

BEFORE THE HEARING EXAMINER
FOR THE CITY OF SEATTLE

In Re: Appeal by

David Moehring and adjacent neighbors
to 2300 W Emerson Street, Seattle
WA 98199

Hearing Examiner File
MUP-18-022

of the September 13, 2018
Determination of Non-Significance by
Lindsay King, Land Use Planner,
Seattle Department of Construction and
Inspections.

Appellant Response to the Applicant
and Owner's Motion to Dismiss Land
Use Appeal of 2300 W Emerson
Street discretionary decision that an
EIS is not required

I. BACKGROUND OF APPEAL AND MOTION

In response to Motion to Dismiss served October 26, 2018 from the Applicant Julian Weber and the property owner Isola Real Estate VII LLC, the appellant, represented by David Moehring, hereby objects to all issues suggesting that the appeal does not have merit or suggesting that the Hearing Examiner does not have the authority to vacate the Determination of Non-Significance.

The Determination of Non-Significance (hereafter 'DNS') issued by the Department is a discretionary decision that indicates that the proposed development site at 2300 West Emerson Street does not require an Environmental Impact Statement (hereafter, EIS). As the appeal indicates, the Seattle Department of Construction and Inspections (hereafter, the 'Department') has made a determination based on erroneous and incomplete information, thereby concluding that an EIS will not be required. Regardless of the size of the property, such decisions are clearly under the jurisdiction of review by the Seattle Office of the Hearing Examiner. More appropriately, the decision should have been "Pursuant to SEPA substantive authority provided in SMC 25.05.660, the proposal has been conditioned to mitigate environmental impacts." Instead, with erroneous and incomplete information, the Department made a decision that "This proposal has been determined to not have a significant adverse impact upon the environment. An EIS is not required under RCW 43.21.030(2)(c)."

1 The proposed 9-dwelling rowhouse development of 2300 West Emerson Street (hereafter
2 the "Subject Property") is located within a relatively short distance from the potential landslide
3 zone which the appellant lives. The development also partially encompasses large trees that
4 will be affected along the public right-of-way.

4 The Motion to Dismiss states (on page 13 with emphasis added) that "There is *absolutely*
5 *no precedent* for requiring an EIS for a small 9-unit rowhouse. In fact, there is *no precedent*
6 *for requiring* an EIS for much larger projects, including mixed-use buildings with
7 commercial space and over 50 residential units." Yet, the Applicant has not provided any
8 information to substantiate the relevance of a size of project relative to a DNS; nor has the
9 Applicant provided any analysis to substantiate the claim that there is no precedent for
10 requiring an EIS for much larger projects. If the Applicant is suggesting that environmental
11 impacts are only relevant for development lots larger than the Subject Property, then they
12 should identify the relative code section, which they have not.

10 In fact, there are numerous Seattle residential examples – including areas within this
11 Magnolia-Interbay neighborhood – where single-lot construction activity has been a part of
12 geotechnical failures. For example, a geotechnical failure related to a building structure has
13 been recorded on Seattle's landslide map in the 3000 block between 29th and 30th Avenue
14 West, even though the steeply sloped site is not within a designated potential landslide
15 area (Figure 1). Only with a completed and corrected SEPA checklist and substantive
16 supporting documentation will the Department be able consider all of the criteria to
17 ascertain if the Subject Property is at risk of affecting the immediate environment.

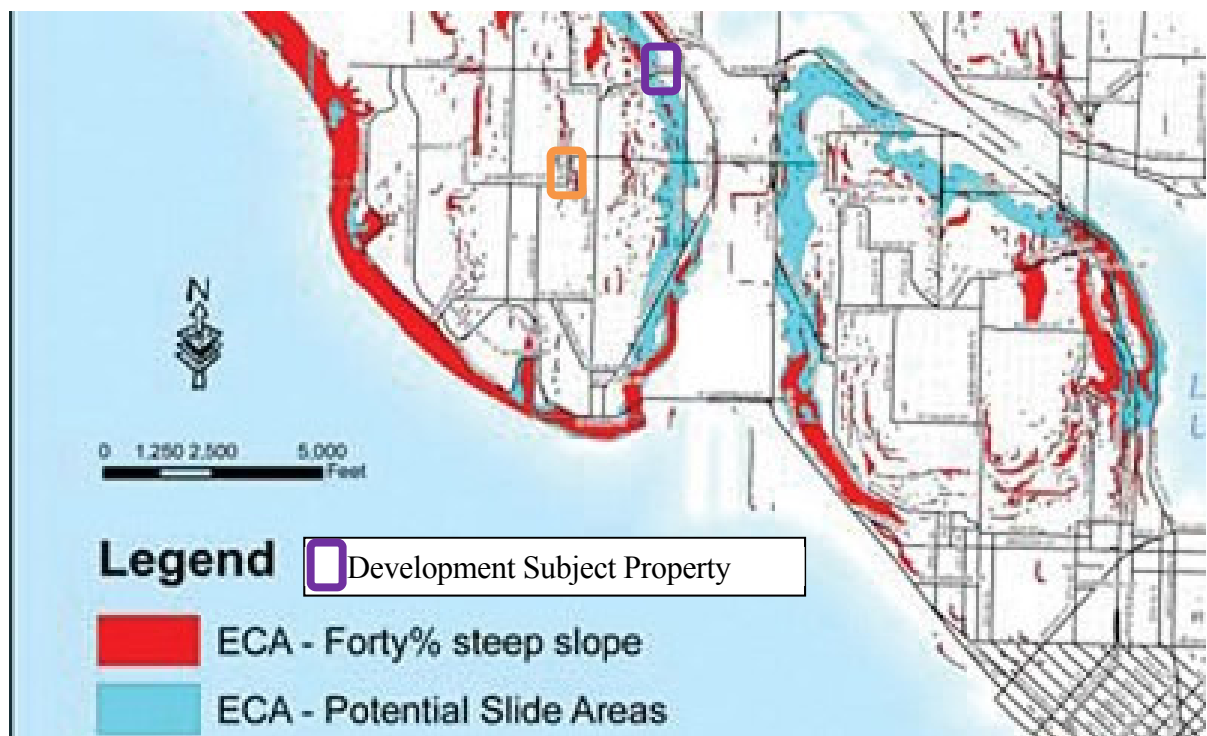


Figure 1- Magnolia and Queen Anne designated areas of Steep Slopes and Potential Slide Areas (MTD Exhibit F)



Figure 2- (above) Annotated site plan of the appeal that indicate areas that were neglected in the DNS. And (below) the Subject Property as viewed from the intersection looking northwest.



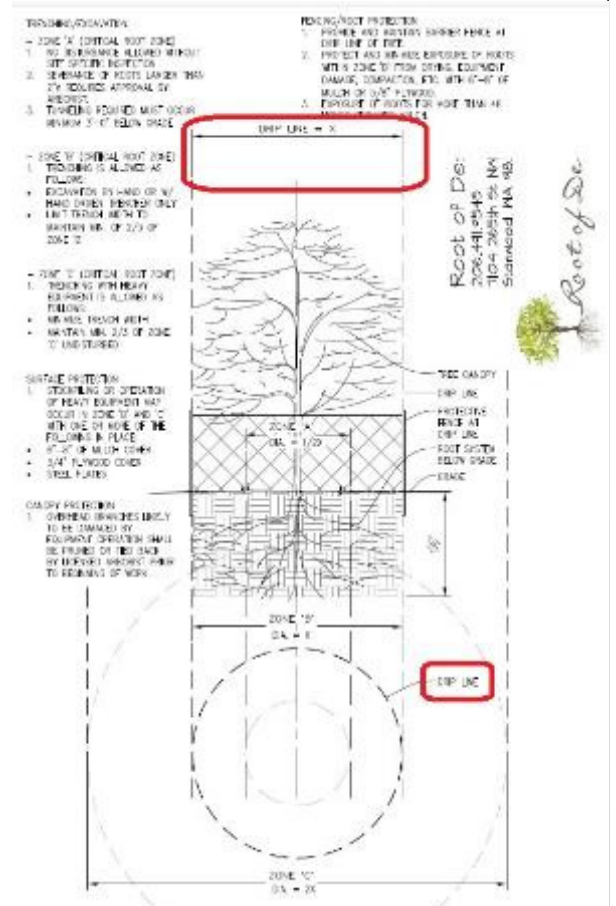


Figure 3- (left) Image of one of the trees located along 23rd Avenue West; and (right) the typical required tree protections to the root feeder zone and tree canopy.

II. REASONS TO DENY THE MOTION TO DISMISS

The Motion to Dismiss concludes that “For Moehring to survive this motion to dismiss, the Hearing Examiner must conclude that (a) Moehring has raised a valid objection to the Decision, and (b) he has requested relief that (i) the Hearing Examiner has jurisdiction to grant, and (ii) directly relates to that valid issue raised on appeal. In other words, even if Moehring raises a valid issue on appeal, but has not requested relief directly related to that issue that the Hearing Examiner has authority to award, or vice versa, then the motion to dismiss must be granted, and the Appeal dismissed.”

(a) Is this a valid objection? Yes :

Seattle Municipal Code (SMC) 23.76.020.D.1 identifies “The notice of the Director's decision shall state the nature of the applicant's proposal, a description sufficient to locate the property, and the decision of the Director. The notice shall also state that the decision is subject to administrative appeal or administrative review and shall describe the appropriate administrative appeal procedure.” Accordingly, the Notice of Decision was published on September 13, 2018 and confirms that it may be appealed. It states “The following appealable decisions have been made based on

submitted plans: Determination of Non-Significance (no environmental impact statement required). Environmental review completed and no conditions imposed. This DNS is issued using the optional DNS process in WAC 197.11.355 and SMC 25.05.355. The comment period was originally published on January 25, 2018 and there is no further comment period on this DNS.” The Appellant and others made comments during the comment period that were evidently ignored or overlooked prior to the decision.

(b) Does the Hearing Examiner has jurisdiction to grant? Yes:

Per SMC 23.76.022, all Type II decisions listed in subsection 23.76.006.C are subject to an administrative open record appeal. This includes procedural environmental decisions for Master Use Permits and for building, demolition, grading, and other construction permits subject to appeal to the Hearing Examiner specifically noted as “Determination of Non-significance (DNS), including mitigated DNS”.

(c) Does the relief requested relates to the issues raised on appeal? Yes:

The requested relief asks the Hearing Examiner to vacate the Determination of Non-Significance with instructions to the SDCI to prepare an Environmental Impact Statement EIS to adequately address the environmental impacts and mitigation to meet the objective of providing adequate protections to Seattle’s right-of-ways and the nearby residents. Per Hearing Examiner’s Rules 3.18 (b), the Hearing Examiner’s decision may affirm, reverse, modify, or remand the Department’s decision or other action that is the subject of the appeal. Further, this decision shall be based upon a consideration of the whole record and, unless otherwise provided by applicable law, supported by substantial evidence in the record. The decision may also include an order disposing of contested issues and/or directing parties to take actions consistent with the decision. Substantial evidence is to be provided in due course with the scheduled hearing starting January 7, 2019.

As indicated in the appeal, each appellant will be adversely impacted by enactment of the proposed development notwithstanding the determination by the responsible party’s discretionary decision that an EIS is not required under RCW 43.21.030(2) (c). The appellant with adjacent neighbors (hereafter “Appellant”) asks that the Hearing Examiner require the Applicant’s development be considered for its environmental impact pursuant to SEPA substantive authority provided in SMC 25.05.660 that may lead this proposal to be conditioned to mitigate the environmental impacts.

SMC 25.05.444 identifies the elements of the environment that must be considered in an Environmental Impact Statement. Those applicable to the Subject Property include the Natural Environment (geology, soils, topography, unique physical features, i.e. rockery, erosion, air quality, odor, climate, surface water, ground water, runoff/absorption, public water supplies, trees and animals, scenic resources); the Built Environment (noise, housing light and glare, aesthetics, transportation systems, vehicular traffic, parking, traffic hazards, public services and utilities, fire, water service, and sewer/solid waste.) Each of these considerations are outlined within SMC 23.45.

III. FACTS TO DENY THE MOTION TO DISMISS

Evidence of Probable Significant Impact:

As indicated in the appeal, the decision is erroneous in several ways. The decision states that the "lead agency for this proposal has determined that it does not have a probable significant adverse impact on the environment. An environmental impact statement (EIS) is not required under RCW 43.21C.030 (2) (c)." Per SMC 25.05.782 - "Probable" means likely or reasonably likely to occur, as in "a reasonable probability of more than a moderate effect on the quality of the environment". "Probable" is used to distinguish likely impacts from those that merely have a possibility of occurring, but are remote or speculative. Given development examples within the Magnolia neighborhood and along this street – including forthcoming testimony regarding a 6-unit development at 3827 23rd Avenue West – there is adequate evidence to demonstrate a probable environmental impact resulting from the development of the Subject Property.

Threshold of Categorical Exceptions:

The Subject Property includes nine dwellings outside an urban center and thereby not exempt by review per Table A for SMC 25.05.800, which states the minimum threshold as four (4) dwellings with SF and LR1 zones.

Application of Work within adjacent Right-of-Way:

The application indicates existing significant trees and rockery within the right-of-way that will be compromised as a result of the proposed development or any such LR1 development minimal five-foot property to structure setback requirements. Significant trees within the right-of-way, if damaged due to the proximity of the new construction to the critical elements of the trees, may take many years to replace even assuming they can be replaced with similar quality resources and in the same geographical location. The existing steep rockery must be evaluated for soil stabilization and retention of the trees. The photos of the rockery included within the Motion to Dismiss only enforce the fact that these are retaining structures exceeding the maximum slope of 1:2 verticle:horizontal pitch. If the rockery is removed, alternative mitigation of soil and tree retention must be considered. The proposal drawings show stairways from the street up to the new rowhouses at locations of the existing rockery where no stairs currently exist. This right-of-way work is not exempt from the evaluation of environmental impacts as suggested in the Motion to Dismiss according to the list of exceptions provided in SMC 25.05.800.B.4.

Potential landslide or failed soil stabilization:

The Motion to Dismiss inaccurately claims there is no history of landslides in the area. This claim contradicts public records ¹. There is at least one recorded landslide at most one block from the Subject Property and another three landslides within three blocks south of the Subject Property. The applicant's response in the Checklist, as required with SMC 25.05.330, was thereby erroneous and not challenged by the Department. The Appellant

¹ See link to city information at

https://www.seattle.gov/dpd/cs/groups/pan/@pan/documents/web_informational/dpdd017622.pdf

requests the right to cross-examine SDCI's Dean Griswold's untimely Land Use Report (Motion Exhibit E).

No evidence in engaging SDOT
Forestry:

As the reason for the subpoena, the phone number indicated on the application drawing belongs to SDOT Urban Forestry's Ben Roberts. Per September 21, 2018 email from Mr. Roberts, "It doesn't not sound like a plan that has been reviewed by SDOT Forestry yet. Most likely, this is the proposal from the development application. SDOT Forestry will review and give accurate guidances based on first hand review of Right of Way trees by in house urban foresters." It is evident, therefore, that the stated correction notice was not responded to prior to the January 19, 2018 SEPA Checklist and the SEPA Checklist review by SDCI dated July 19, 2018. SDOT Forestry's Mr. Roberts was not engaged at the time of the DNS and to the date of this appeal. Additionally, SMC 23.47A.014 requires that "Existing street trees shall be retained unless the Director of Transportation approves their removal. The Director, in consultation with the Director of Transportation, will determine the number, type and placement of street trees."



Admitted error in adjacent Single-Family zone:

The Motion to Dismiss admits that the SEPA checklist, for which the DNS is to be based, was erroneous. The appellant concurs that such an adjacency between LR1 and SF zones are common, but that fact does not dismiss the fact that the environmental impacts of this adjacency need not be considered or mitigated including requirements of SMC 23.47A.014, 23.45.518 and 23.86.012. However, given the SF-5000 property to the south are separated by a street, only the lots to the west may be considered with the appeal.

1 Steep Slope Error:

2 The Motion to Dismiss also indicates that SDCI's Mr. Griswold post-DNS review of the
3 topographical survey indicated there are no areas at least 10 feet of elevation difference.
4 However, drawings demonstrate that the sidewalk on the east end of the side is at
elevation 80-feet with the alley at the west end at 101-feet. Figures 2 and 4 (above)
demonstrates that the change in elevation at the east end is 10 feet. In addition, Exhibit I of

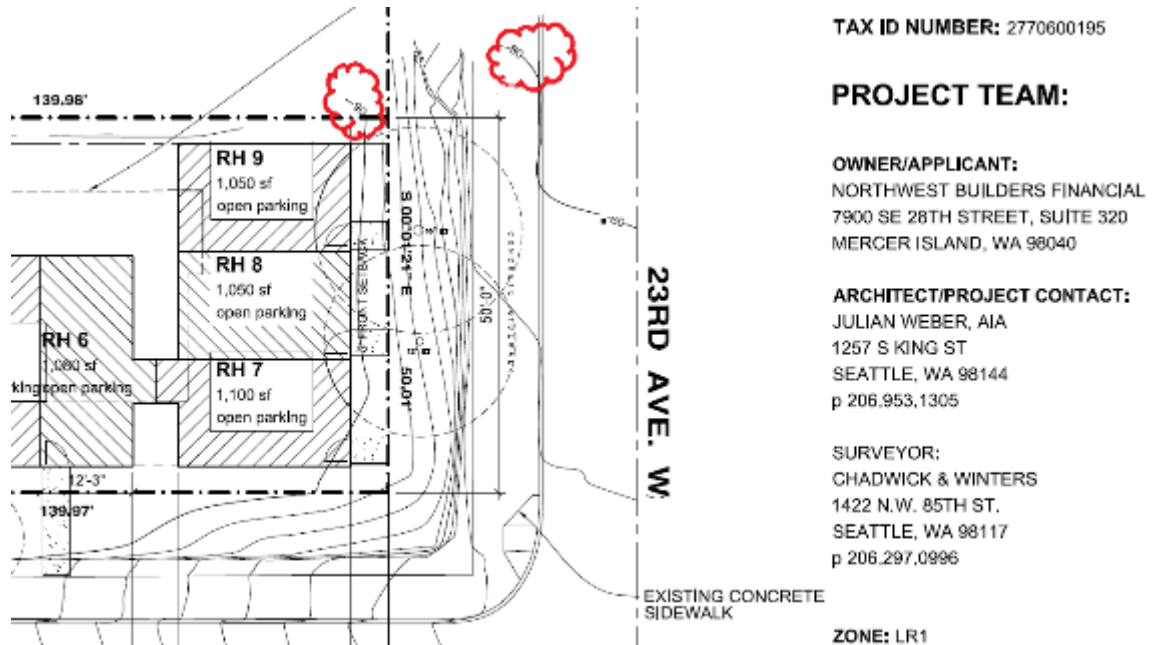


Figure 4- Subject Property topography along street right-of-way. Each topo line is one-foot incline (from Exhibit H of the Motion to Dismiss – annotated).

the Motion to Dismiss requires a cross-examination during appeal proceedings and should not be considered with the consideration to dismiss any part of the appeal.

Tree Protection:

The Arborist report of three (3) pages is woefully inadequate (Motion Exhibit M). Not only does the report indicate that no protections for existing trees are required, the report limitations state that “trees are dynamic and their conditions can change rapidly given changes in environmental factors and site development.” The protection of the street trees are entirely waived by the applicant’s arborist. Evidence has been provided at the hearings of W-17-006 that indicate that the provisions have not been enforced, and are thereby not effective to address environment impacts without coordinated effort between SDOT and the Department. The Motion is indeed accurate that the removal of street trees are regulated by Title 15² of the SMC; and excluded from the protections of SMC 25.11. The Figure 2 and diagram file called “Sheet A1.0” posted with the appeal on September 24th clearly demonstrates, contrary to the motion, that the street trees dripline and root feeder

² Note that the Applicant’s arborist report fails to identify that the City’s policy is to retain and preserve street trees whenever possible. Accordingly, street tree removal shall not be permitted unless the Director determines that a street tree is a hazardous tree; poses a public safety hazard; is in such a condition of poor health or poor vigor that removal is justified; or cannot be successfully retained, due to public or private construction or development conflicts.

1 zone have been ignored with the DNS. In addition, parts C and D of the appeal address the
2 issues and concerns relative to the errors in the DNS relative to the street trees on a steep
3 slope.

4 Inadequate Geotechnical Report:

5 The single-page geotechnical report dated September 13, 2017 referenced within the
6 Motion of Dismiss (Exhibit L) is woefully inadequate for a property with the geographic and
7 topographical characteristics. Other project submissions taken by the SDCI include
8 geotechnical reports in excess of 10 pages to adequately cover all of the issues and
9 document findings. The professional Standard of Care has not been achieved. The lack of
10 attention and due diligence by the Department is clearly erroneous in terms of a DNS.

11 Burden of determination:

12 The applicant references an appeal hearing MUP-17-002 for a parking lot site within an
13 urban village that was ultimately dismissed by the Hearing Examiner given that appellant
14 expressed only concerns and opinions. To apply a different case to a reason to dismiss this
15 appellant is not justified. This case will indeed provide the expert witness testimony and
16 exhibits demonstrating the erroneous DNS.

17 **IV. CONCLUSION**

18 As indicated in the appeal and reiterated within this response, the Appellant has offered the
19 Hearing Examiner the assurance that the Appellants have (a) raised a valid objection to the
20 Decision, and (b) have requested relief that the Hearing Examiner has jurisdiction to grant
21 which is directly related to the issues raised within the appeal.

22 The Department's untimely concurrence with the Applicant's motion has not been considered
23 in this response. The Appellant reserves the right to be able to respond to any subsequent
24 Department response.

25 Filed on behalf of the Appellants this 2nd day of November, 2018.

26 By: 

David Moehring, 3444B 23rd Avenue West

With and for:

BONNIE MCDONALD
3823 23RD AVE W 98199

Certificate of Service

I certify under penalty of perjury under the laws of the State of Washington that on this date I sent true and correct copies, via e-mail, of the attached David Moehring, the Neighbor to 3641 22nd Ave West, **Appellants' Response to the Applicant's Motion to Dismiss** in the matter of the **Determination of Non-significance of 2300 W Emerson**, Hearing Examiner File No. MUP-18-022.

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Dated November 2, 2018



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