

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
RESPONSE IN OPPOSITION TO
MOEHRING'S MOTION FOR
RECONSIDERATION

COME NOW the applicant, Julian Weber, and the property owner, Isola Real Estate VII LLC, by and through its undersigned attorney, Brandon S. Gribben of Helsell Fetterman LLP, and submits the following response in opposition to the appellant, David Moehring's, Motion for Reconsideration of the Hearing Examiner's Order on Motion for Summary Judgment.

I. INTRODUCTION AND RELIEF REQUESTED

Moehring seeks reconsideration of the Hearing Examiner's Order on Motion for Summary Judgment (the "Order") that granted the Applicant's motion for summary judgment and dismissed the land use appeal. The basis for dismissing the appeal rested largely on Moehring's failure to provide any evidence that the proposed development would

1 result in significant adverse environmental impacts that would not be sufficiently mitigated
2 by current City regulations.

3 Moehring seeks reconsideration of the Order based upon (a) irregularity in the
4 proceedings by which the moving party was prevented from having a fair hearing, and (b) a
5 clear mistake was made as to a material fact. Moehring's motion should be denied because
6 he has failed to demonstrate any of the elements necessary for granting reconsideration. It
7 remains undisputed that the sole relief that Moehring requested was an order directing SDCI
8 to prepare an environmental impact statement. It is equally undisputed that Moehring failed
9 to provide any evidence of significant adverse impacts, much less evidence of significant
10 adverse impacts that would not be sufficiently mitigated by the City's current regulations.
11 Because Moehring failed to demonstrate the likelihood of any significant negative
12 environmental impacts, the Examiner should deny the motion and affirm the Order.

13 II. STATEMENT OF FACTS

14 The Premises is located in the Magnolia neighborhood of Seattle and is zoned
15 Lowrise 1 (LR 1). Because of the size of the Project, it is subject to SEPA review under
16 SMC Chapter 25.05 et seq. On January 19, 2018, the Applicant submitted a SEPA
17 environmental checklist containing information about the potential impacts of the Project.
18 SDCI later annotated the SEPA checklist. The Project then went through a period of public
19 comments. After the public comment period and review by SDCI and other City
20 departments, the SDCI Director issued the Decision on September 13, 2017. The Decision
21 contained a Determination of Non-Significance, finding that the Project would not have
22 significant adverse impacts upon the environment, and that an EIS was not required. The
23 Decision imposed no conditions on the Project.

24 On September 26, 2018, Moehring filed the Appeal that sought the sole relief of an
25 order directing SDCI to draft an environmental impact statement. The Applicant moved to

1 dismiss the appeal because it was meritless on its face and, for summary judgment, because
2 there were no issues of material fact. On January 11, 2019, Examiner Vancil issued the
3 Order granting the Applicant summary judgment and dismissing the appeal. 10 days later,
4 Moehring moved for reconsideration of the Order.

5 III. STATEMENT OF ISSUES

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

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

11 IV. EVIDENCE RELIED UPON

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

13 V. AUTHORITY

14 A. **Moehring fails to identify any irregularity in the proceedings that prevented** 15 **him from having a fair hearing.**

16 HER 3.20(a)(1) provides that the Hearing Examiner may grant a party's motion for
17 reconsideration of a Hearing Examiner decision if one or more of the following is shown:

18 (1) Irregularity in the proceedings by which the moving party was prevented from having a
19 fair hearing. The HER do not define or describe "irregularities." However, under CR
20 60(b)(1) irregularities occur when there is a failure to adhere to some prescribed rule or
21 mode of proceeding, such as when a procedural matter that is necessary for the orderly
22 conduct of trial is omitted or done at an unseasonable time or in an improper manner.

23 *Mosbrucker v. Greenfield Implement, Inc.*, 54 Wn. App. 647, 652, 774 P.2d 1267, 1270
24 (1989). CR 60(b)(1) contains similar language to HER 3.20(a) and provides in part that "the
25 court may relieve a party or the party's legal representative from a final judgment, order, or

1 proceeding for... [m]istakes, inadvertence, surprise, excusable neglect or irregularity in
2 obtaining a judgment or order.” Thus, case law interpreting CR 60(b)(1) is instructive on
3 how this tribunal should interpret and apply HER 3.20(a).

4 The Appeal identifies 11 issues with the SEPA Checklist. Moehring argues that
5 there were irregularity in the proceedings because the Examiner found that there were
6 factual issues over whether the SEPA checklist adequately disclosed six specific
7 environmental impacts. While the Examiner concluded that there were factual disputes over
8 whether six of the SEPA checklist items were adequately disclosed, that did not form the
9 basis for the Examiner’s Order awarding summary judgment to the Applicant and, thus, it is
10 not a basis for granting reconsideration.

11 Moehring further claims that there were irregularities in the proceedings because his
12 responses to the Applicant’s motion to dismiss and amended motion to dismiss and for
13 summary judgment requested relief that should have survived the motion. This argument,
14 too, is not an appropriate basis for awarding reconsideration.

15 As an initial matter, the Appeal is the sole document that sets forth the relief being
16 requested by an appellant. The HER govern land use proceedings. Section 3.01(a) states
17 that: “(a) Compliance with Rules. *All appeals must comply with these Rules* and with the
18 requirements established in the law under which the appeal is filed” (emphasis added). HER
19 3.01(d)(4) governs the contents of appeals and requires that it contain the “relief requested,
20 such as reversal or modification.” While an appeal may be amended upon a showing of
21 good cause, it must be amended no later than 10 days after the appeal was filed. HER 3.05.¹

22
23
24 ¹ Amendment. For good cause shown, the Hearing Examiner may allow *an appeal to be amended no later*
25 *than 10 days after the date on which it was filed*. In deciding whether to allow such an amendment, the
Hearing Examiner shall consider whether the fair hearing opportunity of other parties would be prejudiced by
the amendment. (emphasis added)

1 Moehring's Appeal, which was never amended, requested a single form of relief:
2 "Appellant requests that the Hearing Examiner vacate the Determination of Non-
3 Significance with instructions to the SDCI to prepare an Environmental Impact Statement
4 EIS to adequately address the environmental impacts and mitigation to meet the objectives
5 of providing adequate protections to Seattle's right-of ways and the nearby residents." This
6 singular relief was the basis for the Order, not the purported inadequacies with the SEPA
7 checklist.

8 Moehring argues that the Examiner should have informed him that his request for
9 relief would not survive a motion to dismiss and for summary judgment. Even assuming
10 that it would be appropriate for the Examiner to inform Moehring of any deficiencies in his
11 Appeal, it would have been a futile gesture because the deadline to amend the Appeal had
12 long since passed when the conference call took place on December 7, 2018.

13 Moehring's next argument relies on drawing a false parallel between a completely
14 different land use appeal, involving completely different issues. Specifically, Moehring
15 claims that because the appellants in the *Appeal by Escala Owners Association*, MUP 17-
16 035, requested that the Examiner reverse SDCI's Decision with instructions to prepare an
17 EIS that it somehow imbues his Appeal with merit. MUP 17-035 concerned the
18 construction of a 48-story 500 foot tall hotel and residential skyscraper; this appeal concerns
19 the construction of a modest 6-unit and 3-unit rowhouse project. It is outlandish to draw a
20 corollary based upon these two vastly different projects and the similar relief that was
21 requested. If anything, it demonstrates that the relief Moehring requested is unsupported by
22 the factual evidence.

23 **B. The Hearing Examiner did not make a clear mistake as to a material fact.**

24 While it is not exactly clear, it appears that Moehring's basis for reconsideration
25 under "a clear mistake as to a material fact" is that he was precluded from introducing 52

1 exhibits at the land use hearing that was ultimately cancelled. This is not a valid basis for
2 granting reconsideration. Nothing precluded Moehring from submitting these 52 exhibits in
3 his response to the motion for summary judgment and he does not allege that these
4 documents were not available when he submitted his response. Furthermore, Moehring was
5 plainly aware of his right to submit additional documentation when he submitted annotated
6 exhibits with his response.

7 Moehring further argues that it was a mistake for the Examiner to “grant a waiver”
8 from requiring the Applicant to submit a sworn affidavit. This, too, is not a clear mistake of
9 a material fact. The same evidentiary standards that apply to Washington state courts do not
10 apply to quasi-judicial proceedings like this land use appeal. The HER confer the Examiner
11 wide latitude when considering what evidence may be admitted. Specifically, HER 2.17(a)
12 – Evidence – states, in part, that: “*Evidence, including hearsay, may be admitted if the*
13 *Examiner determines that it is relevant to the issue on appeal, comes from a reliable source,*
14 *and has probative (proving) value*” (emphasis added). There is no requirement that a
15 particular document be authenticated by a records custodian or other person with knowledge
16 of the document. Further, Moehring does not dispute the authenticity of the exhibits
17 attached to the Applicant’s motion. The HER explicitly allow the Examiner to consider
18 hearsay evidence. Thus, it was not a mistake of material fact and the Examiner did not
19 “grant a waiver” to the Applicant.

20 VI. CONCLUSION

21 The Hearing Examiner was well within his authority when he scheduled a
22 conference call to discuss the pending motion and allowed for it to be amended. Examiner
23 Vancil also acted within his authority when he granted the motion for summary judgment
24 and dismissed the Appeal. These were not irregularities in the proceeding. In fact, each of
25 these actions was authorized by the HER that govern land use appeals. There was also no

1 mistake as to a material fact that would warrant reconsideration of the Order. Thus, the
2 motion for reconsideration should be denied and the Order should be affirmed.

3 Respectfully submitted this 29th day of January, 2019.

4
5 HELSELL FETTERMAN LLP

6 By: s/ Brandon S. Gribben
7 Brandon S. Gribben, WSBA No. 47638
8 Attorneys for Applicant and Property Owner
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

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:

David Moehring
DMoehring@consultant.com

- ☐ Via first class U. S. Mail
☐ Via Legal Messenger
☐ Via Facsimile
☒ Via Email

Lindsay King
Lindsay.King@seattle.gov

- ☐ Via first class U. S. Mail
☐ Via Legal Messenger
☐ Via Facsimile
☒ Via Email

DATED this 29th day of January, 2019.

s/ Gennifer Holland
Gennifer Holland, Legal Assistant