

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

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

Hearing Examiner File  
MUP-18-022

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

**I. BACKGROUND OF APPEAL AND MOTIONS**

In response to Motion to Dismiss served October 26, 2018 from the Applicant Julian Weber and the property owner Isola Real Estate VII LLC, and subsequently revised on December 7, 2018, 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. Clearly SMC Table A for 25.05.800 indicates that  
11 the number of nine units within this LR1 zoned property is not below the threshold of 4  
12 units. As such, the Environmental policies and procedures apply, If the Applicant is  
13 suggesting that environmental impacts are only relevant for development lots larger than  
14 the Subject Property, then they should identify the relative code section, which they have  
15 not.

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

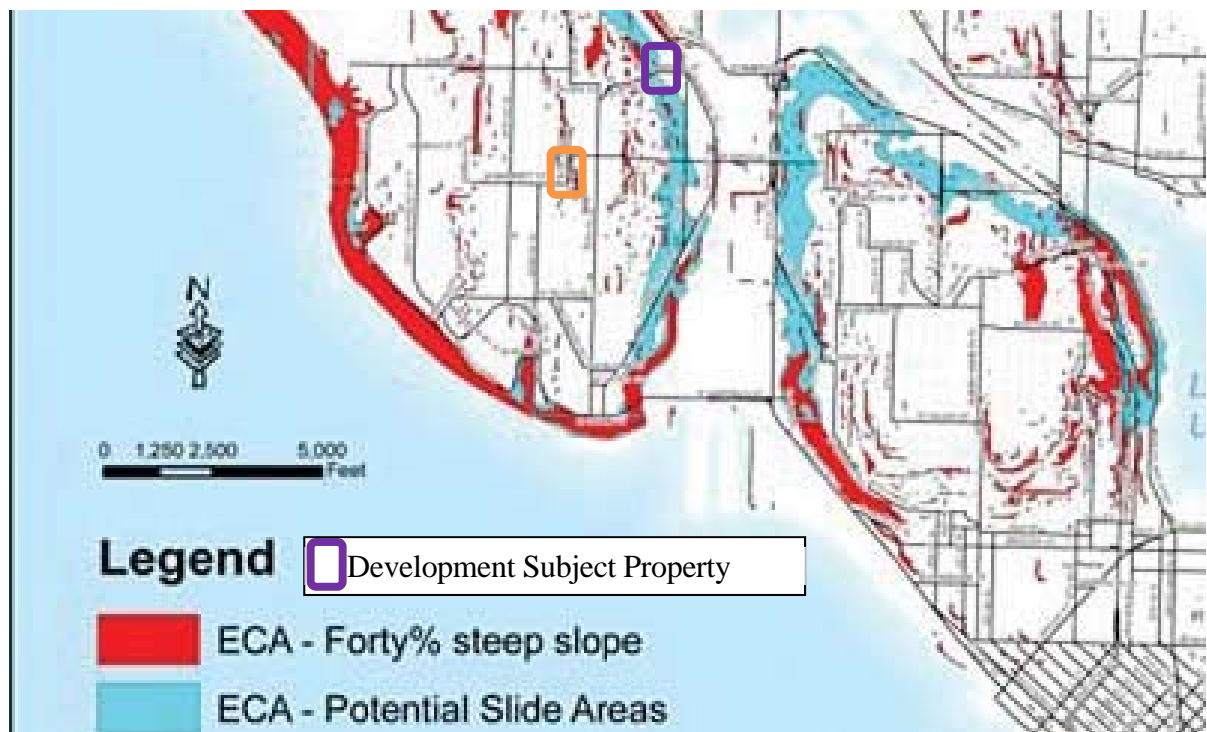




Figure 2- (above) Annotated site plan of the appeal that indicate areas that were neglected in the DNS. And (below) the Subject Property as viewed from the intersection looking northwest.





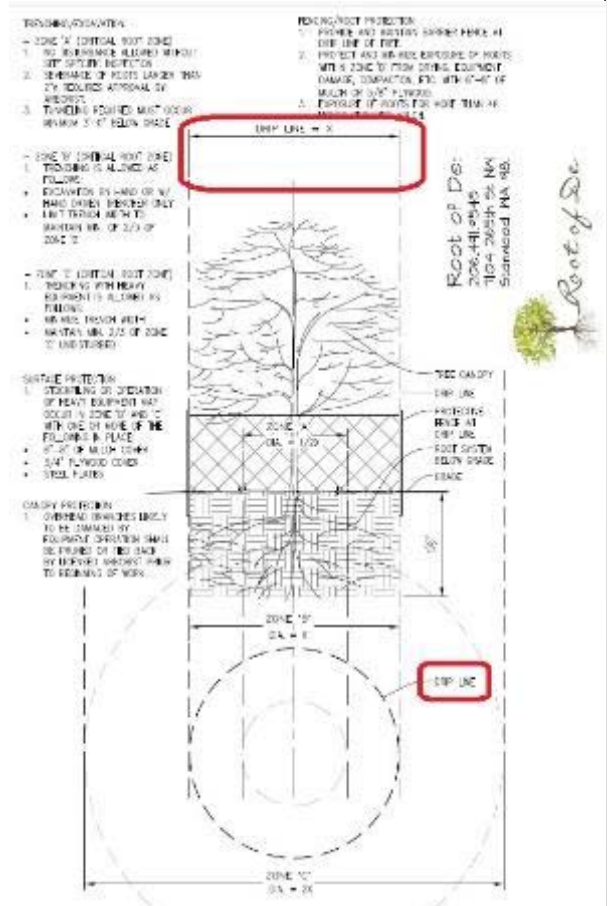


Figure 3- (left) Image of one of the trees located along 23rd Avenue West; and (right) the typical required tree protections to the root feeder zone and tree canopy.

## II. OVERVIEW ON THE MOTION FOR SUMMARY JUDGEMENT

By the "PUBLIC GUIDE TO APPEALS AND HEARINGS BEFORE THE HEARING EXAMINER" dated March 2018, 'Appeal hearings are legal proceedings, in that they are established by law and result in decisions that have legal force and effect. Some persons involved in appeal hearings have lawyers to represent them, but many citizens and City agencies represent themselves. It is not necessary to have an attorney, and you don't have to be an attorney to represent yourself or someone else in a proceeding before the Hearing Examiner. That said, representation by an attorney may be advisable for some complex appeals with difficult legal and factual issues.' Likewise, as stated in the "HEARING EXAMINER RULES OF PRACTICE AND PROCEDURE, Amended August 1, 2012, HER 2.02(w), a "Representative" in an appeal is the individual or firm designated by a party to be the official contact person and to speak for the party. Unless the law establishing the Hearing Examiner's jurisdiction requires otherwise, a representative is not required to be an attorney. Further, HER 3.13 PARTIES' RIGHTS AND RESPONSIBILITIES indicates in paragraph (b)

1 that 'Parties have the right to be represented by an attorney. Representation by an attorney  
2 is not required.'

3 The representative of the appellant, Mr. Moehring, is an architect and not an attorney. As  
4 such, any proposal of legal procedures outside of what is written within the Hearing Examiner  
5 rules or the Seattle Municipal Code as it pertains to administrative appeals should have little  
6 weight within this administrative hearing. HER 3.02 covers the conditions for dismissals, and  
7 therefore motions for dismissals should be accepted. However, per the Hearing Examiner's  
8 all-party conference call of December 7, 2018, the original motion made was largely a  
9 request for a Summary Judgement. The applicant was subsequently allowed to revise the  
10 original motion of October 26 to a request a Summary Judgment. Yet, nowhere within the  
Hearing Examiner Rules are the Hearing Examiner requirements for Summary Judgement  
identified. Instead of providing a fair review of the evidence relative to the need for an  
environmental impact statement on the Subject Property, the applicants legal representative  
is suggesting legal considerations to be applied within an administrative hearing outside the  
Rules of the Hearing Examiner.

11 It is clear that the applicant who is represented by an attorney is seeking to take advantage  
12 of the appellant who is not represented by an attorney. It is clear that this case is not complex  
13 enough to require an attorney. HER 2.11 states that the Hearing Examiner conducting a  
14 hearing has the duty to ensure a fair and impartial hearing. Requiring knowledge of the  
conditions of a Summary Judgments is outside the breathe of the Hearing Examiner Rules  
and the introduction of a Summary Judgement imposes an unfair burden to the appellant.

15 Moreover, the Seattle Municipal Code (version November 19, 2018) has included many  
16 references to what is covered by the Office of the Hearing Examiner. There are 51 references  
17 to the Hearing Examiner within the applicable Title 23 Land Use Code and 64 references to  
18 the Hearing Examiner within the applicable Title 25 Environmental Protection and Historic  
19 Preservation. Yet, none of these references to the authorities of the Hearing Examiner  
20 includes decisions on Motions for Summary Judgement. In fact, the term 'Summary  
Judgement' is not found within any applicable sections of the Seattle Municipal code. Some  
of the relevant codes include SMC 23.76.022 – 'Administrative reviews and appeals for Type  
I and Type II Master Use Permits'; it includes SMC 23.78.014 – 'Appeal of use criteria'; and  
it includes SMC 23.22.058 – 'Environmentally critical areas'.

### 21 **III. REASONS TO DENY THE MOTION FOR SUMMARY JUDGEMENT WITHIN THE** 22 **CONTEXT OF THIS ADMINISTRATIVE APPEAL**

23 The motion for Summary Judgement must be denied as it is not identified as an option with  
24 the Seattle Municipal Code nor has it been identified within the Rules of the Hearing  
25 Examiner. In addition to the question of the authority of the use of Summary Judgments  
within an administrative appeal, the criteria to be granted a Summary Judgement has not  
been met.

26 As an attorney and representative of the Applicant, Mr. Gribben has failed to identify within  
their revised motion how a Summary Judgement would apply. They have failed to

1 demonstrate the standard on summary judgement which requires reviewing all facts and  
2 reasonable inferences in the light most favorable to the nonmoving party, which is the  
3 Appellant, not the Applicant. The applicant has failed to identify the basis for a summary  
4 judgment relative the Department's Determination of Non-significance (DNS) relative to the  
5 Seattle Environmental Protection Act. The purpose of SEPA requirements is "to provide  
6 consideration of environmental factors at the earliest possible stage to allow decisions to be  
7 based on complete disclosure of environmental consequences." By the Department issuing  
8 a Determination of Non-Significance, they are suggesting that there are no environmental  
consequences to this development which the facts might demonstrate otherwise. Specifically  
ignored in the Department's decision was the conditions of soils, the existence of significant  
trees at the crest of a rockery bordering the development site, and the occurrences of  
landslides near the Subject Property as well as landslides in Magnolia outside of designated  
potential landslide areas. The appeal specifically identifies these environmental risks.

9 Any external case references to 'summary judgement', therefore, shall consider just those  
10 that were conducted within Seattle administrative hearings in order to provide a fair  
11 proceeding on the merit of the appeal. Mr. Gribben has not justified how references to  
Summary Judgements at Civil Hearings of the Superior Court would apply to the jurisdiction  
of the Seattle City-Council-appointed Hearing Examiner.

12 The Hearing Examiner cannot deny that this administrative appeal is governed by the rules  
13 of the City of Seattle. The Office of the Hearing Examiner is not known to have authorities of  
14 the Superior Court. Even if the Hearing Examiner's Rules included the Superior Court Civil  
15 Rules CR 56 for Summary Judgement, the proposed motion would fail achieving the criteria  
16 to grant a Summary Judgement. Paragraph (d) would confirm that this case is not fully  
17 adjudicated by the motion. "If on motion under the rule judgment is not rendered upon the  
18 whole case or for all the relief asked and a trial is necessary, the court at the hearing of the  
19 motion, by examining the pleadings and the evidence before it and by interrogating counsel,  
20 shall if practicable ascertain what material facts exist without substantial controversy and  
21 what material facts are actually and in good faith controverted. It shall thereupon make an  
22 order specifying the facts that appear without substantial controversy, including the extent to  
23 which the amount of damages or other relief is not in controversy, and directing such further  
proceedings in the action as are just. Upon the trial of the action, the facts so specified shall  
be deemed established, and the trial shall be conducted accordingly." The Applicant has not  
provided sufficient forms of Affidavits; Further Testimony; Defense Required. Supporting and  
opposing affidavits shall be made on personal knowledge, shall set forth such facts as would  
be admissible in evidence, and shall show affirmatively that the affiant is competent to testify  
to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred  
to in an affidavit shall be attached thereto or served therewith."

24 However, the Motion for Summary Judgement does not include depositions, answers to  
25 interrogatories, or affidavits. Instead, there are fifteen (15) exhibits attached to the Motion for  
26

Summary Judgement without any change to the same number of exhibits that were attached to the original October Motion for Dismissal.

As an architect of thirty years, it is my professional duty and standard of conduct to consider the health, safety and welfare of those at risk when the possibility has become known. Chapter 18.08.235 RSW Legislative findings—1985 c 37 empowers architects in order to safeguard life, health, and property and to promote the public welfare. The legal profession, on the other hand, has not been empowered to interfere with an architect exercising their professional duty to make known risks to the public's health safety and welfare. Chapter 18.235.110 RSW (3) allows a disciplinary authority to consider what sanctions are necessary to protect the public health, safety, or welfare. The Department's decision for a Determination of Non-significance regarding the Environmental Review for this project clearly falls within the thresholds of SMC 23.53.015A, SMC 25.05.060, SMC 25.05.792, and SMC 25.05.660. The appeal is firmly grounded on the basis that the Department has made a discretionary decision that could involve risk to the health, safety, and welfare of those potentially impacted by lack of sufficient and comprehensive review.

#### **IV. EVALUATION OF EXHIBITS WITHIN MOTION FOR SUMMARY JUDGEMENT**

An exhibit does not comply as basis for Summary Judgement, in general, if it does not offer a sufficient forms of affidavits; further testimony; or defense required. As the representative Appellant and as an architect, David Moehring hereby declares that he is qualified to and has conducted an evaluation of Applicant's Exhibits submitted with the Motion for Summary Judgement. Mr. Moehring has been a licensed as an architect since 1989 (IL 001.012961), and he is highly capable of reading and comprehending drawings, engineering and arborist reports, and topographic surveys. Mr. Moehring's summary comments to each exhibit is within the parenthesis ( ) which follows the exhibit title:

1. Ex. A - Director's Decision (does not comply as basis for Summary Judgement);
2. Ex. B - Appeal (ditto);
3. Ex. C - Annotated SEPA Checklist (ditto);
4. Ex. D - Site Photos (photos 1 to 4 confirms Street Trees at top of rockery at risk; distant photos 9 and 15 of the two right-of-way trees along Emerson);
5. Ex. E - Land Use Report (does not comply as basis for Summary Judgement);
6. Ex. F - City's Landslide Prone Areas (confirms Subject Property environmental risk contrary to Exhibit E)
7. Ex. F[a] - Closeup (confirms Subject Property environmental risk contrary to Exhibit E; noting 4 recorded landslides from one to three blocks south of the Subject Property);
8. Ex. G - Correction Notice - Arborist Report (record of the unfulfilled request the Department made to consult City Arborist Ben Roberts on April 10);
9. Ex. H - Correction Response - Arborist Report (Page 3 states "Please see the attached email with Ben Roberts regarding R.O.W. tree protection, and updates made on the landscape sheets." However, the exhibit does not include the referenced email and do not offer any acknowledgment that the email was received.)
10. Ex. I - Dean Griswold (Contrary to prior Exhibit F[a], Mr. Griswold erroneously states "No Known Landslide Areas are mapped in proximity to affect the subject property."

- 1 There are 4 recorded landslides from one to three blocks south of the Subject  
2 Property.)
- 3 11. Ex. J - Topographic Survey (drawing contour lines should a change in grade from  
4 elevation '80' at the street to elevation '90' at the proposed east face of the rowhouses  
5 RH7, RH8, RH9. To the contrary of what is shown in this exhibit, Mr. Griswold  
6 erroneously states within Exhibit I item 3 that "Based on the topographic survey in the  
7 plan set, the property does not contain area with at least 10 feet of elevation difference  
8 with slopes averaging 40 percent or steeper."
- 9 12. Ex. K - SEPA View Corridors (does not comply as basis for Summary Judgement);
- 10 13. Ex. L - Geotechnical Summary (this 1-page Preliminary Geotechnical information  
11 does not show the proposed locations of the 9 rowhouses. In addition, the document  
12 does address record of landslides within the area as shown in Exhibit F[a]; nor does  
13 it address the extent of excavation along the right-of-way; nor does it address the  
14 existing rockery; nor does it address possible contributions of the existing trees within  
15 the excavation area.);
- 16 14. Ex. M - Arborist Report (the 2-page arborist inventory does not address the risk to  
17 trees. The attached plan references the existing building without knowledge of the  
18 proposed Site Plan that was submitted with the appeal.)
- 19 15. Ex. N - MUP-17-002 Findings & Order (this exhibit is the Hearing Examiner's ruling  
20 on an unequitable project that went through a hearing. It offers no basis as a case  
21 study to dismiss an appeal either on its specific merits. It does not provide an  
22 Affidavits; Further Testimony; or Defense required for a Summary Judgement.

23 The Hearing Examiner may grant a motion for summary judgement by Civil Rule 56(c) if (a)  
24 the pleadings and any admissible evidence submitted by the parties and contained in the  
25 record show that there is no genuine issue to any material fact and (b) that the moving party  
26 is entitled to judgement as a matter of law. In addition, "A motion for summary judgement will  
be granted only if, after considering the evidence in light most favorable to the non-moving  
party" – which in this case is the Appellant, David Moehring. A motion for summary  
judgement will be granted only if "reasonable persons could reach but one conclusion."  
[Overton v. Consolidated Insurance Company]. In addition, "[a] court may grant summary  
judgment if the pleadings, affidavits, and depositions establish that there is no genuine issue  
as to any material fact and the moving party is entitled to judgment as a matter of law."  
Lybbert v. Grant County, 141 Wn.2d 29, 34, 1 P.3d 1124 (2000). As is discussed above and  
more in detail below, there are facts of the appeal that do not allow a Summary Judgement.

It is clear that all of the exhibits attached to the Motion for Summary Judgement do not clearly  
provide one conclusion. In fact, the single emailed declaration in Exhibit I contrasts with  
information presented in Exhibits F[a] and J. The Applicant's basis of Summary Judgement  
has failed the criteria as established by Superior Court Civil Rules CR 56.

## **V. EVIDENCE IN RESPONSE TO THE INAPPLICABLE MOTION FOR SUMMARY JUDGEMENT**

Attached to this response is the 10-page compilation of four documents titled Exhibit 'P' that  
demonstrate that the DNS was issued without resolution on the effect to the four right-of-way  
street trees. The documents are presented within Exhibit 'P' in reverse chronological order.



1 Keeping in mind that the Department's decision for Determination of Non-Significance (no  
2 environmental impact statement required) with environmental review completed and no  
3 conditions imposed was issued on September 13, 2018 (per appeal). However, as indicated  
4 on page 1 of the Exhibit 'P' following a response to a Seattle Magnolia-area resident, the  
5 SDOT Urban Forestry arborist listed on the applicant's landscape did not yet review the  
6 development plans. The exhibit also clearly shows an email from the SDOT Arborist dated  
7 April 6, 2018 to the SDCI Land Use Planner Charles Benson requiring an arborist report that  
8 call out the preservation and protection requirements of not only the trees, but the low  
growing vegetation. Mr. Roberts notes that the *"proposed structure is within the [trees] drip  
line. Based on the architectural drawings, this proposed structure would indeed result in  
excessive pruning of the Spruce trees, which does not comply with RPW tree protection  
standards."* (emphasis added).

9 The architect's renderings (below) of the proposed development shows the low growing  
10 vegetation and rockery removed.

11 The motion for Summary Judgement must be dismissed as the Applicant has not clearly  
12 identified that the whole case is without material evidence. The evidence of Exhibit P  
13 provided by the Appellant shall be weighted in favor of the Appellant given they are not the  
moving party. Material facts exist in good faith and with substantial controversy.

14 This appeal has a basis for concern to the environmental impacts given the unusual  
15 characteristics of the proposal. As such, it is essential that the Determination of Non-  
16 Significance ('DNS') must be assessed through the administrative appeal hearing process.  
17 In this particular case there are of nine (9) row-houses within a 7,000 square foot lot. From  
18 the perspective of an architect, the Subject Property has greater impacts to the environment  
19 compared to typical properties of this size for a variety of reasons:

- 20 (1) Whereas the public record for this property is proposing one multifamily dwelling for  
21 every 778 square feet of lot area (7,000 square feet lot divided by 9 dwellings), a  
22 typical property of this lot size within the LR1 zone is limited by the Seattle Municipal  
23 Code Title 23 Land Use Code to one (1) dwelling for every 1,600 square feet of lot  
24 area (Table A of SMC 23.45.512). The number of units proposed is over twice that  
25 what is typically allowed within Seattle's LR1 zones.
- 26 (2) Whereas the public record for this rowhouse development is proposing nine  
dwellings on the one lot, there is no other lot of this size which comes close to nine  
(9) multifamily dwellings of three-stories each.
- (3) Whereas the public record for the proposed development will include a three-story  
rowhouse building containing seventeen (17) bedrooms and seventeen (17)  
bathrooms [per the record set drawings A2.0 to A2.5], there is a significant increase  
compared to the existing parcel (#277060-0190) structure which has a single-story  
and finished basement triplex containing just six (6) bedrooms and six (6) full  
bathrooms. Although the zoning has not changes, this proposed development will  
result in the near trebling of bedrooms and washrooms. Environmental impacts will  
include the trebling traffic impacts, and the trebling of sewer, water, and power  
services. The reduction of permeable surfaces will impact the storm capacity.

Existing property data is from the King County online parcel records:  
<https://blue.kingcounty.com/Assessor/eRealProperty/Dashboard.aspx?ParcelNbr=2770600190>. <https://www.kingcounty.gov/services/gis/Maps/parcel-viewer.aspx> .

- (4) Whereas this lot proposed nine (9) multifamily dwellings, the public records of the compatible developed residential lots have only three to four multifamily dwellings. There is a similarly sized corner lot within a block away at 2201 W Ruffner that has five (5) multifamily rowhouse dwellings. At most, there was an exceptional case within this area was able to include up to six (6) dwellings within the parent lot of 7,000 square feet including Unit Lot Parcels 2770600213 through 2770600218 at 3827 and 3829 23<sup>rd</sup> Avenue West. This development at 3827 and 3829 23<sup>rd</sup> Avenue West resulted in environmental impacts to co-appellant Bonnie McDonald located just to the south of the property.

The following images show the proposed conditions (Figure 4) relative to the existing conditions (Figure 5). The architect's rendering communicates the intent of the design to remove all established street trees and low-planting vegetation, as well as the rockery. The significant trees within the right-of-way and extending within the property (Figure 2 annotated site plan) not only hamper construction excavations, but also inhibit the views across looking at the western slope of Queen Anne. It is imperative through a proper environmental impact study to resolve the discrepancies between the developments of the property verses the stabilization of the right-of-way and its trees and rockery. Recent examples within this area do not demonstrate a coherent review and understanding of scope of projects handled by the Seattle Department of Construction and Inspections and the Seattle Department of Transportation (including 3827 to 3829 23<sup>rd</sup> Avenue West and 3447 22<sup>nd</sup> Avenue West.)



*Figure 4- Record of architect's rendering of the development with street right-of-way rockery, low planting, and trees removed.*



*Figure 5- Existing image of site with right-of-way trees and rockery in place stabilizing a slope over 40% in a 10-foot drop.*

## **VI. ERRORS WITHIN THE REVISED MOTION FOR DISMISSAL AND MOTION FOR SUMMARY JUDGEMENT**

The prior Appellant's responses to the Motion for the October Motion for Dismissal carry forward and still shall apply in addition to this response to the Motion for Summary Judgement. That said, it is important to highlight a few of the inaccuracies in the Applicant's most recent December 7th version of the 'Applicant and Owner's Amended Motion to Dismiss Land use Appeal and for Summary Judgement.'

On Page 4, lines 2 to 5 the Applicant refers to 50-year old case law of Capitol Hill Methodist Church of Seattle v. City of Seattle, 52 Wn.2d 359, 362, 324 P.2d 1113 (1958); CR 56(c). It states that the ruling on a summary judgment motion, it is the duty of the trial court to consider all evidence and all reasonable inferences therefrom in the light most favorable to the nonmoving party. Reed v. Davis, 65 Wn.2d 700, 705, 399 P.2d 338 (1965). The Appellant concurs as the non-moving party that the Hearing Examiner shall consider all evidence and all reasonable inferences therefrom in the light most favorable to the Appellant.

On page 5 lines 18 to 21 the Applicant states that "the checklist requires information related to the Premises, not the abutting right-of-way." This statement is contrary to Checklist B.1(d) and (f) speak to offsite impacts. Moreover, the right-of-way trees' root feeder zone and canopy exist in a significant portion within the development boundary.

1 At the bottom of page 5 the Applicant states that “The purpose of this question is to determine  
2 the natural geographic features of the Premises, not manmade features.” Where does the  
3 Environmental Checklist confine the environmental impacts to be only those natural features  
4 and not created by humans? If a retaining wall that is built off of one’s property, but supports  
5 the soils on one’s property, there are measurable impacts if the retaining wall is altered or  
6 removed. Literally, if SDOT were to remove the rockery, the soils supporting the existing  
7 structure on the lot would likely be destabilized.

8 On page 6 lines 17-20 the Applicant attempts to justify the checklist question B.1.d (Are there  
9 surface indications or history of unstable soils in the immediate vicinity?) stating that “there  
10 is no history of landslides or unstable areas in the immediate vicinity.” Yet, their Exhibit F[a]  
11 - Closeup confirms that there are at least four (4) recorded landslides within one to three  
12 blocks south of the Subject Property. The closest recorded landslide took place just 600 feet  
13 away at 3616 24th Ave West (Parcel #2770600325). [website  
14 <http://web6.seattle.gov/dpd/ParcelData/Parcel.aspx?pin=2770600325> ]

15 Other Environmental Checklists have included landslides recorded within 1 to 3 blocks from  
16 the property of question. As stated above, Mr. Griswold’s declarations are contrary to the  
17 Applicant’s exhibits in two counts, and therefore, are worthy to be further questioned.

18 On page 7 lines 14-15 the Applicant relies on future actions by stating “During this [building  
19 permit] phase, SDCI will confirm that the Project drainage complies with the applicable  
20 ordinances. If that is the case, then the Department should have issued a Determination with  
21 Conditions. Instead, they issued a DNS without conditions. The Hearing Examiner should  
22 remand the decision accordingly.

23 At the top of page 8 the Applicant inaccurately states that it is “undisputed that SDCI: (a)  
24 visited the Premises and saw the number and type of trees; (b) received an arborist report  
25 identifying the type and location of the trees; (c) issued a correction notice requesting  
26 identification of the trees in the right-of-way and asking the arborist to consult with SDOT  
Forestry regarding the right-of way trees; and (d) received a response to its correction  
notice.” The submitted exhibits with the Motion indicated the Applicant’s architect referencing  
an email to SDOT, but that email has not been attached. In fact, discovery and interrogatory  
of the responsible SDOT arborist has been provided in Exhibit ‘P’ to clearly demonstrate that  
SDOT has not been consulted as of the date that the DNS was issued on September 13,  
2018. This is a key issue. The record of Exhibit ‘P’ shows that the SDOT arborist clearly  
required information to show how the buildings could be constructed without encroaching on  
the tree’s root feeder zone. There is no evidence that that question has ever been  
appropriately answered. If in fact SDCI had information about project subsequent to the DNS  
decision, then it demonstrates that the decision was erroneous. The loss of these right-of-  
way mature trees is part of a bigger picture of environmental impacts given the city’s statistics  
that only 5 percent of significant trees are retained within lowrise multifamily developments.



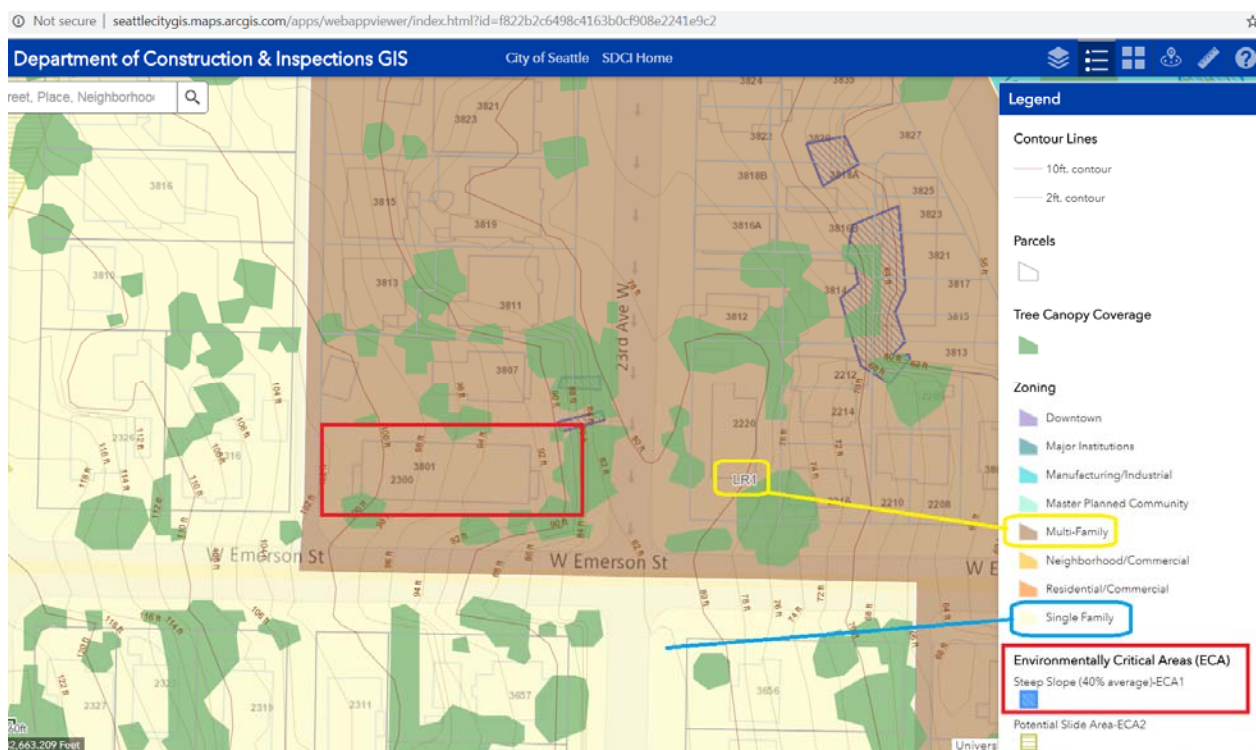


Figure 6 Subject Property outlined in red from the Seattle GIS maps showing the designated environmentally critical areas (ECA) at the northeast corner of the lot, the Tree Canopy cover, and the adjacency to Single-Family zones

Source:

<http://seattlecitygis.maps.arcgis.com/apps/webappviewer/index.html?id=f822b2c6498c4163b0cf908e2241e9c2>- Seattle GIS

At the top of the next page 9 of the motion to dismiss and summary judgement is an astounding admittance of the Department's lack of diligence in their DNS decision. As it may certainly be the case that "there is no basis for requiring an EIS because an LR1 zone abuts a SF 5000 zone." That is not being challenged with this appeal. This is the evidence, however, that the SEPA checklist #5 response ignores the potential impacts to adjacent less dense SF-5000 zones with the Applicant's response stating only that the "current use is multi-family residence, adjacent properties are multi-family residential." The motion continues to declare that "SDCI was well aware that the Premises abutted a SF 5000 zone when it issued the Decision. In fact, the first page of the Decision describes the vicinity zoning as having SF 5000 to the south and to the west of the Premises." Maybe so, but what is required is for the Department to consider the Height Bulk and Scale and edge impacts of this development being adjacent to an SF-5000 zoned property. The Department's awareness is irrelevant if the edge impacts are not addressed in some way within the Checklist as a basis for the DNS. One could build a 100-foot-tall wall acknowledging that it borders a single-family zone, but that acknowledgment alone does not relieve the builder of the wall from mitigating the impacts.

Page 9 lines 7-12 exemplify why there are issues of fact that do not qualify the motion for Summary Judgement. The Applicant states that "the Applicant disclosed that there was a



1 tiny portion of steep slope in the northeast section of the Premises. SDCI then provided an  
2 annotation to the checklist clarifying that the Premises is not mapped as a steep slope.” The  
3 motion further claims that the “SDCI’s determination that there is not a steep slope on the  
4 Premises is based upon site specific information.” There are facts here at the issue so that  
5 this is not something which may be cast as a Summary Judgement. The Figure 6 on the  
6 prior page shows the Subject Property outlined in red from the Seattle GIS maps. It  
7 graphically maps a portion of the designated environmentally critical areas (ECA) at the  
8 northeast corner of the lot. The fact of the map clearly indicates the existence of an ECA  
9 within the site. The maps also indicated a portion of the Tree Canopy cover, as well as the  
10 adjacency to Single-Family zones. The Department must be very careful in how it refers to  
11 these maps compared to reality. Which governs in the determination of significance, the city’s  
12 GIS maps or an accurately completed checklist that should be confirmed from a visit to the  
13 site. For example, the photographs included within Exhibit D of the Motion to Dismiss clearly  
14 show the consistent steep slope along 23rd Ave West and the contour map shows  
15 consistently close contour lines along 23rd Ave West, yet the map only indicated the  
16 northeast corner to be included within the ECA. Also look at the photos of the trees compared  
17 to the mapped tree canopy. The mapping would suggest some of the low-cover plantings to  
18 exist as tree canopy. One may easily conclude that the maps do not circumvent reality. The  
19 reference only to these maps will indeed result in an erroneous decision of DNS.

20 Page 10 lines 12-14 is an erroneous defense to the aesthetic impacts, stating that “the  
21 Applicant has no duty to mitigate for the project’s impacts to its neighbors’ unprotected views.”  
22 The lack of duty to mitigate is not the standard. Whether the SEPA checklist honestly  
23 disclosed the Height Bulk and Scale impacts is the standard. As an architect who has  
24 observed the site and adjacent sites from the elevated alley, it is easy to demonstrate how a  
25 wall of nine rowhouses will directly influence the views of the adjacent properties.

26 Page 10 lines 19-20 attempts to ignore the potential impacts to public services of adding  
approximately 24 persons as a result of this project, and the Applicant’s Checklist stated  
merely that there was a “potential 12 person increase to all public services, but unlikely any  
increase in actual demand.” However, as stated above, the impacts are indeed measurable.  
The public record for the proposed development will include a rowhouse building containing  
seventeen (17) bedrooms and seventeen (17) bathrooms which is a significant increase  
compared to the existing structure which has just six (6) bedrooms and six (6) full bathrooms.  
Each additional bedroom represents at least one to two people. Each additional person  
represents usage of drinking and sanitary water. Each usage represents a determined  
gallons per minute by type of fixture multiplied by the number of additional persons. Plumbing  
systems are sized based on the anticipated flow rate at peak demands. Similarly, electrical  
power consumption is based on the number of devices per person at times of peak demand.  
If every lot within Seattle were to increase their electrical consumption or sanitary waste by  
over two-fold as this property has, it is easy to see why the Checklist response of an unlikely  
increase in the actual demand is erroneous.

Page 11 line 14-15 makes an irresponsible and dismissive statement that “SDOT has  
jurisdiction over the trees in the right-of-way, not SDCI.” Even if the right-of-way trees were  
only on the right-of-way and not extending into the property, the statement suggests that the

1 Department's documented correspondence with SDOT is voluntary or unnecessary. One  
2 city department is no less responsible to another city department when it comes to  
3 environmental impacts. If the project is likely to impact trees belonging to the city, it needs to  
4 be disclosed within the SEPA checklist. The Applicant's subsequent statement about  
5 mitigation not being the same as impact disclosure ignores the fact that you need the latter  
6 before you can get to the former. The paragraph goes on to declare that SMC 25.05.665.D  
7 states that: "Where City regulations have been adopted to address an environmental impact,  
8 it shall be presumed that such regulations are adequate to achieve sufficient mitigation..."  
9 This too is a dismissive approach to what should be evaluated within an EIS. If a site was  
10 completely covered with a grove of trees, would the SEPA overview policy simply rely of tree  
11 protection codes? A recent appeal by TreePAC to the Tree Ordinance challenged the  
12 ongoing travesty in the project by project review system with SDOT missing in action on most  
13 permitting. The tree protection ordinance referred to by SMC 25.11 addresses the retention  
14 and protection of trees primarily within single-family zones. To assume that environmental  
15 impacts may be dismissed at the SEPA checklist level and assumed during the building  
16 permit level is irresponsible. The appellant asks no more restrictions for this project. The  
17 appellant simply requests that the existing street trees are not ignored in the environmental  
18 assessment as is the case confirmed with Exhibit 'P'. By the way, the City has already  
19 declared that their tree protection codes are inadequate. In October 2017, Mayor Burgess  
20 signed the Tree Protection Executive Order with the goal to strengthens Seattle's protections  
21 for trees on private property. The Order states "Whereas, recent research showed that  
22 existing urban tree protections and enforcement practices related to trees must be  
23 strengthened in order to protect Seattle's canopy coverage." ) It goes on to declare that  
24 "SDCI will require consistent documentation for required tree removal review on private  
25 property including mitigating canopy cover loss of trees removed, and monitoring of planted  
26 trees for survival. Informational materials and resources for developers, property owners,  
and the public related to trees and vegetation management shall be updated to reflect this  
emphasis." Despite this Executive Order, this DNS looks to carry on business as usual by  
ignoring trees on and bordering developed properties.

18 Page 13 lines 7-9 references Boehm v. City of Vancouver, 111 Wn. App. 711, 719, 47 P.3d  
19 137 (2002); as well as Moss v. City of Bellingham, 109 Wn. App. 6, 23, 31 P.3d 703 (2001).  
20 " Boehm case file is concerned an MDNS (mitigated) with 39 mitigation conditions. It doesn't  
21 come close to comparing to short shrift review by Seattle on these projects. The Applicant  
22 should identify anything that we have seen within the last decade where we saw an "M" in  
23 front of a DNS. Likewise, the Moss case file is very similar to Boehm: "an environmental  
24 impact statement was not required where the requirements of the local comprehensive plan  
25 and regulations and conditions of plat approval \*mitigated all of the significant environmental  
26 impacts\* of the proposed development, the court affirms the judgment."

24 The number of debatable facts clearly indicate that a Summary Judgement should not be  
25 warranted even if it was indentified as an option for administrative appeals outside of the  
26 Supreme Court. It is the appellant's mutual understanding that the burden of proving the  
inadequacy of a threshold determination is high...and this burden is not met when an  
appellant only argues that they have concern about a potential impact, and an opinion that  
more study is necessary. The Appellants will demonstrate within the requested appeal

1 hearing that the Director had insufficient information to evaluate the proposal's environmental  
2 impacts in the context of the entire record considered in the threshold determination, e.g. the  
3 checklist and other project documents.

4 Contrary to the Applicant's statement on page 14, the SEPA is a stand-alone requirement.  
5 All the documents on SDCI's website are irrelevant to the SEPA determination if they are not  
6 included/cited in the checklist and DNS.

7 As stated in my prior response to the Motion to Dismiss, it is desired to modify the Appellant's  
8 requested relief to add in the alternative that the City require a complete and accurate  
9 checklist as a prerequisite to a DNS.

## 10 **VII. REASONS TO DENY THE MOTION TO DISMISS (repeated from original)**

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

18 (a) Is this a valid objection? Yes :

19 Seattle Municipal Code (SMC) 23.76.020.D.1 identifies "The notice of the Director's  
20 decision shall state the nature of the applicant's proposal, a description sufficient to  
21 locate the property, and the decision of the Director. The notice shall also state that  
22 the decision is subject to administrative appeal or administrative review and shall  
23 describe the appropriate administrative appeal procedure." Accordingly, the Notice of  
24 Decision was published on September 13, 2018 and confirms that it may be  
25 appealed. It states "The following appealable decisions have been made based on  
26 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:

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

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

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

## VIII. 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 23<sup>rd</sup> Avenue West – there is adequate evidence to demonstrate a probable environmental impact resulting from the development of the Subject Property.

1 Threshold of Categorical Exceptions:

2 The Subject Property includes nine dwellings outside an urban center and thereby not  
3 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.

4 Application of Work within adjacent Right-of-Way:

5 The application indicates existing significant trees and rockery within the right-of-way that will  
6 be compromised as a result of the proposed development or any such LR1 development  
7 minimal five-foot property to structure setback requirements. Significant trees within the right-  
8 of-way, if damaged due to the proximity of the new construction to the critical elements of  
9 the trees, may take many years to replace even assuming they can be replaced with similar  
10 quality resources and in the same geographical location. The existing steep rockery must be  
11 evaluated for soil stabilization and retention of the trees. The photos of the rockery included  
12 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.

13 Potential landslide or failed soil stabilization:

14 The Motion to Dismiss inaccurately claims there is no history of landslides in the area. This  
15 claim contradicts public records <sup>1</sup>. There is at least one recorded landslide at most one block  
16 from the Subject Property and another three landslides within three blocks south of the  
17 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  
requests the right to cross-examine SDCI's Dean Griswold's untimely Land Use Report  
(Motion Exhibit E).

26 <sup>1</sup> See link to city information at

[https://www.seattle.gov/dpd/cs/groups/pan/@pan/documents/web\\_informational/dpdd017622.pdf](https://www.seattle.gov/dpd/cs/groups/pan/@pan/documents/web_informational/dpdd017622.pdf)



1 No evidence in engaging SDOT  
2 Forestry:

3 As the reason for the subpoena, the  
4 phone number indicated on the  
5 application drawing belongs to SDOT  
6 Urban Forestry's Ben Roberts. Per  
7 September 21, 2018 email from Mr.  
8 Roberts, "It doesn't not sound like a  
9 plan that has been reviewed by SDOT  
10 Forestry yet. Most likely, this is the  
11 proposal from the development  
12 application. SDOT Forestry will review  
13 and give accurate guidances based on  
14 first hand review of Right of Way trees  
15 by in house urban foresters." It is  
16 evident, therefore, that the stated  
17 correction notice was not responded to  
18 prior to the January 19, 2018 SEPA  
19 Checklist and the SEPA Checklist  
20 review by SDCI dated July 19, 2018.  
21 SDOT Forestry's Mr. Roberts was not  
22 engaged at the time of the DNS and to  
23 the date of this appeal. Additionally,  
24 SMC 23.47A.014 requires that  
25 "Existing street trees shall be retained  
26 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."

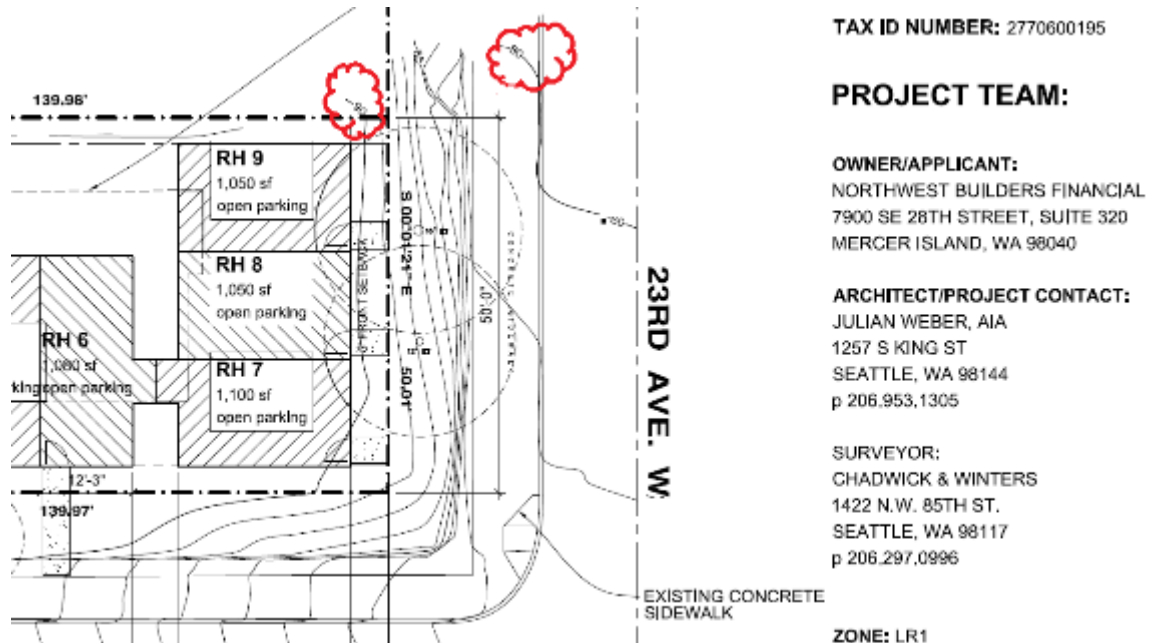
19 Admitted error in adjacent Single-Family zone:

20 The Motion to Dismiss admits that the SEPA checklist, for which the DNS is to be based,  
21 was erroneous. The appellant concurs that such an adjacency between LR1 and SF zones  
22 are common, but that fact does not dismiss the fact that the environmental impacts of this  
23 adjacency need not be considered or mitigated including requirements of SMC  
24 23.47A.014, 23.45.518 and 23.86.012. However, given the SF-5000 property to the south  
25 are separated by a street, only the lots to the west may be considered with the appeal.  
26



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  
5 elevation 80-feet with the alley at the west end at 101-feet. Figure 7 demonstrates that the  
6 change in elevation at the east end is 10 feet. In addition, Exhibit I of the Motion to Dismiss



15 *Figure 7- Subject Property topography along street right-of-way. Each topo line is one-foot incline (from*  
16 *Exhibit H of the Motion to Dismiss – annotated.*

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

18 Tree Protection:

19 The Arborist report of three (3) pages is woefully inadequate (Motion Exhibit M). Not only  
20 does the report indicate that no protections for existing trees are required, the report  
21 limitations state that “trees are dynamic and their conditions can change rapidly given  
22 changes in environmental factors and site development.” The protection of the street trees  
23 are entirely waived by the applicant’s arborist. Evidence has been provided at the hearings  
24 of W-17-006 that indicate that the provisions have not been enforced, and are thereby not  
25 effective to address environment impacts without coordinated effort between SDOT and  
26 the Department. The Motion is indeed accurate that the removal of street trees are  
regulated by Title 15<sup>2</sup> 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 24<sup>th</sup>  
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 **IX. 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 17<sup>th</sup> day of December, 2018.

26 By: 

David Moehring, 3444B 23<sup>rd</sup> 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 and Summary Judgement** in the matter of the **Determination of Non-significance of 2300 W Emerson**, Hearing Examiner File No. MUP-18-022.

**Department:**

Lindsay King  
Seattle Department of Construction & Inspections  
Phone: (206) 684-9218  
Email: [lindsay.king@seattle.gov](mailto:lindsay.king@seattle.gov)

**Applicant:**

Julian Weber  
1257 S King Street  
Seattle, WA 98144  
Phone: (206) 953-1305 x100  
Email: [dpd@jwaseattle.com](mailto:dpd@jwaseattle.com)

**Applicant Legal Counsel:**

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Phone: (206) 292-1144  
Email: [bgribben@helsell.com](mailto:bgribben@helsell.com)

**Office of the Hearing Examiner:**

City of Seattle  
Seattle, WA 98124  
[hearing.examiner@Seattle.gov](mailto:hearing.examiner@Seattle.gov)

Dated December 17, 2018



David Moehring  
Appellant, Neighbor to 2300 W Emerson Street  
3444 23rd Ave West  
Seattle WA 98199

# EXHIBIT P

(4 RELATED DOCUMENTS = 10 PAGES)

## RESPONSE

TO INTERROGATORY

From: Barbara Bernard  
To: Roberts, Ben; PRC  
Cc: David Moehring  
Subject: Re: Urgent project#3029611  
Date: Friday, September 21, 2018 5:01:59 PM

Thank you for the quick reply.

\*Barbara

Sent from Yahoo Mail for iPhone

On Friday, September 21, 2018, 3:43 PM, Roberts, Ben <Ben.Roberts@seattle.gov> wrote:

\*  
Thank you for the notification. It doesn't not sound like a plan that has been reviewed by SDOT Urban Forestry yet. Most likely, this is the proposal from the development applicant. SDOT Urban Forestry will review and give accurate guidances based on a first hand review of Right of Way trees by in house urban foresters

Ben Roberts  
SDOT Urban Forestry

Get [Outlook for iOS](#)

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**From:** Barbara Bernard <barbara\_bernard@yahoo.com>  
**Sent:** Friday, September 21, 2018 3:18 PM  
**To:** PRC; Roberts, Ben  
**Cc:** David Moehring  
**Subject:** Urgent project#3029611

I want to express concern for removal of 4 trees in the ROW of this project. The trees are necessary for the stabilization of the slope, as well as provide a necessary wildlife travel way from Discovery Park to other areas of the city.

**Quoted from David Moehring "EXCEPTIONAL TREES ON ECA - a Potential Landslide area!"**

The arborist states "*None of the trees are exceptional, therefore, no retention is required and if any trees are retained, no protection is required.*" The arborist lumps the SDOT ROW trees along with the trees on the private site; and looks only at the size of the trees per the SDCI Director's Rule and not the requirements of SDOT. Nor does the arborist recognize that the DBH of the tree has only a **12" threshold** when on a designated potential slide area. As a result, the 2 spruce and one fir all become exceptional by the Director's Rule. I am sure SDOT requirements are even more protective".

Please re-examine the situation and prevent the removal of these trees.

Barbara Bernard



EXHIBIT 6

3010A 31st Ave. W

514 772 731

Sent from Yahoo Mail for iPhone

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**From:** David Moehring  
**To:** Roberts, Ben  
**Cc:** DOT SeattleTrees; PRC; Joe3 Veyera; Bagshaw, Sally; Rundquist, Nolan; Dripps, Eric; Griswold, Dean; Orbino, Leslie L; Chan, Kit  
**Subject:** ROW Trees at 2300 W Emerson Street  
**Date:** Friday, September 21, 2018 3:00:51 PM  
**Attachments:** 2300 Moehring 10 2 17.pdf  
Protect at dripline.pdf

---

Hello Mr. Roberts-

**URGENT ---**

There is a lowrise multifamily development (one block from my home) at Emerson and 23rd West where four existing Right-of-Way trees that stabilize steep slopes are at risk. I am writing to you as your phone number is on the L1 sheet of the drawing set as the person to contact to inspect tree protection prior to construction. What is your recollection of this project in speaking with the architect or developer?

The photo of today verses the architect's rendering suggests the **ROW trees are to be cleared** - perhaps to give new \$1-million rowhouse owners better views of the interbay neighborhood railyard or to provide potential new home buyers better views of the typical boxey-style 'architecture' from the street. Nine market rate dwellings are being jammed onto an LR1-zoned lot which typically only has 3 dwellings per the August 2015 code. As a result, there is **no room for new building foundations to clear designated ROW tree root protection areas**. Although the developer's landscape drawings shows a cut-and-paste typical detail of the protection of existing trees being at the tree's dripline, the architect's drawings show the new building edges into the drip lines --- which is only made worse when excavations carve out more in this sloping property and cut deeper and further into the critical root feeder zone.

**ARBORIST certified with SDOT?**

The developer's arborist is from Bothell, and apparently does not know the requirements for street trees in Seattle... or perhaps I am the one who is at a loss of understanding. The arborist report (link below) has been prepared by Shoffner Consulting with mobile (206)755-2871 [ISA Certified Arborist #PN-0909A CTRA #1759].

**EXCEPTIONAL TREES ON ECA - a Potential Landslide area!**

The arborist states "**None of the trees are exceptional, therefore, no retention is required and if any trees are retained, no protection is required.**" The arborist lumps the SDOT ROW trees along with the trees on the private site; and looks only at the size of the trees per the SDCI Director's Rule and not the requirements of SDOT. Nor does the arborist recognize that the DBH of the tree has only a **12" threshold** when on a designated potential slide area. As a result, the 2 spruce and one fir all become exceptional by the Director's Rule. I am sure SDOT requirements are even more protective.

Seattle residents value our trees! **Queen Anne and Magnolia Residents are exhausted** trying to keep our City's staff accountable to tree protection as these large trees are so valuable to Seattle's eco-system and carbon sequestration. To make it worse - as recently observed one block to the north of this development and one block to the east of my residence - the developers are hauling away the large rock which lined the ROW only to leave bush-planted eroding soil on slopes of 1V:1H. Please affirm that will NOT be the case here. Construction access should be planned from the alley and NOT from the street corner ROW.

**\* ACCOUNTABILITY TO OUR EXISTING TREE CANOPY:**

Ben- we look to you as the person whose phone number is identified on the landscape drawing L1 as the person who will step up to the plate rather than hide behind the common excuse of "build at any cost" despite its environmental ramifications.

I would appreciate being able to **visit this location with you** from the right-of-way while looking at the development drawings. Ideally, we would be joined by the assigned SDCI reviewers Kit Chan, Leslie Orbino, Dean Griswold and Eric Dripps.

Tree retention on LR1-zoned lots like this is only 5% or so. I understand that SDOT and SDCI are different departments, but if cross-communication is not taking place because a lot-by-lot tree removal assessment and review is unwieldy in a city of this size, then the former mayor's Order and Councilperson Johnson's 'Tree for All' is not addressing the root of the problem.

Sincerely, and I believe in behalf of the silently giving trees of our urban forest-

David Moehring AIA NCARB  
3444 23rd Ave W, #B  
Seattle WA ; dmoehring@consultant.com  
m 312-965-0634

Important SDCI references to the above:

- January 2018 Plan set --> <http://web6.seattle.gov/dpd/edms/GetDocument.aspx?id=3579604>
- March 2018 arborist report --> <http://web6.seattle.gov/dpd/edms/GetDocument.aspx?id=3635417>

Per the arborist report, these trees are in the Right of Way include:

1. Blue colorado spruce (Picea pungens 'glauca'), 18" dbh, 24' crown spread. Good condition and health. Not exceptional.
2. Blue colorado spruce, 18" dbh, 24' crown spread. Good condition and health. Not exceptional.
3. Noble fir (Abies procera), 5", 8' crown spread. Fair condition and health. Not exceptional.
4. Noble fir, 14" dbh, 12' crown spread. Poor condition, multiple tops. Not exceptional.



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**City of Seattle**  
**Seattle Department of Construction and Inspections**  
Land Use Review

---

JULIAN WEBER

Re: Project #3029611-LU

**Correction Notice #1**

**Review Type** LAND USE  
**Project Address** 2300 W EMERSON ST  
SEATTLE, WA 98199

**Date** April 10, 2018  
**Contact Phone**

**Contact Email**  
**SDCI Reviewer**  
**Reviewer Phone**  
**Reviewer Fax**  
**Reviewer Email**  
**Owner** JOHN JACKELS  
**Corrections also apply to Project(s)**

**Address** Seattle Department of Construction and  
Inspections  
700 Fifth Ave  
Suite 2000  
P.O. Box 34019  
Seattle, WA 98124-4019

**Applicant Instructions**

Please click on the following link to learn "[How to Respond to a SDCI Correction Notice](#)". If the 3-step process outlined in this document is not followed, there may be a delay in permit issuance and there is a potential for penalty fees.

For instructions on **uploading corrected plans through your portal**, follow this link: [How to Upload a Document to an Existing Permit](#)

Note that you will not be able to upload corrected plans until all reviews are completed and the project's status is "Corrections Required".

**Codes Reviewed**

This project has been reviewed for conformance with the applicable development standards of the Land Use Code.

**Corrections**

- 1. Arborist Report.** Please revise the arborist report to identify which trees are located within the ROW, as protection/preservation standards differ in the ROW vs. private property.
- 2.** Please consult with Ben Roberts of SDOT Forestry per tree preservation/retention requirements, particularly regarding the large spruce trees in the 23rd Avenue W ROW, as SDOT Forestry approval is required for any vegetative changes within City ROWs. He can be contacted via email at [Ben.Roberts@seattle.gov](mailto:Ben.Roberts@seattle.gov) or via phone at 206.233.8735 (office) or 206.423.3685 (mobile).

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Project #3029611-LU, Correction Notice #1

Seattle Department of Construction and Inspections  
700 Fifth Ave, Suite 2000, P.O. Box 34019, Seattle, WA 98124-4019  
An equal employment opportunity, affirmative action employer. Accommodations for people with disabilities provided upon request.

Page 1 of 1

7 of 10

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**From:** [Roberts, Ben](#)  
**To:** [Benson, Charles](#)  
**Subject:** RE: 2300 W Emerson St (#3029611)  
**Date:** Friday, April 06, 2018 8:42:24 AM  
**Attachments:** [image005.png](#)  
[image003.png](#)

---

Hi Charles,

Thank you for this!

Yes, the arborist report should identify that these trees and even the low growing vegetation is within the Public Right of Way, therefore has different protection preservation requirements. Based on my quick Google Site review, all the trees in the ROW would be called out for preservation and protection.

\* | This protection requirement would also need to be taken into consideration in the design and constructability of the 23<sup>rd</sup> ave W frontage, where as you noted, the proposed structure is within the drip line. Based on the architectural drawings, this proposed structure would indeed result in excessive pruning of the Spruce trees, which does not comply with ROW tree protection standards. I would advise the applicant to contact me for consultation regarding tree protection requirements around these ROW trees prior to further design.

FYI- I'll be out on vacation all next week, returning April 16<sup>th</sup>.

Thank you again for sending this my way!

Ben Roberts  
SDOT Forester, Landscape Architect Office  
ISA Certified Arborist PN5759A  
ISA Certified Tree Risk Assessor #297  
City of Seattle [Department of Transportation](#)  
O: 206.233.8735 | M: 206.423.3685 | [Ben.Roberts@seattle.gov](mailto:Ben.Roberts@seattle.gov)

*"If there is any one duty which more than another we owe it to our children and our childrens children to perform at once, it is to save the forests of this country" Theodore Roosevelt*

---

**From:** Benson, Charles  
**Sent:** Wednesday, April 04, 2018 4:29 PM  
**To:** Roberts, Ben <[Ben.Roberts@seattle.gov](mailto:Ben.Roberts@seattle.gov)>  
**Subject:** 2300 W Emerson St (#3029611)  
**Importance:** High

Hello Ben,

I wanted to check-in to see if you had any opinion on the trees located in the ROW for this project. It is not completely clear from the plans, but it appears the applicant is intending to retain the two large spruce trees in the 23<sup>rd</sup> Ave W ROW (tree #s 1 and 2 in the Arborist Report) and one fir tree in the W Emerson St ROW (tree #4). My concern is with the Arborist report summary, which states: "None of the trees are exceptional, therefore, no retention is required and if any trees are retained, no protection is required." While this may be the case for trees on private property, I wanted to get your take on this since these trees are in the ROW. The two spruce trees are tall and the plans show new development within the dripline, so maybe some protection is required if you decide these trees need to be retained? Please advise and let me know if you have any questions.

Thanks!

Charles

**Charles H. Benson, III, AICP**

Land Use Planner

Seattle Department of Construction and Inspections

Office: 700 Fifth Ave, Suite 2000, Seattle, WA 98104

Mail: PO Box 34019, Seattle, WA 98124-4019

O: 206-727-3885 [Charles.Benson@seattle.gov](mailto:Charles.Benson@seattle.gov)

*As stewards and regulators of land and buildings, we preserve and enhance the equity, livability, safety and health in our communities.*

EX. G  
(of Matran)



**City of Seattle**  
**Department of Construction and Inspections**  
**Land Use Review**

JULIAN WEBER  
1257 S King Street  
Seattle, WA 98144

**Re: Project# 3029611**

**Correction Notice #1**

<b>Review Type</b>	LAND USE	<b>Date</b>	April 10, 2018
<b>Project Address</b>	2300 W Emerson St	<b>Contact Phone</b>	(206) 953-1305 x100
<b>Contact Email</b>	dpd@jwaseattle.com	<b>Contact Fax</b>	
<b>SDCI Reviewer</b>	Charles Benson III	<b>Address</b>	Seattle Department of Construction and Inspections 700 5th Ave Suite 2000 PO Box 34019 Seattle, WA 98124-4019
<b>Reviewer Phone</b>	(206) 272-3885		
<b>Reviewer Fax</b>			
<b>Reviewer Email</b>	charles.benson@seattle.gov		
<b>Owner</b>	JOHN JACKELS		

**Applicant Instructions**

Please see the attached flyer to learn "[How to Respond to a SDCI Correction Notice](#)".  
If the 3-step process outlined in this document is not followed, it is likely that there will be a delay in permit issuance and there is a potential for penalty fees.

**Codes Reviewed**

This project has been reviewed for conformance with the applicable development standards of the Land Use Code.

**Corrections**

- 1 Arborist Report.** Please revise the arborist report to identify which trees are located within the ROW, as protection/preservation standards differ in the ROW vs. private property.
- 2** Please consult with Ben Roberts of SDOT Forestry per tree preservation/retention requirements, particularly regarding the large spruce trees in the 23rd Avenue W ROW, as SDOT Forestry approval is required for any vegetative changes within City ROWs. He can be contacted via email at [Ben.Roberts@seattle.gov](mailto:Ben.Roberts@seattle.gov) or via phone at 206.233.8735 (office) or 206.423.3685 (mobile).

\*  
See EXHIBIT P DATED SEPT. 21, 2018  
WHERE SDOT ARBORIST DECLARES  
THIS HAS NOT BEEN COMPLETED.

1 of 8 *Ali*



---

**Step 1: Wait for all reviews to be completed**

- You may check the status of any review at the following link: <http://web6.seattle.gov/dpd/permitstatus>
- All reviews must be completed before the applicant can respond, upload, or submit any correction responses.
- **Electronic Plans:** We will send correction letters to the Seattle DCI Project Portal. We will notify the primary contact for the project when all reviews in the review cycle are complete.
- **Paper Plans:** We will notify the primary contact for the project by email or phone when all reviews in the review cycle are complete and plans are ready to be picked up. Once you have been notified, pick up the plans at Plans Routing in the Applicant Service Center.

---

**Step 2: Make Corrections**

**Provide a written response for each item on all correction notices. We will not accept corrected plans without written responses. Include the following information for each item:**

- Describe the change
- Say where the change can be found in the plan set
- If you have not made a requested change, give a code citation or provide calculations to explain why not
- Coordinate responses to correction items among all designers, architects, engineers, and owners
- If you make voluntary changes to your plans, describe the changes you have made in your response letter

**Correct your Plans:**

- Cloud or circle all changes
- You may add new sheets to the plan set if you have new information to show

**For Electronic Plans:**

- Always upload a complete plan set

**For Paper Plans:**

**If you replace sheets in the paper plan sets:**

- Remove the old sheets, mark them as "VOID," and include them loose at the back of each plan set
- All original sheets and plan pages must be returned to Plans Routing in the Applicant Service Center
- Insert the new sheets and staple the plan sets

**If you make changes to the original paper plan sheets:**

- Make all changes with ink (preferably red, waterproof ink). Do not use pencil to make changes
- Do not tape or staple anything to the plan sets

**Platting Actions:** Provide new copies of the survey when responding to a correction notice for a shortplat, lot boundary adjustment, or other platting action. Provide the same number of copies that were required when you submitted the project.

---

**Step 3: Submit Corrected Plans**

**Electronic Plans:**

Upload your corrected plan set and correction response letter through your Seattle DCI Project Portal.

**Paper Plans:**

Return your corrected plans and your correction response letter to Plans Routing in the Applicant Services Center.

**If you don't follow these instructions:**

- **Plans Routing may not accept your corrected plans**
- **We may be delayed in starting corrected plan review, which can delay permit issuance**
- **We may charge a penalty fee**

Plans Routing / Applicant Services Center - 700 5th Avenue, 20th Floor  
Hours: Monday, Wednesday, Friday: 8:00 a.m. - 4:00 p.m., Tuesday, Thursday: 10:30 a.m. - 4:00 p.m.



Date: July 19<sup>th</sup>, 2018

Subject: Correction Notice #1

Project: 2300 W Emerson St  
SDCI project # 3029611

Leslie Orbino & Charles Benson III,

The following are issues and responses raised in the Zoning review dated March 27<sup>th</sup>, 2018, and the Land Use Review dated April 10<sup>th</sup>, 2018:

**Land Use Review**

1. *The environmental Sign inspection was failed. Both signs sit too high to be seen at street level and are difficult to reach safely. Please look at a better location for both signs. Please resubmit a sign conformation online.*

The inspection has been passed, thank you.

**Zoning**

1. **Floor Area Diagrams** – *Please provide one set of floor area diagrams that includes all gross floor area on the site (show all levels of the building).*

Please see the revised sheet A2.0 for updated FAR diagrams with dimensions and a table of individual units.

2. **Height** – *Add elevation dimensions for maximum height and all other height exception elevation dimensions on elevation plans.*

Please see the added spot elevations on the elevation sheets. The elevations already call out the maximum height allowed, within the elevation strings.

3. **Setback** - *Per SMC 23.53.015.D.1.b, a setback equal to half the difference between the current right-of-way width and the minimum right-of-way width established in subsection 23.53.015.A.6 is required (3 feet). Please review the code and address accordingly...*

Please see the site sheets for updated R.O.W setback adjacent to W Emerson St, and all of the corresponding plan changes that were made to accommodate.

4. **Projections permitted in required setbacks and separations** – *Per SMC 23.45.518.H1, please provide dimensions of these projections into setbacks that meet this code requirement...*

Please sheet A1.0 for the added awning dimensions.

5. **Rooftop feature** – *show rooftop calculations that meet SMC 23.45.514.J.4 for stair penthouse...*

Please see the existing calculation on sheet A2.5.

6. **Landscape plan** – on landscape plan, please show location of solid waste and recycle. Update score sheet after this has been added...

Please see the updated landscape sheet for trash location.

7. **Amenity area** – on amenity area diagram, please provide dimensions and matrix showing calculations to verify calculations on diagram...

Please see the updates on sheet A1.1 and the updates on sheet A0.0.

8. **Design standards** – provide color representation of design standards per SMC 23.45.529...

Please see the added images on sheet A3.0.

9. **Bicycle parking** – provide bicycle parking per Table D for 23.45.015.D.2...

Please see the added bike parking on sheet A1.0 & the Landscape plans.

#### Land Use

1. **Arborist report** – Please revise the arborist report to identify which trees are located within the ROW, as protection/preservation standards different in the ROW vs private property.

Please see the last page of the original arborist report which numbers the trees in the R.O.W (trees #1 & #2) as well as the attached email with Ben Roberts regarding R.O.W tree protection, and updates made on the landscape sheets.

2. **SDOT** – Please consult with Ben Roberts of SDOT Forestry per tree preservation/retention requirements, particularly regarding the large spruce trees in the 23<sup>rd</sup> Ave West R.O.W, as SDOT Forestry approval is required for any vegetative changes within City R.O.W.'s...

Please see the attached email with Ben Roberts regarding R.O.W tree protection, and updates made on the landscape sheets.

Feel free to contact me at [dpd@jwaseattle.com](mailto:dpd@jwaseattle.com) or 206.953.1305.

Thank you,

Julian Weber, AIA

NO EMAIL ATTACHED.  
SEE EXHIBIT P DATED  
TWO MONTHS AFTER THIS  
LETTER WHICH DECLARES  
THIS HAS NOT BEEN COMPLETED.

OK

EX. M  
(of motion)

## SHOFFNER CONSULTING

21529 4TH AVE. W #C31 BOTHELL, WA 98021 MOBILE: (206)755-2871

October 4, 2017

← DATE PRECEEDS  
EXHIBITS G + H

Brooke Friedlander  
Isola Homes  
1518 1st Ave. S. Suite 301  
Seattle, WA 98134

RE: Tree Inventory - 2320 W. Emerson St. Seattle, WA.

Brooke:

This report is provided to address the inventory of the trees on the property at the address of 2300 W. Emerson St. in the City of Seattle, Washington. For reference to this report, please see the accompanying map showing the approximate locations of the trees.

### 1. Site Conditions

The project site is located in the Magnolia of Seattle in a residential neighborhood. The property is developed with a multi-family residence. Most of the site is occupied by the building, but there are trees along the western and southern perimeters.

### 2. Tree Inventory, Condition Assessments and Exceptional Status

I conducted a tree inventory and condition assessment on all trees on the property. There are none just off-site with drip lines that extend onto the property. I conducted visual assessments of the trees to gather information on their health and condition. During my assessments, I took notes of any conditions that may present a defect putting a tree or a portion of it at risk of failure, or any conditions that may be symptoms of failing health.

The City of Seattle provides classifications of trees on private properties in Director's Rule 16-2008 which includes size thresholds for specific species to be classified as exceptional.

Following is information on these trees:

- R.O.W. →
1. Blue colorado spruce (*Picea pungens 'glauca'*), 18" dbh, 24' crown spread. Good condition and health. Not exceptional.

R.O.W. →

  2. Blue colorado spruce, 18" dbh, 24' crown spread. Good condition and health. Not exceptional.

R.O.W. →

  3. Noble fir (*Abies procera*), 5", 8' crown spread. Fair condition and health. Not exceptional.

14.43

R.O.W. →

4. Noble fir, 14" dbh, 12' crown spread. Poor condition, multiple tops. Not exceptional.
5. Japanese maple (*Acer japonicum*), 4" dbh, 10' crown spread. Good condition and health. Not exceptional.
6. Japanese maple, multiple trunks (2, 2, 2, 2, 3, 4) 6.5" dbh, 18' crown spread. Good condition and health. Not exceptional.
7. Apple (*Malus domestica*), 5" dbh, 12' crown spread. Good condition and health. Not exceptional.

None of the trees are exceptional, therefore, no retention is required and if any trees are retained, no protection is required.

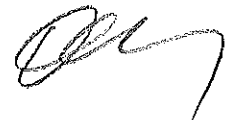
### 3. Use of This Report and Limitations

This report is provided to Isola Homes as a means of reporting on the inventory of the trees located on the project site. While Shoffner Consulting has used every means available to determine tree health and development impacts, trees are dynamic and their conditions can change rapidly given changes in environmental factors and site development, therefore these assessments pertain only for those noted on the day of their evaluation, and no guarantee can be made against damage caused by unforeseen development-related impacts. Natural decline and failure of trees is not predictable, therefore, Shoffner Consulting and Tony Shoffner cannot be held liable for retained trees that die or fail prior to or following development of the property.

Cordially,



Tony Shoffner  
ISA Certified Arborist #PN-0909A  
CTRA #1759

R.O.W. = Trees within Right-of-Way  
that extend into the development  
excavation areas as indicated  
in the appeal. 



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