Hearing Examiner Ryan Vancil
January 21, 2019

BEFORE THE HEARING EXAMINER
CITY OF SEATTLE

In the Matter of the Appeal of:	Hearing Examiner File: MUP-18-022 Department Reference: 3029611-LU
David Moehring, et.al. Neighbors to 2300 West Emerson Street to the SEPA Determination of Non-Significance for the development located at 2300 West Emerson Street	APPELLANTS' MOTION FOR RECONSIDERATION RE: ORDER ON SUMMARY JUDGEMENT MOTION

The Appellants, represented by David Moehring, respectfully moves for the Hearing Examiners' reconsideration of the decision on MUP-18-022 issued on 11th day of January 2019. This request is timely per Hearing Examiner Rules of Practice and Procedure (HER) 2.04 and 3.20(b) given the Martin Luther King Jr holiday qualifies the filing within 10 days after the date of the Hearing Examiner's decision and extended to the next business day.

Per HER 3.20(a), this motion for reconsideration is made for two reasons: (1) Irregularity in the proceedings by which the moving party was prevented from having a fair hearing; and (4) a clear mistake was made as to material fact.

In summary, this Motion for Reconsideration of the Order includes the following facts:

(1) The Applicant's Motion for Dismissal of Oct 26, 2018 was deemed by the Hearing Examiner not being complete and worded instead as a motion for Summary Judgement.

(2) The Hearing Examiner's Conference call of December 7th offered the Applicant an opportunity to revise and resubmit the original motion as a request for Summary Judgement.

(3) The Hearing Examiner's Order on the revised motion dated January 11, 2019 indicated at least six (6) of fifteen (15) instances where the Applicant's Motion for Summary Judgement should be denied. These points are further identified with this Motion for Reconsideration Section I. "Reconsideration due to Irregularity in the Proceedings."

(4) The Hearing Examiner's Order on the revised motion dated January 11, 2019 indicated that the Applicant's Motion for Summary Judgement dated December 7 that "neither party submitted evidence under sworn declaration" (page 3). This was preceded by the Hearing Examiner's statement that "it is the decision maker's role to determine whether the opposing party's evidence reveals a factual dispute." Since it was interpreted that neither party submitted evidence by the standard required for summary judgement, the Hearing Examiner has no basis to grant the Motion for Summary Judgement.

(5) The above discrepancies were highlighted in the context of the law within the Appellant December 17th response to the motion, stating "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." (page 6). In other words, the Appellant has already dismissed the adequacy of the Motion for Summary Judgement based on the lack of documented evidence; and it was expected for the Hearing Examiner to rule accordingly.

(6) Conversely, the Appellant indeed provided declarations within the response from a professional architect. Within page 7 of the Response to the Motion for Summary Judgement, as an expert witness David Moehring (appellant's representative) declared 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." Therefore, the exhibits 'A' through 'N' submitted with the Appellant's response to the Applicant's Motion for Summary Judgment must be deemed as evidence.

(7) As identified in the Appellant response (page 8), "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. Yet, despite the number of Motion items indicated by the Hearing Examiner to be denied, the Hearing Examiner has granted the Summary Judgement with prejudice to the Motion's moving party (Applicant) rather than the non-moving party (Appellant).

(8) A motion for summary judgement will be granted only if "reasonable persons could reach but one conclusion." Clearly with at least six of the fifteen issues as reviewed within the Hearing Examiner's order that denied the Applicant's motion for dismissal or summary judgment, one cannot conclude that all reasonable persons would reach the one conclusion identified in the January 11, 2019 order to grant the Applicant's motion for Summary Judgement.

(9) The Applicant motion, carried by the Hearing Examiner's final paragraph of the Order, suggests that despite the acknowledged issues of the case merit, the key reason for Summary Judgment is that the Notice of Appeal "does not seek the remedy of remand for additional or more adequate SEPA analysis." Yet, with the clarifications or demonstrations of similar appeals, it is not evident that this appeal is remiss in any way. Accordingly, such a conclusion is further challenged in detail within Section II below on the 'Requested Relief Corresponds with Department Determination' and Section III below on 'Reconsideration due to Clear Mistake to the Material Fact.'

(10) The Applicant states that HER 2.16 authorizes other dispositive motions including motions for summary judgment. Yet, this Rule does not indicate 'Summary Judgements' are included as a dispositive motion. None of the Seattle Municipal Codes for which the Hearing Examiner has been given authority allows the use of Summary Judgements.

I. Reconsideration due to Irregularity in the Proceedings

The Hearing Examiner should grant a party's motion for reconsideration of the Hearing Examiner decision if there was an irregularity in the proceedings by which the moving party was prevented from having a fair hearing. This is the case with this appeal given (as summarized above) that the Hearing Examiner's Order on the revised motion dated January 11, 2019 indicated at least six (6) of fifteen (15) instances where the Applicant's Motion for Summary Judgement should be denied. These six points of the appeal's merit include:

(1) Per Order page 5, inadequately covered SEPA Checklist Item #2 relative to documented landslides is thereby denied from the Applicant's motion to dismiss.

(2) Per Order page 6, inadequately covered SEPA Checklist Item #4 relative to the lack of documentation of existing trees is thereby denied from the Applicant's motion to dismiss.

(3) Per Order page 8, inadequately covered SEPA Checklist Item #7 relative to impacts to adjacent properties' views is thereby denied from the Applicant's motion to dismiss.

(4) Per Order page 9, inadequately covered SEPA Checklist Item #9 relative to the impacts of the increased number of occupants is thereby denied from the Applicant's motion to dismiss.

(5) Per Order page 10, insufficient arborist report relative to DNS analysis is thereby denied from the Applicant's motion to dismiss.

(6) Per Order page 11, the suggestion that this 9-dwelling proposal is exempt from SEPA review is thereby denied from the Applicant's motion to dismiss.

The Hearing Examiner has indeed concurred that at least for these six items that the appeal has merit. With the number of the Applicant's Motion for Dismissal items indicated by the Hearing Examiner to be denied, the Summary Judgement must be evaluated with prejudice toward the non-moving party rather than the moving Applicant. A motion for summary judgement may only be granted if "reasonable persons could reach but one conclusion." Clearly with at least six of the fifteen issues as reviewed within the Hearing Examiner's being denied the Applicant's motion for dismissal or summary judgment, one cannot conclude that all reasonable persons would reach just one conclusion.

Clearly, the Applicant's suggestion that "The object and function of summary judgment procedure is to avoid a useless trial" is not the case here. How may one consider an appeal where the Hearing Examiner has identified at least six points of merit to be considered a 'useless trial?' Such an assumption is not justified. As such, the Order to grant the summary judgement must be reconsidered.

II. Requested Relief Corresponds with Department Determination

The original Appellant Motion to Dismiss response of November 2, 2018 (page 5) and the Motion for Summary Judgement response of December 17, 2018 (page 17) further clarified the requested relief stating "The appellant with adjacent neighbors … asks that the Hearing Examiner require the Applicant's development be considered for its environmental impact pursuant to SEPA substantive authority provided in SMC 25.05.660 that may lead this proposal to be conditioned to mitigate the environmental impacts." Such a clarification must be reconsidered for a fair proceeding. Just as the Hearing Examiner initiated a conference call on December 7 with all parties to indicate to the developer's (or applicant's) attorney that their Motion for Dismissal should be revised as a Motion for Summary Judgement, the Hearing Examiner had a similar

opportunity to suggest to the Appellant that they must provide all of their evidence prior to the appeal hearing with the response to the Motion for Summary Judgement. That conversation did not transpire. Nor did the Hearing Examiner take the opportunity to suggest to the Appellant that their clarification of the requested relief was insufficient as worded.

This original and clarified request for relief would be consistent with the recently remanded MUP-17-035 that requested that "the Hearing Examiner reverse the Director's decision and remand with instructions to prepare an Environmental Impact Statement… as required by law. Appellants also request that the remand include specific instructions requiring that SDCI mitigate the adverse impacts to Appellants pursuit to the city's substantive SEPA authority as is authorized by law.[1]" The Hearing Examiner Ryan Vancil granted this requested relief in part within the June 12, 2018 Order for that case.[2]

Per HER 2.11, the "Examiner conducting a hearing has the duty to ensure a fair and impartial hearing, to take all necessary action to avoid undue delay in the proceedings, to gather facts necessary for making the decision or recommendation, and to maintain order. The Examiner has all powers necessary to these ends including, but not limited to the following:

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(d) Rule on offers of proof and receive evidence;
(e) Rule on procedural matters, objections and motions;
(f) Question witnesses and *request additional exhibits*;
(g) Permit or require oral or written argument, briefs, proposed findings of fact and conclusions, or other submittals the Examiner finds appropriate, and determine the timing and format for such submittals;
(h) Regulate the course of the hearings and the conduct of the parties and others so as to maintain order and *provide for a fair hearing.*
(i) *Hold conferences* for settlement, simplification of issues, or *for any other proper purpose*." (*Emphasis added.*)

It is evident that the incomplete Motion for Summary Judgement is not a basis to thwart a fair hearing from being provided. It is irregular for Hearing Examiner to provide guidance and ability of amend a motion of the Applicant while denying the same to the Appellant. The Appellant's representative, David Moehring, hereby recommends to rectify this irregularity in the proceedings with a fair hearing by reopening the case and allowing the Appellant's witnesses testimony in the matter. As such, the Order to grant the summary judgement must be reconsidered.

III. Reconsideration due to Clear Mistake to the Material Fact

It is my understanding that the Hearing Examiner should grant a party's motion for reconsideration of a Hearing Examiner decision if a clear mistake was made as to a material fact. This is the case with this appeal in the review of the 'Findings and Decision of the Hearing Examiner', as the Hearing Examiner has not included all Findings of Fact. This Motion for

[1] MUP-17-035 Page 8 of 8, November 9, 2017.

[2] Amended Findings and Decision https://web6.seattle.gov/Examiner/case/document/10104

Reconsideration relies on the adequacy of the original appeal and responses to the motions along with attachments to both. It relies on the publicly available records for this project available on the Department's website. Intentionally, this motion offers no new evidence other than indicating there exists an abundance of evidence as documented within the Witness and Exhibits list.

In the original appeal, the relief requested that "the Hearing Examiner vacate the Determination of Non-Significance with instructions to the SDCI to prepare an Environmental Impact Statement EIS to adequately address the environmental impacts and mitigation to meet the objective of providing adequate protections to Seattle's right-of-ways and the nearby residents."

Similar to MUP-17-035, this case specifically listed the issues of the Department's Determination of Non-Significance that would likely result in significant negative impact that cannot be mitigated. The Appeal for 2300 W Emerson (MUP-18-022) clearly states on page 2 lines 12-15 the likely impacts including the "protection of existing trees along the right-of-way of the Subject Property is of interest for soil retention, storm water runoff, neighborhood aesthetics, natural habitats, and thermal local heat island affects. The Appellant will be adversely impacted by enactment of the proposed development notwithstanding the determination by the responsible party's discretionary decision that an EIS is not required under RCW 43.21.030(2)."

Furthermore, the Appellant responses (indicated above) refers to the applicable code requirement of SMC 25.05.444 elements of the environment that must be considered within an Environmental Impact Statement including "the Natural Environment (geology, soils, topography, unique physical features, i.e. rockery, erosion, air quality, odor, climate, surface water, ground water, runoff/absorption, public water supplies, trees and animals, scenic resources); the Built Environment (noise, housing light and glare, aesthetics, transportation systems, vehicular traffic, parking, traffic hazards, public services and utilities, fire, water service, and sewer/solid waste)."

Also like MUP-17-035, this case should not be dismissed simply because evidence had not been presented with the Statement of Appeal. There is no basis to grant a waiver and provide preferential treatment to the Applicant from providing sworn evidence within their motion for summary judgement while at the same time denying the Appellant the right to produce abundant evidence during a hearing. There were fifty-two (52) exhibits listed as evidence in the Appellant's list of exhibits and witnesses issued January 7 (and amended the following day.) Several attachments to the Motion reply by the Appellant, including the discovery of SDOT's arborist, provide evidence that the street trees were not considered with the Department's determination of Non-Significance. The Order suggestion that the burden of proof has not been met is premature given there has been no hearing to provide evidence. The biased production of evidence just by the Appellant prior to the appeal hearing is contrary to the following Hearing Examiner rules:

(1) HER 2.11 (a) that requires presentation of evidence while the "Examiner [is] conducting a hearing … to ensure a fair and impartial hearing.";
(2) HER 3.13 (a) that requires "Each party in an appeal proceeding has the right to notice of hearing, presentation of evidence, rebuttal, objection, cross-examination, argument, and other rights determined by the Hearing Examiner as necessary for the full disclosure of facts and a fair hearing."; and

(3) HER 3.15 (b)(3) outlines the purpose of the Hearing for the "Appellant's presentation of evidence". Documenting evidence within appeals or non-qualifying Motions for Summary Judgement is contrary to Hearing Examiner rules and policies.

IV. Concluding Reconsideration Actions

Within the provisions of the authority of the Hearing Examiner, the Appellant moves for a reconsideration made for key reasons: (1) Irregularity in the proceedings by which the moving party was prevented from having a fair hearing; and (4) a clear mistake was made as to a material fact.

The appellant does not question the Hearing Examiner's authority or his reasoning with the exception of (a) the second paragraph of the second page and (b) the final paragraph of the last page. The appellant does ask that the Hearing Examiner reconsider the applicability of HER 1.03(c) which states "When *questions of practice or procedure arise that are not addressed by these Rules*, the Hearing Examiner shall determine the practice or procedure most appropriate and consistent with providing fair treatment and due process. The Hearing Examiner may look to the Superior Court Civil Rules for guidance." (*Emphasis added.*) The Applicant has raised no questions of practice of procedure within their motion. It simply referenced (and as identified herein – inaccurately in some cases) HER 2.16 and 3.02a. Thus, there is no reason within a fair proceeding for the Hearing Examiner to interpret the published Rules and Policies of the Hearing Examiner. The last paragraph of the Order appears to bypass the procedures of a hearing denying the appellants' stated environmental impacts, the acknowledged merits of the appeal, and the right to present fifty documents of evidence with expert and layperson testimony.

Regardless of the resolution of this motion, the Appellant acknowledges the decision by the Hearing Examiner on this motion as the final decision for the City of Seattle. If denied this Motion for Reconsideration in accordance with RCW 36.70C.040, a request for judicial review of the decision would be commenced within twenty-one (21) days of the date the order on the motion for reconsideration is issued.

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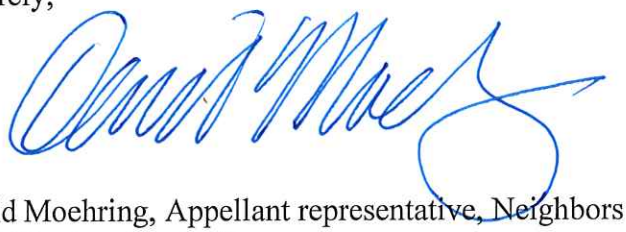
Sincerely,



David Moehring, Appellant representative, Neighbors to 2300 West Emerson Street
3444 23rd Ave West, #B
Seattle WA 98199

Dated January 21, 2019

Certificate of Service

I certify under penalty of perjury under the laws of the State of Washington that on this date I, David Moehring, a Neighbor to 2300 W Emerson Street, sent true and correct copies via e-mail, of the attached **Appellant Motion for Examiner's Reconsideration** to every person listed below, in the matter of the **LAND USE DECISION APPEAL** to the Determination of Non-Significance for the development at 2300 W Emerson Street lot, Hearing Examiner File No. MUP-18-022.

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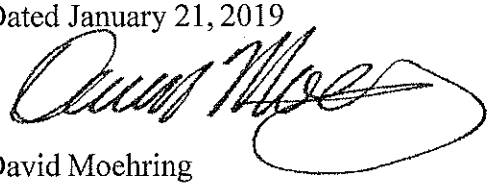
Dated January 21, 2019



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