Hearing Examiner Barbara Dykes Ehrlichman

BEFORE THE HEARING EXAMINER
CITY OF SEATTLE

In the Matter of the Appeals of: NEIGHBORS TO MIRRA HOMES DEVELOPMENTS, from decisions issued by the Director, Seattle Department of Construction and Inspections.	Hearing Examiner Files: MUP-19-019 (P) & MUP 19-020 (P) Department References: 3032834-LU & 3032833-LU APPLICANTS' AND OWNER'S MOTION TO DISMISS LAND USE APPEAL AND FOR SUMMARY JUDGMENT

COMES NOW the applicants, Brooke Friedlander and Andy McAndrews, and the property owner, Mira 111 LLC ("Mirra"), by and through their undersigned attorneys, Brandon S. Gribben and Samuel M. Jacobs of Helsell Fetterman LLP, and moves the Hearing Examiner to dismiss this land use appeal with prejudice.

I. INTRODUCTION AND RELIEF REQUESTED

This matter concerns a consolidated appeal of two Seattle Department of Construction and Inspections ("SDCI") Director's Decisions that approved the proposed short subdivision under permit numbers 3032833 and 3032834 (the "Short Subdivisions") for the properties located at 3410 23rd Avenue West and 3416 23rd Avenue West (the "Property"). Declaration of Colt Boehme ("Boehme Decl."), Exs. A and B. The Short Subdivisions sought to subdivide the two parcels into two lots each. SDCI issued the

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Decisions that approved the Short Subdivisions on April 29, 2019. Boehme Decl., Exs. C and D.

David M. Moehring ("Moehring"), who has extensive experience appealing SDCI land use decisions, filed an appeal of the Decisions on May 10, and supplemented the appeal on May 13, 2019 (the "Appeal"). Boehme Decl., Ex. E. The issues raised by Moehring on Appeal are without merit on their face, brought merely to secure delay, and are woefully insufficient to refute the Decision. In addition, there are no issues of material fact that would preclude an award of summary judgment in favor of Mirra. For these reasons, the Appeal must be dismissed in its entirety.

II. STATEMENT OF FACTS

The Property is zoned Multifamily Lowrise 1 (LR1). The Property is comprised of two rectangular lots containing approximately 6,000 square feet each. Access to the Site is from 23rd Avenue West to the west. And there is an alleyway to the east.

On September 14, 2018, the applicants submitted the Short Subdivisions to SDCI to subdivide each parcel of land into two separate lots. Soon thereafter, SDCI posted the Notice of Application. The Short Subdivisions then went through a period of public comments that ended on November 5, 2018. After the public comment period and review by SDCI and other City departments, the SDCI Director issued the Decisions on April 29, 2019. On May 10, 2019, Moehring filed the Appeal; on May 13, 2019, Moehring supplemented the Appeal.

The Appeal raises five objections to the Decisions alleging that the proposed Short Subdivisions do not meet the following criteria under SMC 23.24.040:

1. Conformance to the applicable Land Use Code provisions, as modified by this Chapter 23.24;

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2. Adequacy of access for pedestrians, vehicles, utilities, and fire protection as provided in Section 23.53.005 and Section 23.53.006;

3. Whether the public use and interests are served by permitting the proposed division of land;

4. Conformance to the applicable provisions of Section 25.09.240 in environmentally critical areas and Section 23.60A.156; and

5. Whether the proposed division of land is designed to maximize the retention of existing trees.

Each of Moehring's five objections to the Decisions are without merit on their face, mandating dismissal of the Appeal. In addition, there are no issues of material fact that preclude an award of summary judgment in favor of Mirra.

III. STATEMENT OF ISSUES

1. Should the Appeal be dismissed where it is meritless on its face? Yes.

2. Should Mirra be awarded summary judgment where there are no issues of material fact and Mirra is entitled to judgment as a matter of law? Yes.

3. Should the appeals be dismissed where, assuming *arguendo* that Moehring's objections to the Decisions are true, they are insufficient to support the relief requested? Yes.

4. Should the Appeal be dismissed where it was brought merely to secure delay? Yes.

IV. EVIDENCE RELIED UPON

This motion is based upon the Decisions, the Appeal, the file in this matter, the Declaration of Colt Boehme and the exhibits attached thereto.

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V. AUTHORITY

A. Standard for Motion to Dismiss.

Under Hearing Examiner Rules of Practice and Procedure ("HER") 3.02(a), the Hearing Examiner has authority to dismiss the Appeal "if the Hearing Examiner determinates that it...is without merit on its face..." The five objections raised by Moehring, which will be discussed in turn below, are without merit on their face and should be dismissed.

B. Standard for Summary Judgment.

HER 2.16 authorizes other dispositive motions, including motions for summary judgment. "The object and function of summary judgment procedure is to avoid a useless trial." *Balise v. Underwood*, 62 Wn.2d 195, 199, 381 P.2d 966 (1963). Summary judgment is properly granted "if the pleadings, affidavits, depositions or admissions on file show that there is no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law." *Balise*, 62 Wn.2d at 199; *see Capitol Hill Methodist Church of Seattle v. City of Seattle*, 52 Wn.2d 359, 362, 324 P.2d 1113 (1958); CR 56(c). In 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). If, from this evidence, reasonable people could reach only one conclusion, the motion should be granted. *Wood v. City of Seattle*, 57 Wn.2d 469, 471, 358 P.2d 140 (1960).

A defendant who moves for summary judgment meets its initial burden and summary judgment is appropriate where the defendant has demonstrated that an essential element of the plaintiff's claim has not been established. *Howell v. Spokane & Inland Empire Blood Bank*, 117 Wn.2d 619, 624-25, 818 P.2d 1056 (1991). The burden then shifts to the nonmoving party to set forth specific facts to demonstrate the existence of a material

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issue of fact sufficiently rebut the moving party's contentions. *Young v. Key Pharm., Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989). In her response, "the nonmoving party cannot rely on the allegations made in its pleadings." 112 Wn.2d at 226. "The nonmoving party may not rely on speculation or argumentative *Young* assertions that unresolved factual issues remain." *Marshall v. Bally's Pacwest, Inc.*, 94 Wn. App. 372, 377, 972 P.2d 475 (1999). Rather, the nonmoving party's response "by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." CR 56(e). If the plaintiff "fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial," then the trial court should grant the motion. *Young*, 112 Wn.2d at 225 (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)). Because there are no issues of material fact, the Hearing Examiner should award Mirra summary judgment and dismiss the Appeal.

C. The Short Subdivisions conform to all applicable Land Use Code provisions.

Moehring argues in his Appeal that the Short Subdivisions do not comply with applicable Land Use Code provisions because the "LR1zoned lots…are limited to maximum number of 1 dwelling for every 2,200 square feet or 1 dwelling for every 1,600 square feet…" and that "the density average for 1,200 sq ft of land area for each primary residence exceeds the allowable Floor Area Ratio by at least 33 percent."[1] These are not valid objections to the Decisions.

As an initial matter, the Short Subdivisions are only dividing a single parcel into two separate lots; they do not authorize any construction or development. The building permit is what authorizes construction on the Property, not the Short Subdivisions. Irrespective of the

[1] *See* Appeal, pg. 2.

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Examiner's lack of jurisdiction to review the building permits as part of this Appeal, Moehring's statement about density is not correct.

For rowhouse developments, there are no density limits on lots 3,000 square feet and greater. Previously, the density limit for all townhomes and rowhouses on lots less than 3,000 square feet was one dwelling unit per 1,600 square feet. The Land Use Code, however, was recently amended to increase this density limit. Now, under SMC 23.45.12.A.1-3, for lots less than 3,000 square feet, rowhouse and townhouse density limits are "one dwelling unit per 1,300 square feet of lot area..." When the density calculations result in any fraction of .85 or greater, that number is rounded up to one additional dwelling unit.

This Short Subdivisions will result in a 3,000 square foot lot and a 2,999 square foot lot. As mentioned above, there are no density limits for rowhouses on lots 3,000 square feet or greater. For the 2,999 square foot lot, Mirra would be entitled to two dwelling units, which is what they are proposing, under either density calculation.[2]

Again, the Decisions merely approve the Short Subdivisions, which subdivide one parcel of land into two separate lots. They are land use permits and do not authorize or allow any particular type of development on the Property. Thus, it cannot conflict with the requirements for rowhouse developments because it does not authorize *any* type of development on the Property, including rowhouses. Thus, Moehring's objection that the Short Subdivisions do not comply with SMC 23.24.040.A.1 should be dismissed.

D. The Short Subdivisions comply with SMC 23.53.005 and 23.53.006 by providing adequate access for pedestrians, vehicles, utilities, and fire protection.

Moehring claims, without any explanation or specificity, that the Short Subdivisions do not provide adequate access for pedestrians, vehicles, utilities, or fire protection. SMC

[2] 2,999 square feet divided by 1,600 equals 1.87, which rounds up to two dwelling units. 2,999 square feet divided by 1,300 equals 2.3, which rounds down to two dwelling units.

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23.53.005.A.1 – Access to Lots – provides that: "Street or private easement abutment required for residential uses, at least 10 feet of a lot line shall abut a street or a private permanent vehicle access easement meeting the standards of Section 23.53.025, or the provisions of subsection 23.53.025.F for pedestrian access easements shall be met." The Short Subdivisions demonstrate that both resulting lots will have more than 10 feet of frontage on either 23rd Avenue West or the alley. Thus, the Short Subdivisions comply with SMC 23.53.005.

SMC 23.53.006.A – Pedestrian access and circulation – provides that: "General requirements. Pedestrian access and circulation are required on all streets in all zones as set forth in this Section 23.53.006." The Short Subdivisions both have a 5-foot pedestrian access easement along the northern five feet of each parcel, which satisfies the requirement under SMC 23.53.006.[3]

Moehring also claims in his Appeal that the Short Subdivisions fail "to provide an access easement meeting minimum width and height clearance requirements."[4] As discussed above, both parcels have more than 10 feet of frontage on either 23rd Avenue West or the alley. And there are no height requirements found in SMC 23.53.005 or 23.53.006. Because the Short Subdivisions do not authorize the construction of any buildings, there are no height requirements that could be violated. So, this objection should be dismissed as well.

E. <u>The public use and interests are served by approving the Short Subdivisions.</u>

Moehring claims, again, without any explanation or specificity, that approval of the Short Subdivisions does not serve the public use and interests. The only plausible support for this assertion is that because Moehring claims that the Short Subdivisions fail to satisfy

[3] *See* Exs. C and D, sheet 4 of 5.
[4] *See* Appeal, pg. 3.

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the other criteria under SMC 23.24.040 that the Short Subdivisions do not serve the public use and interests. The Decisions state that: "The public use and interest are served by the proposal since all applicable criteria are met and the proposal creates the potential for additional housing opportunities in the City." For the reasons discussed in this motion, Moehring's other objections to the Appeal are without merit and, thus, the Short Subdivisions serve the public use and interests.

F. The Short Subdivisions comply with the applicable provisions of SMC 25.09.240, and SMC 23.60A.156 does not apply.

The Appeal is utterly devoid of any explanation for why the Short Subdivisions do not comply with SMC 25.09.240 and 23.60A.156. SMC 25.09.240 – Short subdivisions and subdivisions – "applies to all applications for short subdivisions and subdivisions…" Subsection B (Requirements) states that:

> Parcels shall be divided so that each lot contains an area outside all environmentally critical areas and buffers identified in subsection 25.09.240.A for all areas of site disturbance including, but not limited to, the principal structure, temporary site disturbance for shoring and grading, overhangs, all accessory structures, utilities, necessary walkways (referred to as the "required area") and necessary access to the required area…

Sheet 3 of the Short Subdivisions identify the steep slope ECA on the Property. Boehme Decl., ¶7. There is no requirement, however, to locate the "required area" outside the ECA because Mirra has obtained an Approved Relief from Prohibition on Steep Slope Development under permit numbers 6694810-EX and 6694811-EX. Boehme Decl., Exs. F and G.

SMC 23.60A.156 only applies to environmentally critical areas in the Shoreline District. Because the Property is not located in a Shoreline District, this ordinance does not apply to the Short Subdivisions. Hence, this objection is without merit and should be dismissed.

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G. The Short Subdivisions are designed to maximize the retention of existing trees.

Moehring argues that the Short Subdivisions do not meet the approval criteria under SMC 23.24.040.A because of the "[f]ailure of the proposed division of land to be designed to maximize the retention of existing trees."[5] This conclusory statement fails to allege, much less demonstrate, that there is a different division of land that would better maximize the retention of existing trees. This objection must be dismissed as well.

H. The Appeal should be dismissed because it was brought merely to secure delay.

Under HER 3.02(a), the Hearing Examiner may dismiss an appeal prior to the hearing if the appeal is brought merely to secure delay. Moehring has filed numerous land use appeals in the short time since he moved to Seattle. Specifically, Moehring has (unsuccessfully) appealed the following permits:

- Permit No. 3020730 (MUP-016);
- Permit No. 3026716 (MUP 17-018);
- Permit No. 3026908 (MUP 17-023);
- Permit No. 3027558 (MUP 17-024);
- Permit No. 3028431 (MUP 18-001); and
- Permit No. 3029611 (MUP 18-022).

This list does not include this consolidated land use appeal or the recent appeal filed by Moehring for Permit No. 3032857 under MUP 19-021.

In addition to submitting numerous land use appeals, Moehring has also submitted hundreds, perhaps thousands, of public comments on residential land use and development permits throughout the City. Many of those appeals and public comments concerned property that was located miles away from his townhome in Magnolia. Simply put, Moehring is on a crusade to halt new residential developments in the City at all costs.

[5] *See* Appeal, pg. 3.

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Based upon the public records, the vast majority of those land use appeals and public comments concerned many of the same issues that were raised in this Appeal. And the majority of those appeals were dismissed prior to a hearing. Moehring is well aware that the issues raised in his Appeal have no merit, because he has raised them many times before. Because it is readily apparent that Moehring brought this Appeal merely to secure delay, the Appeal should be dismissed on that basis as well.

VI. CONCLUSION

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

HER 3.02(a) allows the Hearing Examiner to dismiss an appeal prior to the hearing if the appeal fails to state a claim for which the Hearing Examiner has jurisdiction to grant relief, is without merit on its face, is frivolous or is brought merely to secure delay. The Appeal fails to raise a valid objection to the Decisions, and is without merit on its face. Accordingly, it is respectfully requested that the Hearing Examiner dismiss the entire Appeal with prejudice.

Finally, HER 2.16 allows the Hearing Examiner to award summary judgment to the moving party. Mirra is entitled to summary judgment because there are no issues of material fact. Thus, it is respectfully requested that the Hearing Examiner affirm the Decisions and dismiss the Appeal with prejudice.

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Respectfully submitted this 10th day of June, 2019.

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By: *s/ Brandon S. Gribben*
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on June 10, 2019, the foregoing document was sent for delivery on the following party in the manner indicated:

Appellant: Neighbors to Mirra Homes Developments 3444B 23rd Ave W Seattle, WA 98199 Urban.Magnolia@pacificwest.com	☐ Via first class U. S. Mail ☐ Via Legal Messenger ☐ Via Facsimile ☒ Via Email
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DATED this 10th day of May, 2019

s/Kyna Gonzalez
Kyna Gonzalez, Legal Assistant