seattle, WA 98154-1154
206.292.1144 **WWW.HELSELL.COM**

should be denied because he has failed to demonstrate any of the elements necessary for granting reconsideration.

II. STATEMENT OF FACTS

The Property is zoned Multifamily Lowrise 1 (LR1). The Site is a rectangular lot containing approximately 6,000 square feet. Access to the Site is from 22nd Avenue West to the east. There is an improved alleyway to the west and existing developments to the north and south.

On July 31, 2017, Sound Equities submitted the Permit to SDCI to subdivide one parcel of land into two separate lots. Several days later, SDCI posted the Notice of Application. The Permit then went through a period of public comments that ended on August 16, 2017. After the public comment period and review by SDCI and other city departments, the SDCI Director issued the Decision on December 18, 2017. On January 2, 2018, Moehring filed the Appeal; on January 8, 2018, Moehring filed the Amended Appeal.

The Amended Appeal raised five objections to the Decision; to wit, (a) the Decision is based on an erroneous application of the short plat approval criteria, SMC 23.24.040.A, (b) the Decision does not contain any findings of fact and provides conclusory analysis, (c) the short plat conflicts with the purpose, intent and requirements for rowhouse development, (d) the Decision fails to identify or require conditions to ensure subsequent development will not result in noncompliance with the Seattle Municipal Code (the "Code"), and (e) the Decision circumvents zoning density prohibited by King County.

Sound Equities then filed a motion to dismiss which was granted in part, leaving only two discrete issues to be decided at the hearing: (a) whether the Short Plat failed to provide adequate access for vehicles under SMC 23.24.040.A.2, by failing to provide exclusive vehicle access for each of the proposed lots under SMC 23.84A.024, and (b) whether the Short Plat was designed to maximize the retention of existing trees.

HELSELL
FETTERMAN
Helsell Fetterman LLP
1001 Fourth Avenue, Suite 4200
Seattle, WA 98154-1154
206.292.1144 **WWW.HELSELL.COM**

During the hearing, Moehring failed to introduce any evidence or testimony that the Short Plat did not provide adequate access under the Land Use Code. Furthermore, Moehring failed to allege, much less identify, an alternative short plat that was better designed to maximize the retention of existing trees. After the hearing concluded, and the parties submitted post-hearing briefs, Examiner Vancil issued his Findings and Decision that "the [Director's] Decision was not shown to be clearly erroneous, and it should therefore be affirmed."[1] Moehring then filed a motion for reconsideration on May 29, 2018. He then filed a "revised" motion for reconsideration on May 31, 2018 that was well outside the strict time limits for filing the motion.

III. STATEMENT OF ISSUES

1. Whether the motion for reconsideration should be denied because Moehring has failed to identify any irregularities in the proceedings that prevent him from having a fair hearing? Yes.

2. Whether the motion for reconsideration should be denied because Moehring has failed to identify a clear mistake as to a material fact? Yes.

IV. EVIDENCE RELIED UPON

This response is based upon the pleadings and papers filed in this matter.

V. AUTHORITY

A. The Hearing Examiner should disregard Moehring's "revised" motion for reconsideration.

Before getting to the merits (or lack thereof) of Moehring's motion for reconsideration, it should be noted that Moehring filed a "revised" motion for reconsideration on May 31, 2018 – well past the 10 day deadline to file a motion for reconsideration. Hearing Examiner Rules of Practice and Procedure ("HER") 3.20(b)

[1] *See* Findings and Decision, Conclusion No. 5.

HELSELL FETTERMAN
Helsell Fetterman LLP
1001 Fourth Avenue, Suite 4200
Seattle, WA 98154-1154
206.292.1144 **WWW.HELSELL.COM**

provides that: "Motions for reconsideration must be filed no later than 10 days after the date of the Hearing Examiner's decision." The Findings and Decision was issued on May 16, 2018. Because the 10th day fell on Saturday, May 26, and Monday May 28 was Memorial Day, a federal holiday, the motion for reconsideration was due Tuesday, May 29 by 5:00 p.m. Thus, the Hearing Examiner should disregard Moehring's "revised" motion for reconsideration because it is untimely.

B. <u>Moehring fails to identify any irregularity in the proceedings that prevented him from having a fair hearing.</u>

HER 3.20(a)(1) provides that the Hearing Examiner may grant a party's motion for reconsideration of a Hearing Examiner decision if one or more of the following is shown: (1) Irregularity in the proceedings by which the moving party was prevented from having a fair hearing. The HER do not define or describe "irregularities." However, pursuant to CR 60(b)(1) irregularities occur when there is a failure to adhere to some prescribed rule or mode of proceeding, such as when a procedural matter that is necessary for the orderly conduct of trial is omitted or done at an unseasonable time or in an improper manner. *Mosbrucker v. Greenfield Implement, Inc.*, 54 Wn. App. 647, 652, 774 P.2d 1267, 1270 (1989). CR 60(b)(1) contains similar language to HER 3.20(a) and provides in part that "the court may relieve a party or the party's legal representative from a final judgment, order, or proceeding for… [m]istakes, inadvertence, surprise, excusable neglect or irregularity in obtaining a judgment or order." Thus, case law interpreting CR 60(b)(1) is instructive on how this tribunal should interpret and apply HER 3.20(a).

Moehring alleges that there were irregularities in the proceedings because he was precluded from offering testimony based upon his failure to identify himself as a witness. This was not an irregularity in the proceedings. Examiner Vancil's Prehearing Order dated January 31, 2018 directed Moehring to file and serve his final witness list by no later than

HELSELL FETTERMAN
Helsell Fetterman LLP
1001 Fourth Avenue, Suite 4200
Seattle, WA 98154-1154
206.292.1144 **WWW.HELSELL.COM**

March 29, 2018 at 5:00 p.m. The Prehearing Order specifically stated that: "Witness lists must include the names of witnesses and a brief summary of their expected testimony. If a witness will be testifying as an expert, a statement of qualifications must be include."

HER 2.11 explicitly authorizes the Examiner to rule on procedural matters and objections. It is undisputed that Moehring failed to identify himself as a witness in his witness and exhibit list. Thus, Examiner Vancil was authorized by the HER to exclude Moehring from testifying as a witness during the hearing. It was consequently not an irregularity in the proceedings when Examiner Vancil precluded Moehring from testifying as a witness.

Moehring relies on several statements in the Public Guide to Appeals and Hearings Before the Hearing Examiner (the "Public Guide") in support of his claim that he should have been entitled to testify at the hearing even though he failed to disclose himself as a potential witness. These arguments are unavailing. The first page of the Public Guide specifically states that: "**NOTE**: Hearings and prehearing matters are governed by the *Hearing Examiner Rules of Practice and Procedure and the Hearing Examiner Rules for Discrimination Cases*. You will need to review these rules if you participate in an appeal. They are available from the Office of Hearing Examiner and on the Office's website at: http://www.seattle.gov/examiner" (emphasis in the original). The Public Guide is informational only, does not govern land use appeals, and cannot be used as a basis to demonstrate an irregularity in the proceeding.

Finally, even if precluding Moehring from testifying could be considered an "irregularity," which it is not, Moehring has failed to identify how this prevented him from having a fair hearing. While Moehring makes the conclusory statement that the hearing was unfair because he was not able to provide testimony and certain documentary evidence, Moehring does not state with any particularity the alleged testimony or documentary

HELSELL
FETTERMAN
Helsell Fetterman LLP
1001 Fourth Avenue, Suite 4200
Seattle, WA 98154-1154
206.292.1144 **WWW.HELSELL.COM**

evidence that he was precluded from offering. During the hearing, Moehring did not make any offer of proof[2] as to what he would have testified about or what the evidence he was seeking to introduce would have demonstrated.

The land use hearing concerned two discrete issues: (a) whether the Short Plat failed to provide adequate access for vehicles under SMC 23.24.040.A.2, by failing to provide exclusive vehicle access for each of the proposed lots under SMC 23.84A.024, and (b) whether the Short Plat was designed to maximize the retention of existing trees. The first issue, whether the Short Plat provided adequate access, is a purely legal issue that can be decided based solely on the Short Plat. The Hearing Examiner permitted Moehring to argue legal issues and he was even permitted to file a post-hearing brief that addressed those arguments.

Regarding the second appeal issue, whether the Short Plat was designed to maximize the retention of existing trees, Moehring called a certified arborist to testify at the hearing. Moehring is not an arborist and is not otherwise qualified to offer expert testimony on this issue. Regardless, he was permitted to call his expert witness to testify. And Moehring does not identify any specific testimony or documentary evidence that he was precluded from offering that might be relevant to this appeal issue.

For Moehring to be granted reconsideration he must demonstrate that (a) there was an irregularity in the proceeding, and (b) that the irregularity precluded him from having a fair hearing. Moehring fails on both counts. The simple fact remains that the Prehearing Order required Moehring to disclose any witnesses, including himself, that he intended to elicit testimony from during the hearing. The Hearing Examiner acted well within his authority when he precluded Moehring from testifying as a witness where he failed to

[2] HER 2.02(r) states: "Offer of proof" - a party's statement for the record of what excluded evidence would show had it been admitted.

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Helsell Fetterman LLP
1001 Fourth Avenue, Suite 4200
Seattle, WA 98154-1154
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identify himself as a witness in violation of the Prehearing Order. But, even if that could be considered an irregularity, it did not prevent Moehring from having a fair hearing.

C. <u>The Hearing Examiner did not make a clear mistake as to a material fact.</u>

Moehring argues that the Hearing Examiner's findings were incomplete because Moehring was precluded from testifying and offering certain evidence. Again, Moehring does not make an offer of proof of the testimony or documentary evidence that he was precluded from offering. Regardless, this is not a clear mistake as to a material fact. Moehring goes on to allege three separate mistakes of material fact that will be discussed in turn below.

1. <u>The Short Plat complies with the access requirements under SMC 23.24.040.</u>

Moehring argues that because SDCI's Closing Statement states that "the short subdivision will provide pedestrian and vehicular access (including emergency vehicles), and public and private utilities" yet the Short Plat states that "no curbcuts or vehicular access from 22nd Avenue W. will be granted for any future development permits associated with proposed parcel A" is a clear mistake of material fact. It is not. Moehring is required to identify a clear mistake of material fact in the Examiner's Findings and Decision. His reliance on SDCI's the Sound Equities' post-hearing briefs is not a sufficient basis for granting reconsideration, especially when those arguments were not relied upon by the Hearing Examiner in his Findings and Decision.

Moehring ignores the Hearing Examiner's detailed analysis which points out that "[n]either SMC 23.24.040.A.2 nor [23.84A.024] requires dedicated vehicular access to be established on each lot for the subdivision."[3] The parcels are only required to provide access, which includes pedestrian access. Parcel A meets this requirement because it has direct access to 22nd Avenue West and an exclusive pedestrian access easement over Parcel

[3] Findings and Decision, Conclusions, ¶2.

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1001 Fourth Avenue, Suite 4200
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B to the alley. Parcel B meets this requirement because it has direct vehicular and pedestrian access to the Alley.

2. Moehring concedes that the Short Plat complies with the vehicular access requirements under SMC 23.53.005 and 23.53.025.

Section II(B) of Moehring's motion for reconsideration acknowledges that the Short Plat complies with the vehicular access requirements under SMC 23.53.005 and 23.53.025.

3. The Short Plat complies with the definition of a "Lot" under SMC 23.84A.024.

Moehring claims that the rear parcel (Parcel B) has not met the definition of a "Lot" because the Short Plat states that there will be no curbcuts or vehicular access allowed for future development from 22nd Avenue West and that "[n]o easement may be provided for Parcel B through Parcel A given the application bars vehicular access by Parcel A to the street."[4] As an initial matter, this is a legal argument. Moehring fails to identify a mistake of fact made by the Examiner, let alone a clear mistake as to a material fact.

Not only has Moehring failed to identify a legally cognizable basis for granting reconsideration under the HER, but his argument that Parcel B does not meet the definition of a "Lot" is flat wrong. SMC 23.84A.024 defines a Lot as follows:

> "Lot" means…a parcel of land that qualifies for separate development or has been separately developed. A lot is the unit that the development standards of each zone are typically applied to. *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.*" (emphasis added).

As discussed in Sound Equities' post-hearing brief, the definition of a "Lot" requires that a parcel of land either (a) provide vehicular access to a private or public street, or (b) provide permanent access through an exclusive and unobstructed easement. The second alternative only requires access, not vehicle access.

[4] *See* Motion for Reconsideration, Section II(C).

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1001 Fourth Avenue, Suite 4200
Seattle, WA 98154-1154
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Similarly, SMC 23.24.040.A.8.d, which only requires that new lots provide access to an alley, not vehicle access, provides that:

> Every lot except unit lots and lots proposed to be platted for individual live-work units in zones where live-work units are permitted, shall conform to the following standards for lot configuration, unless a special exception is authorized under subsection 23.24.040.B:
>
> d. If the property proposed for subdivision is adjacent to an alley, and the adjacent alley is either improved or required to be improved according to the standards of Section 23.53.030, then *no new lot shall be proposed that does not provide alley access,* except that access from a street to an existing use or structure is not required to be changed to alley access. Proposed new lots shall either have sufficient frontage on the alley to meet access standards for the zone in which the property is located or provide an access easement from the proposed new lot or lots to the alley that meets access standards for the zone in which the property is located.

(emphasis added). This code provision is consistent with the definition of a "Lot" because both provisions only require access, which may be satisfied by a pedestrian access easement.

Parcel A meets the definition of a "Lot" because Parcel A has pedestrian access to 22nd Avenue West, a public street, as well pedestrian access to the improved alley over the pedestrian access easement over Parcel B. Parcel B meets the definition of a "Lot" because (a) it provides direct vehicular access to the improved alley,[5] and (b) it provides an exclusive, unobstructed permanent pedestrian access easement over Parcel A. The Hearing Examiner agreed with this analysis in his Findings and Decision when he made the following conclusion:

> Neither SMC 23.24.040.A.2 nor [23.84A.024] requires dedicated vehicular access to be established on each lot for the subdivision. Instead, these provisions require lot access that satisfies that requirement elsewhere in the Code. In this case, the proposed lots meet the definition of "Lot" because the subdivision includes a 5-foot-wide pedestrian access easement that serves both lots. Both lots benefit from this easement, and thus "abut upon and [are] accessible from an exclusive, unobstructed permanent access easement,"

[5] SMC 23.84A.002 states: "Alley" means *a public right-of-way not designed for general travel and primarily used or intended as a means of vehicular and pedestrian access to the rear of abutting properties*. An alley may or may not be named. (emphasis added)

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Helsell Fetterman LLP
1001 Fourth Avenue, Suite 4200
Seattle, WA 98154-1154
206.292.1144 **WWW.HELSELL.COM**

> where an "access easement" is not required to be an easement for vehicles, but also encompasses pedestrian easements. The pedestrian easement is "exclusive" because it is dedicated solely to access from the two proposed lots and not to the public or other users. Both lots meet the standards for street frontage as Parcel A has street frontage, and Parcel B fronts an improved alley and has access to the pedestrian easement for access to the street. The Appellant failed to demonstrate that the proposed short plat does not meet the criteria of SMC 23.24.040.A.2.[6]

Moehring's claims that the Short Plat does not provide adequate access are without merit and, more importantly, do not allege, much less identify, a clear mistake as to a material fact.

4. The Short Plat is designed to maximize the retention of existing trees, and thus, complies with SMC 23.24.040.A.6.

The Hearing Examiner properly concluded that the Short Plat was designed to maximize the retention of existing trees. Moehring, again, fails to identify any mistake of fact in the Examiner's Findings and Decision, let alone a clear mistake as to a material fact that would warrant reconsideration of the Hearing Examiner's Decision.

Moehring claims that the Short Plat does not comply with SMC 23.24.040.A.6 because "there remains no evidence to support the Departments due diligence that the proposed short plat subdivision will maximize the retention of existing trees."[7] Moehring has it exactly backwards. It is his burden to demonstrate that Director's Decision is clearly erroneous – which he failed to do – not SDCI's.

Moehring goes on to assert that he presented three alternative subdivisions of land that were better designed to maximize the retention of existing trees. He did not. Moehring argues that by combining the two 5 foot easements into one 10 foot easement along the southern border, that would result in the retention of a tree to the north. Moehring ignores the fact that by combining the easements, assuming that would even be permitted by the

[6] *See* Findings and Decision, Conclusions, ¶2.
[7] *See* Motion for Reconsideration, Section II(D).

HELSELL FETTERMAN
Helsell Fetterman LLP
1001 Fourth Avenue, Suite 4200
Seattle, WA 98154-1154
206.292.1144 **WWW.HELSELL.COM**

City, it would be much more difficult to retain the tree along the southern border due to the increase in the utility infrastructure. Moehring also fails to address the argument raised in Sound Equities' post-hearing brief that combining the easements would only push the development further to the north, thereby resulting in the loss of any trees in that area.

Mohering next argues that subdividing the property approximately 35-37 feet west of the alley would result in the retention of a tree located at the proposed rear boundary line. Moehring again ignores the arguments raised in Sound Equities' post-hearing brief for why this alternative short subdivision would not result in the retention of any additional trees. Under SMC 23.45, rowhouses may be developed with only five foot front setbacks and zero foot rear setbacks with alley. Thus, this proposed subdivision would not result in the retention of any additional trees because the rowhouses could be developed up to that rear property line.

Finally, Moehring argues that by subdividing the lot longitudinally it would result in the retention of more trees than the Short Plat because it would no longer be necessary to provide a utility easement because both lots would have frontage on 22nd Avenue West and the improved alley. Moehring continues to ignore the development that is allowed in LR1 zones. It is undisputed that under SMC 23.45 rowhouses may be developed with only five foot front setbacks, zero foot rear setbacks with alley, and zero side setbacks. Putting aside the awkward development that would result from long skinny lots, it would not better maximize the retention of existing trees than the Short Plat.

VI. CONCLUSION

The Hearing Examiner acted well within his authority under HER 2.11 when he precluded Moehring from testifying based upon his failure to comply with a Prehearing Order and identify himself as a witness. It was not an irregularity in the proceedings. And even if it was, it did not preclude Moehring from having a fair hearing because (a) he does

HELSELL
FETTERMAN
Helsell Fetterman LLP
1001 Fourth Avenue, Suite 4200
Seattle, WA 98154-1154
206.292.1144 **WWW.HELSELL.COM**

not identify any exhibit that he was precluded from introducing based upon the preclusion of his testimony, (b) he was able to make legal arguments concerning whether the Short Plat provided adequate access, (c) he was permitted to question his arborist about the trees, and (d) he did not have any personal knowledge that was relevant to the issue of whether the Short Plat was designed to maximize the retention of existing trees. Moehring also fails to allege any clear mistake of material fact; he simply disagrees with Examiner Vancil's Findings and Decision, which is an insufficient basis for granting reconsideration. For all of these reasons, Sound Equities respectfully requests that the Hearing Examiner deny the Moehring's Motion for Reconsideration.

Respectfully submitted this 4th day of June, 2018.

HELSELL FETTERMAN LLP

By: *s/ Brandon S. Gribben*
Brandon S. Gribben, WSBA No. 47638
Attorneys for Applicant and Property Owner
Sound Equities Incorporated

HELSELL FETTERMAN
Helsell Fetterman LLP
1001 Fourth Avenue, Suite 4200
Seattle, WA 98154-1154
206.292.1144 **WWW.HELSELL.COM**

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on June 4, 2018, the foregoing document was sent for delivery on the following party in the manner indicated:

Appellant Contact:
David Moehring

☐ Via first class U. S. Mail
☐ Via Legal Messenger
☐ Via Facsimile
☒ Via Email to
dmoehring@consultant.com

Hearing Examiner
Office of Hearing Examiner
700 Fifth Avenue, Suite 4000
Seattle, WA 98104

☐ Via first class U. S. Mail
☐ Via Legal Messenger
☐ Via Facsimile
☒ Via Email to
Alayna.johnson@seattle.gov

Department Contact:
Joseph Hurley
SDCI
PO Box 34019
Seattle, WA 98124

☐ Via first class U. S. Mail
☐ Via Legal Messenger
☐ Via Facsimile
☒ Via Email to
joseph.hurley@seattle.gov

s/ Kyna Gonzalez
Kyna Gonzalez, Legal Assistant

HELSELL FETTERMAN
Helsell Fetterman LLP
1001 Fourth Avenue, Suite 4200
Seattle, WA 98154-1154
206.292.1144 **WWW.HELSELL.COM**