Hearing Examiner Ryan Vancil

BEFORE THE HEARING EXAMINER
CITY OF SEATTLE

In the Matter of the Appeal of: DAVID MOEHRING from a decision issued by the Director, Seattle Department of Construction and Inspections.	Hearing Examiner File: MUP-18-0022 Department Reference: 3029611-LU APPLICANT AND OWNER'S REPLY TO APPELLANT'S RESPONSE TO AMENDED MOTION TO DISMISS LAND USE APPEAL AND FOR SUMMARY JUDGMENT

Moehring's Response is divided into sections that separately addresses the motion to dismiss and motion for summary judgment. Sections II – VI[1] of Moehring's Response addresses the summary judgment portion of the Applicant's motion. Sections VII – VIII[2] of Moehring's Response addresses the motion to dismiss portion of the Applicant's motion. Each of these sections will be discussed in turn below.

I. REPLY TO APPELLANT'S RESPONSE TO APPLICANT'S AMENDED MOTION FOR SUMMARY JUDGMENT

In Section II of the Response, Moehring argues that a summary judgment motion is inappropriate in a land use appeal because it is not specifically identified in the HER. That

[1] Section I of the Response is background of the appeal and motion.
[2] Section IX of the Response is the conclusion.

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is not correct. HER 2.16(e) refers to "motions to dismiss all or part of an appeal" and "other dispositive motions." A motion for summary judgment is a dispositive motion and falls squarely within the scope of HER 2.16. During the telephone conference on December 7, 2018, Examiner Vancil acknowledged that a motion for summary judgment was appropriate and allowed under the HER.

In Section III of the Response, Moehring argues that the Superior Court Civil Rules do not apply, and that even if they did, the Applicant has not met the standard for summary judgment. HER 1.03 – Interpretation of Rules – subsection (e) states that: "The Hearing Examiner may look to the Superior Court Civil Rules for guidance." Thus, the HER contemplate the Examiner applying the Civil Rules to land use appeals where appropriate.

Moehring then argues that the Applicant should not be awarded summary judgment because it has not submitted affidavits or certified copies of the exhibits. The documents submitted by the Applicant are admissible under the HER. HER 2.17 – Evidence – subsection (a) expressly provides that: "Evidence, *including hearsay*, may be admitted if the Examiner determines that it is relevant to the issue on appeal, comes from a reliable source, and has probative (proving) value" (emphasis added). The vast majority, if not all of the documents attached to the Applicant's motion are documents that were either created or reviewed by SDCI, and formed the basis for the Director's Decision. Moehring does not allege that these documents are not authentic or relevant to the Decision and Appeal. Thus, the exhibits are admissible evidence, support the Applicant's motion for summary judgment and may be considered by the Examiner.

Section IV of the Response is similarly devoted to arguing that the exhibits introduced by the Applicant do not comply with the admissibility standards for summary judgment. Again, unlike the Civil Rules, hearsay evidence is admissible in a land use appeal under HER 2.17(a). The documentary evidence overwhelmingly demonstrates that, even

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when viewed in a light most favorable to Moehring, that there are no material issues of fact that warrant a remand of the Decision to SDCI, much less require SDCI to perform an environmental impact statement, which is the sole relief requested.

Section V of Moerhing's Response claims that the DNS was "issued without resolution on the effect to the four right-of-way street trees."[3] In support of this claim, Moehring attaches Exhibit P, which consists of public comments, correction notices, and internal emails among SDOT and SDCI. These documents, however, support the Applicant's position because it demonstrates that SDCI was aware of and considered the issues that Moehring raises in the Appeal.

Moehring argues that an email between the Appellants and SDOT that was sent after the Decision was issued demonstrates that the potential environmental impacts were not adequately considered by SDCI. However, there are other emails that were sent well before the Decision was issued, which demonstrate that SDOT was aware of this project and the trees in the City right-of-way.[4] Moreover, the permit that is the subject of this Appeal does not authorize the removal of any trees. SMC Title 15 governs the retention of street trees and is not reviewed under SEPA. Moehring does not claim that SMC Title 15 is insufficient to mitigate any potential impacts to the street trees.

Next, Moehring argues that the Appeal must proceed to a hearing because in his opinion the development of nine rowhouses on an approximate 7,000 square foot lot will have "greater impacts to the environment compared to typical properties of this size."[5] As an initial matter, merely alleging greater impacts to the environment is not a sufficient basis for attacking the Decision. The relevant inquiry is whether there were any potential environmental impacts were not adequately disclosed to SDCI or whether the City's current

[3] *See* Response, 8:26.
[4] *See* Response, Ex. P, pg. 9-10.
[5] *See* Response, 9:15-16.

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environmental regulations do not sufficiently mitigate the impacts. Moehring does not argue either of these points.

Instead, Moehring claims that the size of the project will have greater environmental impacts than smaller projects. That is axiomatic. Moehring's claims that the project's density is unprecedented is simply without merit. And the argument that the "number of units proposed is over twice that what is typically allowed within Seattle's LR1 zones" is misleading at best. Moehring relies on SMC 23.45.512, Table A, for the proposition that in LR1 zones the Land Use Code allows one rowhouse unit for every 1,600 square feet of land. This is not what Table A provides. Table A specifically states that the density limit on lots less than 3,000 square feet is one unit for every 1,600 square feet. For lots 3,000 square feet or greater there is no density limit. Not only does the proposed development not exceed the density limits (because there are none), but the City is replete with examples of developments that are as dense, if not denser, than the proposed rowhouse units.

Section VI is devoted to pointing out purported inaccuracies in the Applicant's motion to dismiss and for summary judgment. For the purposes of this Reply it is not necessary to delve into the minutia of Moehring's arguments. The record and the documents speak for themselves and demonstrate that the potential environmental impacts were disclosed to SDCI. While the breadth of the environmental impacts are disputed by Moehring, he does not dispute that the range of environmental impacts were disclosed to SDCI, nor does he claim that the City's environmental regulations are inadequate to sufficiently mitigate those impacts. Because there are no material issues of fact that (a) the potential environmental impacts were disclosed to and considered by SDCI, and (b) that the City's environmental regulations are adequate to achieve sufficient mitigation of the environmental impacts, the Examiner should award the Applicant summary judgment and dismiss the Appeal in its entirety.

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II. REPLY TO APPELLANT'S RESPONSE TO APPLICANT'S AMENDED MOTION TO DISMISS

In his response to the motion to dismiss, Moehring fails to identify one single environmental impact that was either not disclosed by the Applicant, or that SDCI was not aware of when it issued the DNS. This alone warrants dismissal of the Appeal. Another fatal flaw in Moehring's response is that he does not rebut the fact that even assuming each of his allegations in the Appeal are correct, they are insufficient demonstrate that the City's regulations are inadequate to sufficiently mitigate the impacts, much less that an environmental impact statement for the Project should be required. Thus, the Applicant and Owner's motion to dismiss the Appeal should be granted.

Moehring sets forth 11 specific reasons for why the motion to dismiss should be denied, which will be discussed in turn below.

First, Moehring alleges in his response that SDCI's Decision was based upon "erroneous and incomplete information,"[6] yet he fails to identify any specific environmental impact that was not part of the record, or known to SDCI when it issued the Decision. The failure to identify any specific environmental impact that was not considered by SDCI renders his Appeal defective and requires its dismissal.

Second, Moehring argues that the motion to dismiss should be denied because the Project will have a probable significant adverse impact on the environment. In support of this argument, Moehring alludes to testimony that will be offered at the hearing for a development located at 3827 23rd Avenue West. The development at 3827 23rd Avenue West has absolutely no bearing on whether the environmental impacts of this Project were disclosed to SDCI and whether an environmental impact statement should be required.

[6] *See* Response, 1:22.

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Third, Moehring claims that the Project is not categorically exempt from SEPA review. That statement is correct and the motion to dismiss did not allege that the Project was exempt from SEPA or that it was a basis for dismissing the Appeal. So, it is not a valid objection to the motion.

Fourth, Moehring argues that the motion to dismiss should be denied because the "application indicates existing significant trees and rockery within the right-of-way that will be compromised as a result of the proposed development."[7] Moehring's allegation, even assuming it's true, does not allege that SDCI was unaware of any potential environmental impacts when it issued the Decision. It alleges the opposite – that the impacts were disclosed to SDCI. Again, Moehring fails to allege that City's environmental regulations are insufficient to mitigate the Project's environmental impacts, including those to the right-of-way and street trees.

Fifth, Moehring goes on to allege that the motion to dismiss "inaccurately claims that there is no history of landslides in the area."[8] Moehring claims that his response is supported by the public records and then provides a link to the City of Seattle Landslide Prone Areas. This document demonstrates that this information was known to SDCI (since they created the document) when it issued the Decision.

Sixth, Moehring contends that SDOT did not review the plans set submitted by the Applicant. This, too, is not a valid reason for denying the motion to dismiss. The question before the Examiner is whether the potential environmental impacts were adequately disclosed to or know by SDCI when it issued the Decision. SDOT's review of the Project takes place during the construction permit review phase, not during a SEPA Environmental

[7] *See* Response, 18:4-5.
[8] *See* Response, 18:14.

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Determination. Likewise, the retention of street trees under Title 15 of the SMC is not part of the SEPA review process.

Seventh, Moehring claims that potential impacts of the Project with respect to the abutting SF 5000 zone need to be considered or mitigated. There is no dispute that SDCI was aware of the abutting SF 5000 zone when it issued the Decision – the first page of the Decision specifically identifies the vicinity zoning as follows: North: LR1; East LR1; South: SF 5000; West: SF 5000. Because SDCI was aware of the vicinity zoning when it issued the Decision, it is not a valid basis for denying the motion.

Eighth, Moehring purports that there was an error in disclosing whether or not there was a steep slope on the Premises. While the Applicant initially disclosed that there was a steep slope on the Premises, the topographic survey prepared by a licensed surveyor with Chadwick & Winters, unequivocally established that the Premises did not contain a steep slope. Moehring has failed to present any evidence that the topographic survey is incorrect or that there is a steep slope on the Premises.

Ninth, Moehring argues that the arborist report is inadequate. This argument is unavailing and insufficient to defeat the motion to dismiss. The arborist report adequately discloses the location and type of trees on the Premises and the abutting right-of-way. The adequacy of tree protection measures under Chapter 25.11 and Title 15 of the SMC will be addressed during the construction permit review. Those issues are not before the Examiner on Moehring's appeal of the Decision.

Tenth, Moehring claims that the geotechnical report is inadequate because it is of insufficient length. Yet, Moehring does not identify a single aspect of the report that he believes is insufficient or a potential environmental impact that was not disclosed. There will be additional geotechnical reports provided during the review of the construction permit.

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Finally, Moehring alleges that the case law provided in the motion-in-chief, including an Examiner's decision, is not applicable to this matter because it concerned a different case with different facts. Regardless, the legal principles and holdings in those cases are applicable to this land use appeal for the reasons stated in the initial motion. And Moehring's claim that he will provide "expert testimony and exhibits"[9] does not imbue the Appeal with merit.

III. CONCLUSION

There are three compelling reasons for why the Appeal should be dismissed. First, the Appeal is without merit on its face. Second, when viewing the facts in favor of Moehring, there are no material issues of fact that preclude an award of summary judgment to the Applicant. Third, even assuming every single allegation made in the Appeal is true, it is factually and legally insufficient for the Examiner to "vacate the Determination of Non-Significance with instructions to SDCI to prepare an Environmental Impact Statement EIS to adequately address the environmental impacts,"[10] which is the sole relief requested in the Appeal. Thus, the motion to dismiss and for summary judgment should be granted and the Appeal should be dismissed in its entirety.

Respectfully submitted this 19th day of December, 2018.

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[9] *See* Response, 21:11.
[10] *See* Appeal, 8:6-8.

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CERTIFICATE OF SERVICE

I, Gennifer Holland, certify under penalty of perjury under the laws of the State of Washington that the above pleading was served on the parties listed below via the indicated method:

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DATED this 19th day of December, 2018.

s/Gennifer Holland
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