Deputy 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 REPLY in OPPOSITION to APPLICANTS' AND OWNER'S MOTIONS TO DISMISS LAND USE APPEAL and for SUMMARY JUDGEMENT

I. INTRODUCTION AND RELIEF REQUESTED

The administrative appeals to 3410 and 3416 23rd Avenue West is necessary because of the Seattle Department of Construction and Inspections Director's erroneous decision to not apply all of the criteria required to approve of a Short Plat Subdivision. As a result, the negative consequence of this faulty decision will be ten (10) townhouse-rowhouse dwellings whereas the Code allows just six (6) such dwellings; and in addition, it will also include noncompliant townhouses being located behind rowhouses. The consequences also include noncompliant lots that will be created without emergency access from a street or legal alley. The unofficial contract rezone from LR1 to LR2 has no benefit to the public; and the lack of

emergency access endangers the immediate area's public health, safety and property welfare. The premature short subdivision conditional approval that requires retaining walls and sequences construction on the parent lots supersedes the functionally-dependent SEPA review yet to be completed. Finally, the short plat makes no considerations for alternative platting configurations that would provision the maximum retention of existing street trees and the existing 26-inch diameter trunk fir tree on the neighbor's property. The merits of the appeal are significant.

The Applicants, Brooke Friedlander and Andy McAndrews, and Property Owner, Mirra 111 LLC, represented by Brandon S. Gribben and Samuel M. Jacobs of Helsell Fetterman LLP, have requested on June 10, 2019 a Motion to Dismiss land use appeal and for Summary Judgement. By the June 20th amended pre-hearing order of the Office of the Hearing Examiner[1], this reply from the Appellants, Neighbors to Mirra Homes Development is timely as a result in various City agencies (SDOT, SDCI and Fire Marshall's Office) failing to respond to a public disclosure requests[2]. In brief, the response provides the reasons why the request for a Motion for Summary Judgement is inadequate and does not apply for this case. This response also clearly defines how each of the items raised within the original appeal have merit given the inadequate application of the required Type II decision criteria for short plat subdivisions.

The appellants request that the Applicants Motions are squashed allowing a fair proceedings within an appeal hearing. In summary, this response includes several parts:

[1] https://web6.seattle.gov/Examiner/case/document/12350

[2] The Seattle Fire Department has recently retracted their initial claim that no documents exists for the Subject Properties given evidence provided by the Applicant Andy McAndrews demonstrated Fire comments were made in November 2018. These comments have not yet been made fully available to this date, July 1, 2019.

I. Introduction

II. Statement of Facts

III. Items of Appeal that were Excluded from Applicants' and Owners Motions

IV. Inadequacy of the Motion for Summary Judgement

V. Inadequacy of the Remaining Items in the Motion to Dismiss

VI. Additional Evidence in Support of Appeal

VII. Conclusion

II. STATEMENT OF FACTS

This appeal for the subject properties of 3410 to 3416 23rd Avenue West in Seattle has significant relevance as it has revealed the Seattle Department of Construction and Inspections (hereafter, the Department) has intentionally failed to apply all of the criteria in their discretionary decision to allow a short plat subdivision. This decision thereby creates an illegal lot that does not meet the criteria as a subdivided short plat. In fact, this appeal reveals a Department policy from a past few years that contradicts King County Land Use Title 19 and is not supported by any exceptions within the Seattle Municipal Code (hereafter SMC or the Code).[3]

This appeal is appropriate in challenging a Type II decision as identified in the SMC 23.76.004 Landuse Decision Framework which specifically includes "Short Subdivisions", and any "decision to approve, condition or deny a project based on

[3] Reference King County Title 19A.08.180 which states "Circumvention of zoning density prohibited. A legal lot, which has been subject to a boundary line adjustment or created through a legally recognized land segregation process and is of sufficient land area to be subdivided at the density applicable to the lot, may be further segregated. However, such further segregation of the lot shall not be permitted if the **total number of lots contained within the external boundaries of the lots subject to the original boundary line adjustment or the total number of lots contained within the external boundary of the parcel subject to the original land segregation, exceed the density allowed under current zoning**. (Ord. 13694 § 53, 1999)." http://www.kingcounty.gov/council/legislation/kc_code/22_Title_19A.

SEPA Policies." Therefore, for both reasons the appeal is within the authority of the Hearing Examiner. Although this appeal is only for the decision on the short plat, the short plat decision is conditioned on remedial actions to stabilize the site which falls within the realm of an environmental policy review.

The appeal is appropriate in questioning the decision being made upon the review of the Fire Department, especially given the eastern portions of the proposed subdivisions have no street access and border an unimproved dead-end alley that is inadequate for emergency access. The decision that that "Pursuant to SMC 23.24.040, the Director shall, *after conferring with appropriate officials*, use the following criteria to determine whether to grant, condition, or deny a short plat per the limits of the Code SMC 23.24.040" (emphasis added). The Applicant suggesting that the Fire Department is not involved with short subdivisions is erroneous. Given one of the appealed criteria was to consider that all newly created lots have access for emergency vehicles, conferring with the Seattle Fire Department for new lots with the only access via an unimproved dead-end alley was a must. The Applicant must recognize that short plats are Type II appealable decisions relative to the appropriate application of the criteria.

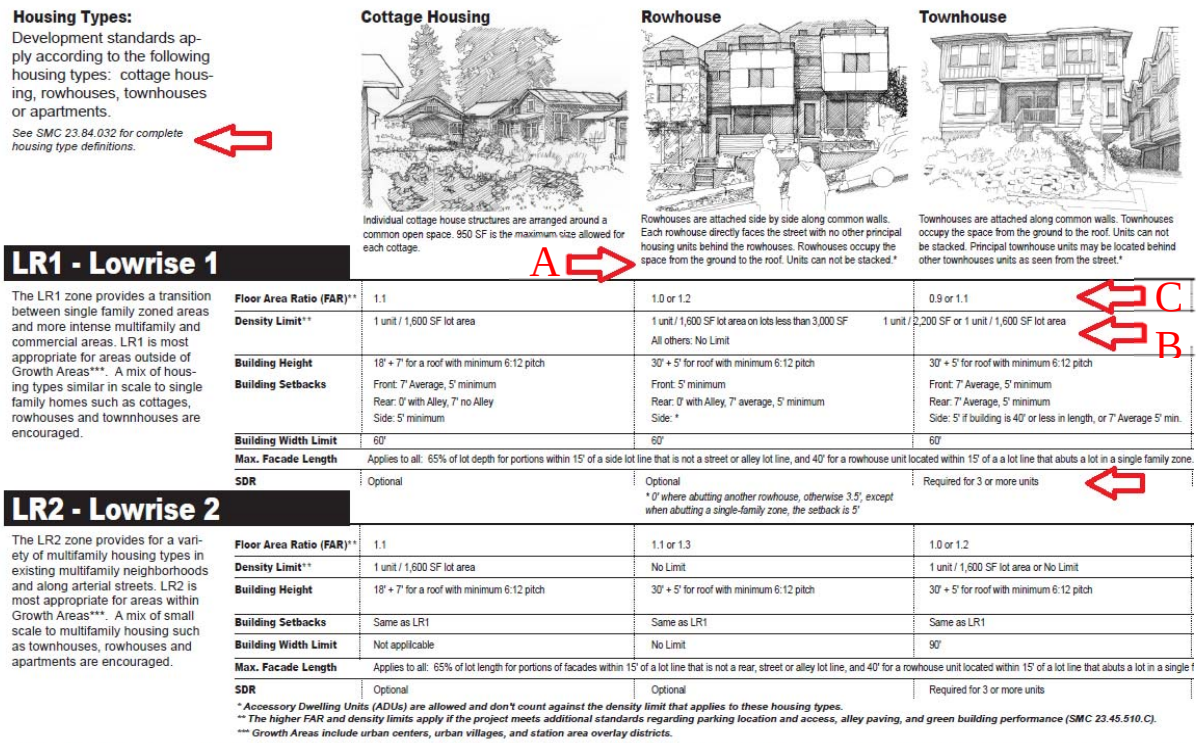
<u>What criteria have been inadequately considered by the Department?</u>

The decision of the Department has violated five (5) of the required criteria to make a decision for Short Plat:

Decision is inadequate to Criteria 1: Lack of conformance with the Land Use Code rowhouse development rules provisions of SMC 23.84A.032.20(R)[4] that have not been modified by any of the requirements of SMC 23.24. As appeal attachments C and G (from the SDCI EDMS records) shows, the application is

[4] Council Bill Number: 117952; Ordinance Number: 124378, December 2013 version #15

violating this code requirement that “no portion of any other dwelling unit” (which is the street-facing rowhouses), “except for an attached dwelling unit, is located between any dwelling unit and the street faced by the front of that unit” (which includes the alley-facing duplex townhouses). To clarify what this means, the Department has issued a guide for multi-family zones as cropped in Figure 1 below.



Housing Types:
Development standards apply according to the following housing types: cottage housing, rowhouses, townhouses or apartments.
See SMC 23.84.032 for complete housing type definitions.

	Cottage Housing	Rowhouse	Townhouse
	Individual cottage house structures are arranged around a common open space. 950 SF is the maximum size allowed for each cottage.	Rowhouses are attached side by side along common walls. Each rowhouse directly faces the street with no other principal housing units behind the rowhouses. Rowhouses occupy the space from the ground to the roof. Units can not be stacked.*	Townhouses are attached along common walls. Townhouses occupy the space from the ground to the roof. Units can not be stacked. Principal townhouse units may be located behind other townhouses units as seen from the street.*

LR1 - Lowrise 1

The LR1 zone provides a transition between single family zoned areas and more intense multifamily and commercial areas. LR1 is most appropriate for areas outside of Growth Areas***. A mix of housing types similar in scale to single family homes such as cottages, rowhouses and townnhouses are encouraged.

	Cottage Housing	Rowhouse	Townhouse
Floor Area Ratio (FAR)**	1.1	1.0 or 1.2	0.9 or 1.1
Density Limit**	1 unit / 1,600 SF lot area	1 unit / 1,600 SF lot area on lots less than 3,000 SF All others: No Limit	1 unit / 2,200 SF or 1 unit / 1,600 SF lot area
Building Height	18' + 7' for a roof with minimum 6:12 pitch	30' + 5' for roof with minimum 6:12 pitch	30' + 5' for roof with minimum 6:12 pitch
Building Setbacks	Front: 7' Average, 5' minimum Rear: 0' with Alley, 7' no Alley Side: 5' minimum	Front: 5' minimum Rear: 0' with Alley, 7' average, 5' minimum Side: *	Front: 7' Average, 5' minimum Rear: 7' Average, 5' minimum Side: 5' if building is 40' or less in length, or 7' Average 5' min.
Building Width Limit	60'	60'	60'
Max. Facade Length	Applies to all: 65% of lot depth for portions within 15' of a side lot line that is not a street or alley lot line, and 40' for a rowhouse unit located within 15' of a a lot line that abuts a lot in a single family zone.		
SDR	Optional	Optional * *0' where abutting another rowhouse, otherwise 3.5', except when abutting a single-family zone, the setback is 5'*	Required for 3 or more units

LR2 - Lowrise 2

The LR2 zone provides for a variety of multifamily housing types in existing multifamily neighborhoods and along arterial streets. LR2 is most appropriate for areas within Growth Areas***. A mix of small scale to multifamily housing such as townhouses, rowhouses and apartments are encouraged.

	Cottage Housing	Rowhouse	Townhouse
Floor Area Ratio (FAR)**	1.1	1.1 or 1.3	1.0 or 1.2
Density Limit**	1 unit / 1,600 SF lot area	No Limit	1 unit / 1,600 SF lot area or No Limit
Building Height	18' + 7' for a roof with minimum 6:12 pitch	30' + 5' for roof with minimum 6:12 pitch	30' + 5' for roof with minimum 6:12 pitch
Building Setbacks	Same as LR1	Same as LR1	Same as LR1
Building Width Limit	Not applicable	No Limit	90'
Max. Facade Length	Applies to all: 65% of lot length for portions of facades within 15' of a lot line that is not a rear, street or alley lot line, and 40' for a rowhouse unit located within 15' of a lot line that abuts a lot in a single f		
SDR	Optional	Optional	Required for 3 or more units

** Accessory Dwelling Units (ADUs) are allowed and don't count against the density limit that applies to these housing types.*
*** The higher FAR and density limits apply if the project meets additional standards regarding parking location and access, alley paving, and green building performance (SMC 23.45.510.C).*
**** Growth Areas include urban centers, urban villages, and station area overlay districts.*

A

C

B

From]Seattle SDCI - Seattle's Lowrise Multifamily Zones ... - Seattle.gov ; www.seattle.gov/Documents/Departments/SDCI/.../MultifamilyZoningSummary.pdf

Figure 1 - SDCI table on lowrise multifamily zones available on-line. “A” note clarifies that dwellings may not be built behind rowhouses. “B” note indicates the maximum number of dwellings for townhouses is 1 dwelling for every 1,600 square feet of lot area if the conditions of SMC 23.45.510.C are met.

The note therein marked by “A” within the Rowhouse column rephrases the code requirement by stating “Each rowhouse directly faces the street with no other principal housing units behind the rowhouses.” As the Hearing Examiner can easily see within the Appeal Attachment “G”, the southern two of three adjacent developments included within this appeal includes a total of six (6) rowhouses

facing the street and four (4) other primary dwellings (townhouses) behind the rowhouses. If the six rowhouses were considered townhouses instead, then the total number of dwellings will exceed that allowed for the Subject Property's LR1-zoning.[5] Refer to the declaration of Henry McGuire regarding Department responses to this issue of circumventing density limits with subdivisions. Also refer to the declaration of David Moehring, an architect considered as an expert witness in landuse by the City Attorney and confirmed by Hearing Examiner Ryan Vancil within the appeal of the MHA FEIS.[6]

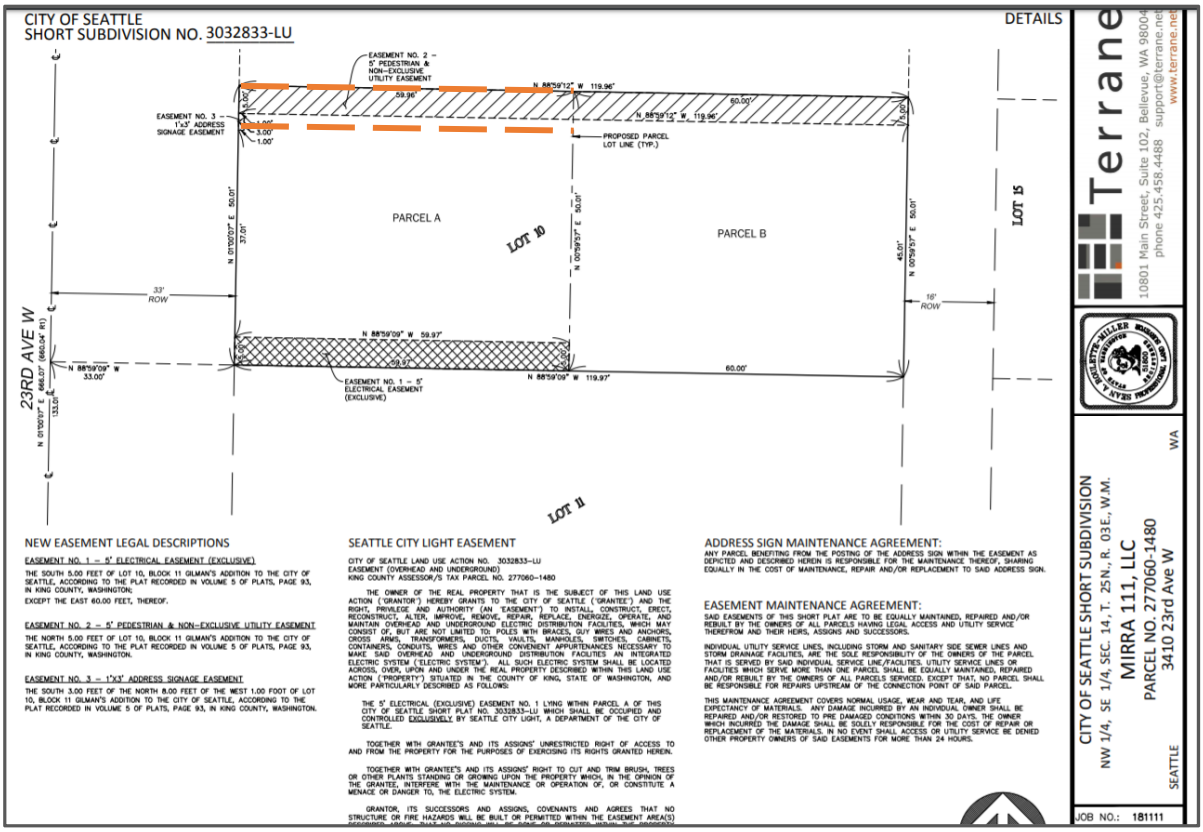


Figure 2 - 3410 23rd Ave W Application for Short Plat #3032833. The dashed line has been added to typically show an area required that is at least a 10-foot wide emergency access easement for the street to a lot with a dead-end alley.

[5] http://www.seattle.gov/Documents/Departments/SDCI/Codes/MultifamilyZoningSummary.pdf

[6] Hearing Examiner on-line Case Details for HE File Number: W-17-006; Day 11 August 20, 2018, City Closing Brief Volume 9-12, transcript pp 201 – 220. https://web6.seattle.gov/Examiner/case/document/10852

- **Decision is inadequate to Criteria 2:** Lack of conformance adequate access for pedestrians, vehicles, utilities and fire protection as provided in Section 23.53.005 Access to lots. Reference the appeal Attachment E which shows the existing property condition which does not have an improved alley for use by the Subject Properties. Also refer to the declaration of David Moehring, an architect considered as an expert witness in landuse issues as noted above.

Figure 2 shows a portion of the Short Subdivision No. 3032833-LU for the 3410 23rd Ave West property. It roughly shows dividing the property in half into a west street-facing section called 'Parcel A' and an east unimproved alley right-of-way-facing section called 'Parcel B'. Figure 4 shows is similar portion of the Short Subdivision No. 3032834-LU for the 3416 23rd Ave West property. In both cases, only three easements are included within the legal description. None of these three include an emergency access easement as required by the code where there is no direct street access and there is insufficient space for emergency access (Figure 3 below).

NEW EASEMENT LEGAL DESCRIPTIONS

EASEMENT NO. 1 – 5' ELECTRICAL EASEMENT (EXCLUSIVE)

THE SOUTH 5.00 FEET OF LOT 9, BLOCK 11 GILMAN'S ADDITION TO THE CITY OF SEATTLE, ACCORDING TO THE PLAT RECORDED IN VOLUME 5 OF PLATS, PAGE 93, IN KING COUNTY, WASHINGTON;

EXCEPT THE EAST 60.00 FEET, THEREOF.

EASEMENT NO. 2 – 5' PEDESTRIAN & NON–EXCLUSIVE UTILITY EASEMENT

THE NORTH 5.00 FEET OF LOT 9, BLOCK 11 GILMAN'S ADDITION TO THE CITY OF SEATTLE, ACCORDING TO THE PLAT RECORDED IN VOLUME 5 OF PLATS, PAGE 93, IN KING COUNTY, WASHINGTON.

EASEMENT NO. 3 – 1'X3' ADDRESS SIGNAGE EASEMENT

THE SOUTH 3.00 FEET OF THE NORTH 8.00 FEET OF THE WEST 1.00 FOOT OF LOT 9, BLOCK 11 GILMAN'S ADDITION TO THE CITY OF SEATTLE, ACCORDING TO THE PLAT RECORDED IN VOLUME 5 OF PLATS, PAGE 93, IN KING COUNTY, WASHINGTON.

Figure 3 - Notes on both subdivision sets calling for just three easements; none of which is for the required emergency access.

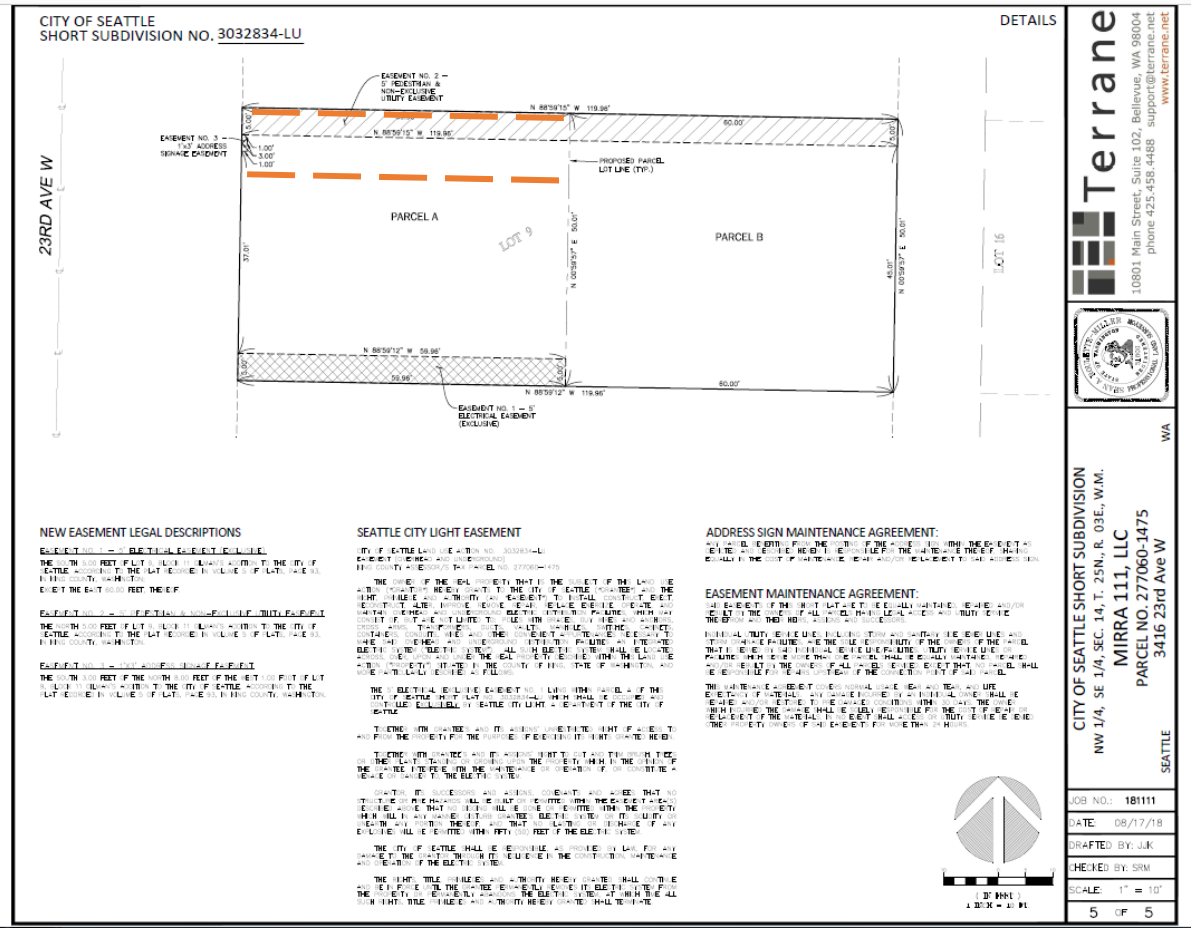


Figure 4 – 3416 23rd Ave W Application for Short Plat #3032834. The dashed line has been added to typically show an area required that is at least a 10-foot wide emergency access easement for the street to a lot with a dead-end alley.

The Director's decision is clearly erroneous stating "This short subdivision will provide pedestrian and vehicular access (including emergency vehicles), and public and private utilities." Although utilities are covered by Easements No. 1 and No. 2, and pedestrian easements are covered by Easement No. 2, the vehicular and emergency vehicles access is not indicated in any of the documents issued for the short subdivision.

If the unimproved alley is not considered by the applicant, then a 10-ft wide access easement from 23rd Ave. West beneficial to both Parcel A (west side) and

Parcel B (along east side), the short subdivision does not comply with SMC 23.53.025 - Access easement standards, which states: "If access by easement has been approved by the Director, the easement shall meet the following standards. Surfacing of easements, pedestrian walkways required within easements, and turnaround dimensions shall meet the requirements of the Right-of-Way Improvements Manual. A. Vehicle access easements serving one or two single-family dwelling units or one multifamily residential use with a maximum of two units shall meet the following standards: 1. Easement width shall be a minimum of 10 feet, or 12 feet if required by the Fire Chief due to distance of the structure from the easement, or a minimum width as needed to meet the driveway standards of subsection 23.54.030.D.1." In addition, such emergency access easements must be at least 16.5 feet in height clearance. SMC 23.53.025 requires vehicle access widths to be based on the number of dwelling units being served, not the number of parking spaces being provided.[7] No such conditions or easements have been included within the documents used as the basis of the decision. Moreover, if the alley is to be improved as a means of emergency access, then it needs to be widened. Per clarification from the Department in October 2017, “Seattle’s code requires: (1) Vehicle Access Easements serving one or two single-family dwelling units or one multifamily residential building with up to two units should be at least 10 feet wide, or 12 feet wide if required by the Fire Code. (2) Vehicle Access Easements serving at least three but fewer than ten single family units, or multifamily dwelling units should be at least 20 feet wide.” With this Subject Properties along, the number of dwellings served already exceeds the threshold.

[7] Publication dated October 31, 2017 titled “Vehicle Access Easement Standards” by SDCI Community Engagement. It states: “SDCI receives many multifamily and commercial short plat and lot boundary adjustment applications proposing ten-foot-wide vehicle access easements for lots with no street frontage.”

D103.((2))1 Grade. Fire apparatus access roads shall not exceed 10 percent in grade.

Exception: Grades steeper than 10 percent as *approved* by the fire chief.

D103.((3))2 Turning radius. The minimum turning radius shall be determined by the *fire code official*.

D103.((4))3 Dead ends. Dead-end fire apparatus access roads in excess of 150 feet (45 720 mm) shall be provided with width and turnaround provisions in accordance with Table D103.((4))3 and Figure D103.3.

TABLE D103.((4))3
REQUIREMENTS FOR DEAD-END
FIRE APPARATUS ACCESS ROADS

LENGTH (feet)	WIDTH (feet)	TURNAROUNDS REQUIRED
0-150	20	None required
151-500	20	120-foot Hammerhead, 60-foot "Y" or 96-foot diameter cul-de-sac in accordance with Figure D103.1
501-750	26	120-foot Hammerhead, 60-foot "Y" or 96-foot diameter cul-de-sac in accordance with Figure D103.1
Over 750	Special approval required	

http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=2&cad=rja&uact=8&ved=2ahUKEwiVpPu6iZPjAhUKiFQKHSGADYAQFjABegQIBRAC&url=http%3A%2F%2Fwww.seattle.gov%2Fdocuments%2FDepartments%2FSDCI%2FCodes%2FSeattleFireCode%2F2012SeattleFireAppendixD.pdf&usg=AOvVaw3ULRw0is6vBBEIoqlidwye

In addition, Seattle's Fire code Appendix D requires the following:

Vehicle Access roads longer than 150 feet as would be the case for the subject properties would require some means of turnaround. The decision fails to include this condition for emergency access to the creation of a legal lot.

Figure 5- Appendix D of the Seattle Fire Code requiring at least a 60-foot "Y" turnaround in an alley of 20 feet in width when the dead-end is longer than 150 feet and less than 501 feet.

- **Decision is inadequate to Criteria 4**: The appeal accurately states the erroneous decision has “failed to demonstrate serving the public use and interests by permitting the proposed division of land”. 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." Since the applicable criteria indented within the appeal have not been met, the reason offered by the Department in their decision is erroneous. Moreover, by suggesting the Department’s application policy to provide more housing on the subject properties than allowed within SMC limits for each zone only serves the land owner’s revenue interests and, as indicated above, does not serve the interests of the health, safety and welfare of the immediate public located within the vicinity of these developments. Specifically, SMC Table A 23.45.510 establishes the maximum floor area and SMC 23.45.512 established the maximum number of family-sized unit requirements within LR zones. These code sections were recently revised in 2019 with the passing of the MHA ordinance. The requirements applicable at the time of this application are summarized in Figure 1 with the lines marked as ‘B’ and ‘C’ for dwelling count and dwelling floor area respectively. By allowing a short subdivision after the developer has submitted a non-compliant mixture of con-compatible dwelling types of townhouses behind rowhouses to the contrary of SMC 23.84A.032.R.20 rowhouse development rules, the public’s interests in following the law has been violated.

- **Decision is inadequate to Criteria 5**: The Department has failed to demonstrate full conformance and apply conditions to the applicable provisions of

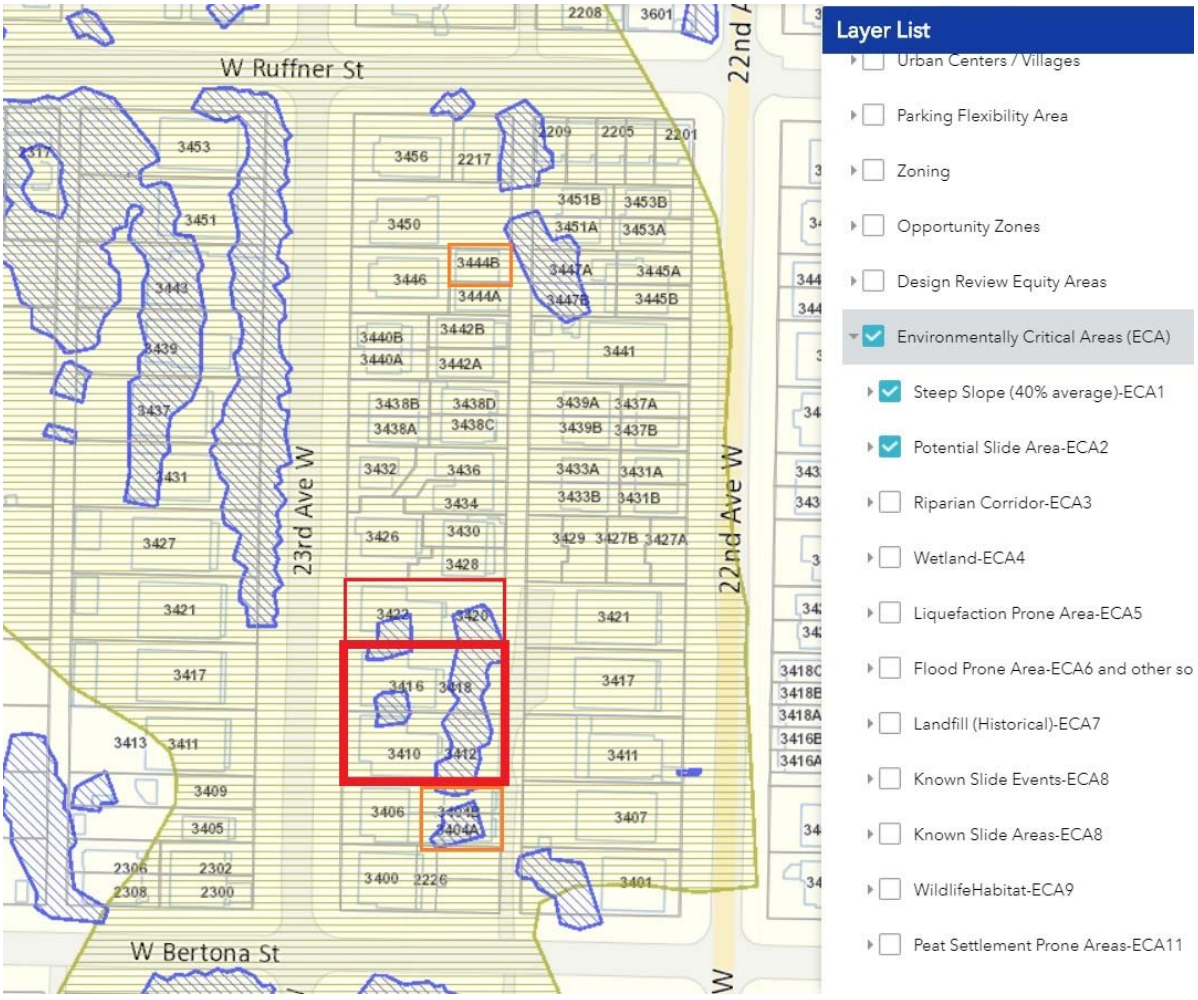


Figure 6 - Area interactive GIS map with larger and lighter-colored areas as Potential Slide Area - ECA2; and the smaller darker diagonally-hatched steep slope areas (ECA1).

Section 25.09.240, Short subdivisions and subdivisions, in environmentally critical areas. The assessment relative to this code section goes beyond the waiver of steep slope (or coded as ECA1). The appellants all live within Seattle's designated potential slide area (coded as ECA2). Each project within an ECA must complete 30-page ECA form for which the Department is to make an appealable discretionary decision on. This evaluation has not yet been completed. From the photos taken from the unimproved alley (found within the original Appeal Attachments) it is evident that the slope is substantial. The reason this is a concern on this subdivision

is that despite receiving the waiver of the steep slope, the decision criteria is bound by the condition that the lower portion of the site is developed and that the soil is stabilized prior to the upper portion. The motion to dismiss and summary judgement excludes this consideration, nor does it provide the evidence that the imposed condition is supported by the yet-to-be-completed SEPA evaluation. Therefore, the Examiner does not have the authority at this time to consider dismissing this issue without review of the facts. The Appellant has subpoenaed the City engineers for this purpose (reference Figure 8 herein).

- **Decision is inadequate to Criteria 6:** The decision fails to adequately consider whether the proposed division of land is designed to maximize the retention of existing trees. The evidence was initially presented within the Appeal Attachment C. The third page of the Attachment are two Applicant-provided diagrams with the top diagram for 3412 23rd Ave West parcel, and the bottom diagram for 3410 23rd Ave W including annotations of what both will look like on one parent lot. Other annotations note the objections where this single functionally-related development has application information disbursed assuming a short subdivision would be approved outright. The Examiner will notice immediately that the location of the 26-inch diameter at breast height (dbh) existing fir tree is not shown. The tall fir is located on an appellant's property to the immediate south. An image of this tree is included within the last page of Attachment C, as well as looking to the west along the boundary of these two properties included here as Figure 7. Recent example of subdivision-related protected tree removal at 2213 NW 63rd Street includes nine trees within a protected tree grove removed – including initial contractor neglect on the adjacent lot 2203 NW 60th street.[8]

[8] (Hearing Examiner MUP-19-004). Complete tree grove removal from an adjacent lot.

Figure 7- large fir tree located at the property immediately to the south of 3410 23rd Ave address has not been included in the short plat considerations. (Looking west).

Likewise, without consideration for the tree locations at this short plat, the same is likely here. More information about the tree loss in the short subdivision case is available online at the following locations of the SDCI EDMS system:

Other Supporting Documents	1176 KB	03/18/19	001987-19CP	Code Compliance Complaint
Other Supporting Documents	331 KB	03/18/19	001987-19CP	Code Compliance Complaint

As offered in appeal hearings, there exists at least two platting alternatives that should have been considered for the property abutting the existing fir tree. Figure 8

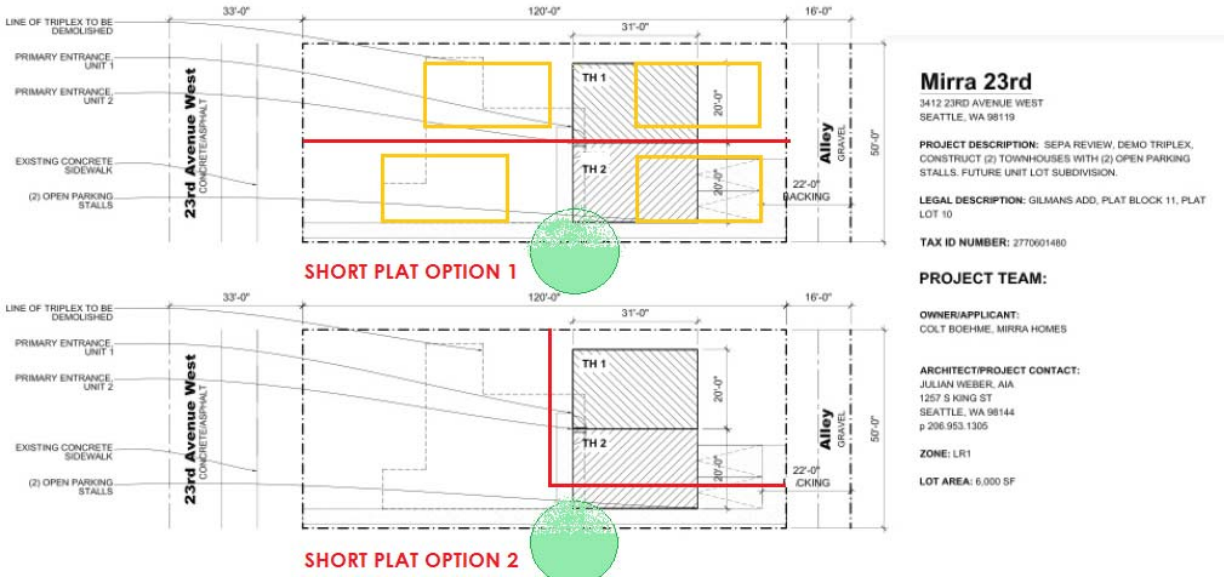


Figure 8- Examples of other short plat options that would facilitate the maximum retention of existing trees on the 3610 232rd Ave W property.

is submitted here as evidence that platting options to retain existing trees were available. Attachments J1 and J2 have been attached that include the Applicant's arborist inventory. Records show that Planner David Landry and another Department staff asked of the Applicant's architect tree retention compliance questions on the short subdivision stated "as a condition of approval, new construction on the up-slope lot (Parcel B) should only be allowed if site stabilization is installed on the down-slope lot (Parcel A), per SMC 25.09.080. Please provide information in the way of written discussion and elevation drawings demonstrating

how the stabilization (wall) will relate to the 26" Douglas fir located on the adjacent property along the southern property line and steps taken to preserved its integrity as an Exceptional tree." In addition, the staff member inquired about street trees stating "SMC 23.45.524.B states that street trees are required if any type of development is proposed. No street trees are proposed in your plan. Please reconcile." Figure 8 has been prepared by architect David Moehring to provide evidence that there are indeed better short plat configurations that would alleviate not only the inadequacies of the proposed short plat relative to existing tree retention, but also relieve appeal issues relative to access to alleys and new short subdivision lots having access from exclusive vehicular access points. Option '1' subdivides the lot into a north and south half[9] so that both portions have access to both the street and an improved alley (if pursued). The option also allows the future structures to shift in the east-west direction to avoid the critical root zones of existing trees. A noncomplying arrangement of townhouses behind rowhouses is also avoided. Option '2' provides a 10' wide access easement along the south end of the property and provides the required access of the west subdivision to the improved alley if proposed[10]. This lot line 'panhandle' could also be flipped to orientate on the east lot so that it has the minimum required 10-foot width of street frontage.

The essential problem is that the records reveal a sequence that locates the number and size of dwellings exceeding SMC Table A 23.45.510 and SMC 23.45.512 without considering rowhouse development rules, tree retention,

[9] Example of such attached "O" to this response as evidence from similar lot at 3452 14th Ave W
[10] Reference the LBA configuration of 2813 4th Ave W or 1829 11th Avenue West.

emergency access, legal lots, and impacts of the ECA to the SEPA evaluation. This case demonstrates all of those flaws and the Department's erroneous actions.

Geotechnical Report
Proposed Development: 3410-3420 23rd Avenue W, Seattle, WA
September 28, 2018

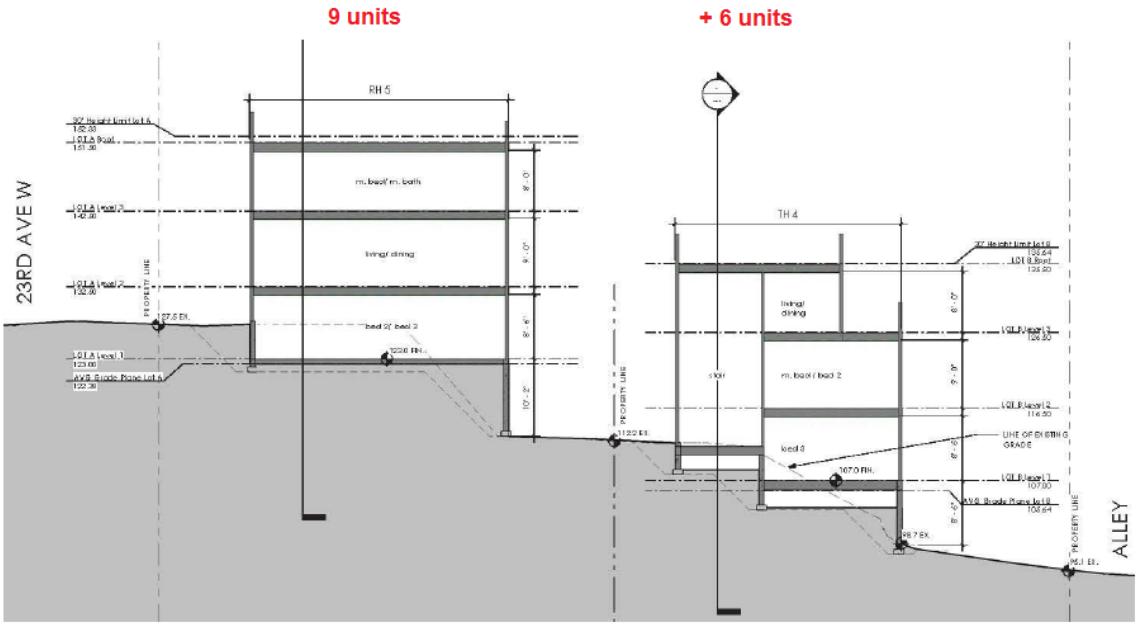


Plate 1. Typical east-west building section, looking north.

Figure 9- Geotechnical report cross section of development look from south to north.

Per HER 3.02(a), the Hearing Examiner may only 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 short plat Type II decision is clearly within the jurisdiction of the Hearing Examiner. The appeal has clearly stated valid objections to five (5) of the decisions made by the Department to the Decisions and thereby has significant merit. And despite the applicant's claims, there has been no request

or interest from the appellant to delay the code-compliant decisions with a fair hearing of the facts[11]. Given the Hearing Examiner has not yet been able to issue the Appellant's requested subpoenas for documents and testimony from parties that were to be consulted in the short subdivision decision, closing these proceedings at the request of the Applicants' and Owner's preference would deny the Appellants their offer of proof.

In addition, given the Motions for Summary Judgement require the prejudice to the non-moving party, which in this case is the Neighbors to Mirra Homes Development (the Appellants) and not the Applicants for Mirra Homes, the request by the Applicant to "respectfully request[ed] that the Hearing Examiner dismiss the entire Appeal with prejudice" is actually contrary to my understanding of the law.

[11] Rules of the Hearing Examiner **2.11 PRESIDING OFFICIAL, t**he "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:
(a) Determine the order of presentation of evidence;
(b) Administer oaths and affirmations;
(c) Issue subpoenas;
(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; and
(i) Hold conferences for settlement, simplification of issues, or for any other proper purpose."

III. ITEMS OF APPEAL THAT WERE EXCLUDED FROM APPLICANTS' AND OWNERS MOTIONS

The motion to dismiss failed to address that this appeal has challenged the Department's condition of the short subdivision. Attachments 'A' and 'B' to the appeal document the condition as shall be considered as evidence to the case. The condition states "The proposed Short Subdivision is CONDITIONALLY GRANTED for the Life of the Project. 1. New construction on the upslope lot (Parcel B) should only be allowed if site stabilization is installed on the downslope lot (Parcel A). Therefore, the short plat will be approved with the condition to require a non-appealable site stabilization wall per description above and per SMC 25.09.080 A & B."

Similarly, the motion to dismiss failed to address that this appeal has challenged the Department's application of this condition without first making a decision on the SEPA evaluation. The second part of Attachments 'A' and 'B' include the published Notice of Applications to allow 3-unit rowhouse building and SEPA Environmental Determination. As indicated in the appeal, the Short Plats are not timely as they assume that the pending Type II SEPA determinations (may be challenged in an appeal) are irrelevant to an approved short plat that is conditioned to require a non-appealable site stabilization wall. In simplistic terms, how can a Type II decision to a short subdivision proceed a Type II environmental evaluation on the condition that a Type I wall of retention and development of the lower lot is required? Instead, the proposed Type I site stabilization measures must first be evaluated within the Type II SEPA evaluation so that in-turn a Type II condition dependent on the stabilization may be properly assessed. Accordingly, as the appeal's Motion has not challenged the appeal to the Department lack of due

process, the Hearing Examiner must allow this issue to be continued in the appeal proceedings.

Of greatest significance, however, and very likely the driving motive for almost all short subdivisions within lowrise multifamily zones (not to be confused with subsequent Unit Lot Subdivisions for the purposes of selling dwelling units to individual owners), the Motion for Summary Judgement is silent about the appeals objections to the use of short plats as a means of bypassing rowhouse development rules. Again, by allowing a short subdivision after the developer has submitted a non-compliant mixture of con-compatible dwelling types of townhouses behind rowhouses to the contrary of SMC 23.84A.032.R.20 rowhouse development rules, the Director has knowingly violated the intent of the code. Yes, Mr. Moehring and several others have cited numerous examples of violations to rowhouse development rules and tree protection codes within the council districts 6 and 7 where he resides and is engaged with community residents.[12] It may be the Motion acknowledges the violation of the rowhouse development rules through the unauthorized policy of subdivisions.

The Motion claims that these "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." That may be the case with some short subdivisions where development plans have not been submitted with the intake of documents[13], but

[12] The Applicant's motion is ripe for defamation charges given several of the motion's statements are not directed toward any facts of the case, but instead comments directed at the individual's character or reputation being unjustly tarnished as a result of a fraudulent statement or action of the individual. Such written defamation, or libel, has been injected into the motion solely to causes harm to a law-abiding and code-conscience architect's reputation or credibility on the basis false statements and conjecture.

[13] Reference Hearing Examiner case MUP-17-036 at 924 NW 51st as one example of no development plans.

that is clearly not evident here. To exasperate the severity in this case, the Conditions of the appeal require development on the lower portion of the lot on the basis of the proposed development on the upper portion of the property.

IV. INADEQUACY OF THE MOTION FOR SUMMARY JUDGEMENT

The Applicant seeks a Summary Judgement but has failed in meeting the conditions of Washington Civil Rules 56 in their request.

First, the Appellant states that HER 2.16 allows the Hearing Examiner to award summary judgement to the moving party. The Hearing Examiner Rules make no mention of Summary Judgment. This section does cover motions to dismiss all or part of an appeal, other dispositive motions, and motions to exclude evidence – but is not explicit about Summary Judgements. Technically, I question if an administrative appeal on a project-specific decision even qualifies as a Civil case, and the appellant would appreciate identifying how many examples of summary judgements have been considered in MUP cases.

Second, it appears that the only affidavits provided are from the applicants who otherwise would not have the expertise to testify in regards to documents which they did not prepare or documents which they are not responsible for. As such, the Hearing Examiner should bear prejudice to the non-moving party, and not to the moving party who would be unable to testify regarding the content of a document. In this Motion for Summary Judgment, the owner of Mirra Homes Colt Boehme has declared several documents for which they do not have the expertise to testify. Mr.Boehme would not be qualified to explain, for example, how this project was reviewed by the City to arrive at the conclusion to waive to steep slope

conditions. Specifically, these documents without explanation of their meaning and merit in the Motion for Summary Judgment include:

Exhibit A – Subdivision drawings for 3410 23rd (SDCI #3032833-LU) – qualified to testify would be Terrane;

Exhibit B – Subdivision drawings for 3416 23rd (SDCI #3032834-LU) – qualified to testify would be Terrane;

Exhibit C – Analysis and Decision of the Director for 3410 23rd (SDCI #3032833-LU) – qualified to testify would be the Department;

Exhibit D – Analysis and Decision of the Director for 3416 23rd (SDCI #3032834-LU) – qualified to testify would be the Department;

Exhibit E – The appeal to the Decision of the Director for 3410 and 3416 23rd (SDCI #3032833-LU and #3032833-LU) – qualified to testify would be the Appellant;

Exhibit F – SDCI approved relief of the steep slope for 3410 23rd (SDCI #6694811-EX) – qualified to testify would be the Department's engineer;

Exhibit G – SDCI approved relief of the steep slope for 3412 23rd (SDCI #6694810-EX) – qualified to testify would be the Department's engineer.

Third, although Mr. Boehm offers an owner's account of the decision on waiving the steep slope issues, the Hearing examiner should take note that Exhibits F and G do not waive the SEPA Review requirements, as explicitly has been written. As such, the timeliness of the short subdivision which relies on soil stability measures and building erection sequences from low to high portions of the slope, is premature and requires the completion and decision on the appealable SEPA decision. Given conditions of soil stabilization has been set on the Short Plat, that stabilization must first be vetted through the SEPA review process.

Fourth, per the CR 56, “the judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” The only documents that fit this criteria are the last two attachments. But given the appeal is not questioning the steep slope decision, the evidence is moot. The remaining points of Summary Judgement have not been presented to be challenged with countering evidence. The only question that remains in the motion is the merit to challenge the five identified criteria and the condition of the approval that precedes the SEPA review.

Fifth, per the CR 56. “When Affidavits Are Unavailable. Should it appear from the affidavits of a party opposing the motion that for reasons stated, the party cannot present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.” This certainly applies in this case where the Appellant has subpoenaed several key expert witnesses to testify and to produce relative documents of proof. The Appellant is entitled to obtain evidence that the Short Plat decision has been made without reasonable consultation, and therefore the hearing shall be continued and the Summary Judgement should be denied.

Lastly, per the CR 56, “The Hearing Examiner has been presented with the appeal and attachments submitted with the appeal material facts that exist as public records and without substantial controversy.” Therefore, the Hearing Examiner “shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or of relief that 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."

V. INADEQUACY OF THE REMAINING ITEMS IN THE MOTION TO DISMISS

The motion for Summary Judgement attempts to avoid the evidence that the short subdivision is all about the ability to achieve a building permit for noncompliant townhouses behind rowhouses. There is no other reason for a short subdivision that a unit lot subdivision cannot achieve. Yes, we all acknowledge the Master Use Permits as being separate from the construction permits. But without the Master Use Permits the construction plans will not be able to be pursued as desired. The bottom line is that the Department's practice for allowing property developers of a non-phased development to use short subdivisions or lot boundary adjustments is just a means to bypass code requirements and maximum thresholds. This evidence is abundantly clear for the Hearing Examiner to rule relative to the requested relief within the original appeal.

The appellants have no objection to new construction within Seattle. The appellants do object when the Director does not fully apply all the criteria of Short subdivisions or the use of policy to override Code.[14]

The Motion is erroneous in its argument on page 6 suggesting that the land-use code has changed and this functionally-dependent development of three adjacent lots may benefit from the new MHA legislation that allowed increases in Floor Area Ratio (FAR) within LR1 zones. Albeit a new development could have its density limits expanded if it withdraws its vesting in the code at the time it the application was applied for. However, this development has not retracted and re-

[14] Reference the Hearing Examiner's expressed opinions stated in the H.E. case MUP-17-036.

vested its application. If it did, the developer would need to commit to participating in affordable housing units or pay the in-lieu-of-fees. The development cannot reap the bonus area benefits of the new code without also participating in the conditions of the MHA process. As such, the "one dwelling per 1,300 square feet of lot area…" stated in incorrect. The process that the motion describes[15] cannot take place as currently defined in the Code. There exists no exceptions to the rowhouse development rules of SMC 23.84A.032.20 that allows the use of subdivisions as a means for other dwellings to be located behind rowhouses. Even if there was such an exception included, the subdivided lot would have to be a legal lot, which is not the case as proposed. If the applicant is serious in their claim that the short subdivision cannot conflict with the requirements for rowhouse developments "because it does not authorize any type of development on the Property, including rowhouses", then there is no reason to pursue the short plat unless the owner would like to sell of parts of the property to other owners. As being agreeable to this logic, the combined lots measuring about 6,000 square feet each would be able to be ultimately built out to one of the following:

- An unlimited number of rowhouses per rowhouse development rules, will all of the rowhouses facing the street and no other primary dwelling behind them. Given the lot width of 50-feet, squeezing any more than four (4) rowhouses per parent lot is unlikely.
- Or a limited number of townhouses or detached single family dwelling not to exceed 1 dwelling for every 1,600 square feet of lot

[15] The Motion sates on page 6 lines 11-14: "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."

area. In other words, just 3 townhouses or just three detached single dwellings.

- Cottages per the Code
- Apartment building per the Code.
- It is also possible that they could combine all three lots within their common ownership to have 150 feet of frontage, resulting in 12 to 13 long and narrow rowhouses all facing the street with no dwellings behind them.
- Similarly, it is also possible that they could combine all three lots within their common ownership to have about 18,000 square foot of lot area resulting in 12 townhouses and/or detached single dwellings.
- By contrast, the three lots area seeking 9 rowhouses and 6 townhouses for a total of 15 dwellings, which is only possible within LR2 or higher zoning designations.

In addition, the Motion is erroneous in its argument on page 7 suggesting that the application drawings submitted (reference Colt Boehm's attached subdivision sets partially included within figures 2, 3 and 4 within this document) already include a private permanent access easement meeting the standards of 23.53.025. A shared alley does not meet within the Code definition of a private permanent or 'exclusive' vehicle access easement. Even if it did, the dead-end alley does not provide access to emergency vehicles without one of the approved vehicle turn-around configurations (Appendix D of the Seattle Fire Code.) If there was a turnaround provided within private property, these proposed subdivisions would require a deeded access for emergency vehicles. The short subdivisions submitted list no such easement on any other property or their own.

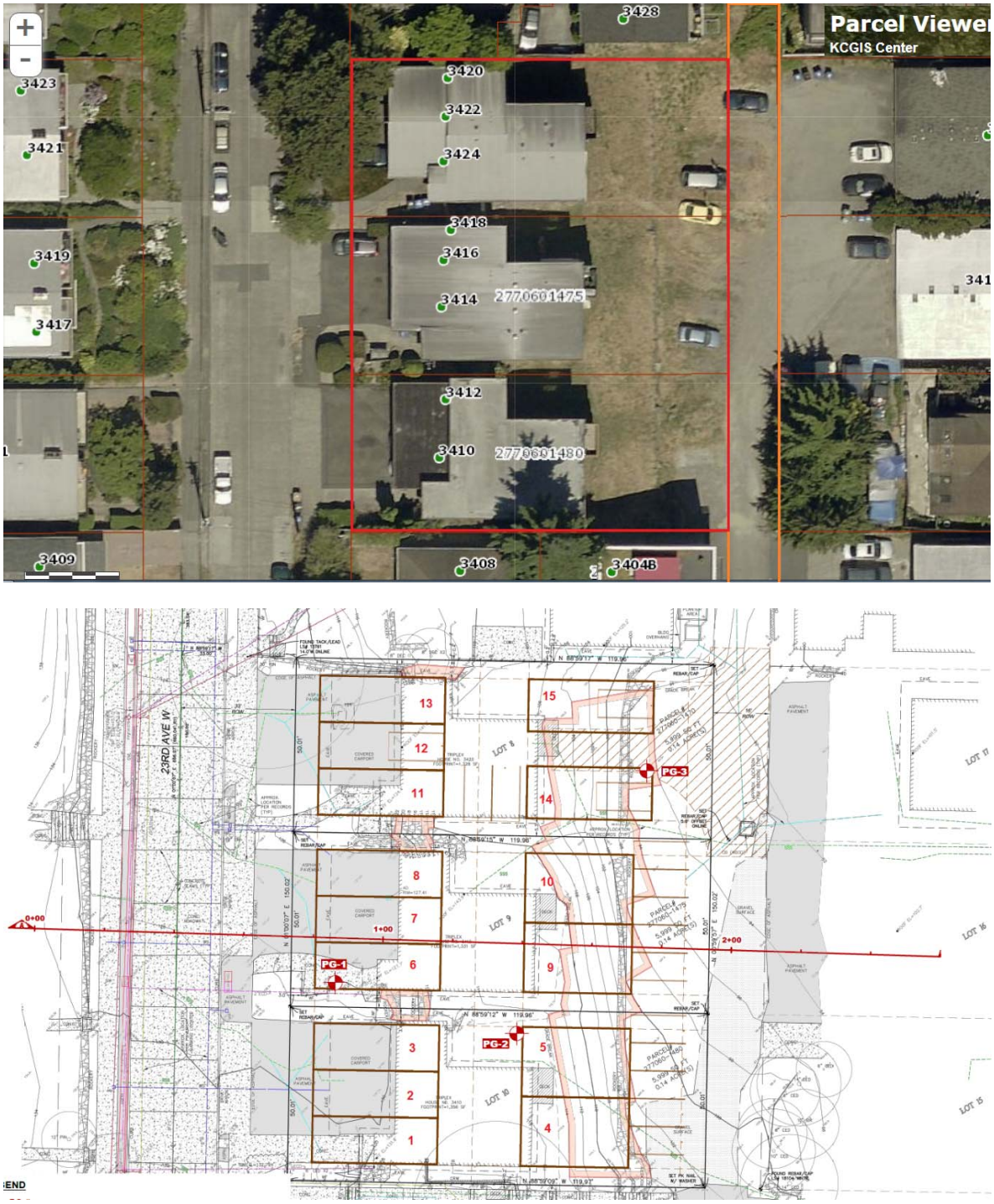


Figure 10- (Above) Existing condition from King County parcel viewer; and (lower) condition initially included within the Geotechnical report of 15 dwelling units. The darker tones are paved parking, street or driveways.

As included within the documents included within the affidavit from Mr. Henry McGuire, the Department published on October 31, 2017 the need to provide access independence of the vehicles needed on the street. Allison Wentworth of SDCI has also stated that the width of emergency access is not only for vehicles, but also a safe egress width for people given egress may be required past a burning building.

The appellants are not questioning the technical interpretation of the steep slopes. Living within the same ECA-2 potential landslide area as the proposed development, however, we are all very concerned in how our properties may be impacted and have noted accordingly in the first part of the appeal. Just because the city used some prescriptive approach declassify a marked steep slope, the potential landslide classification does not change. The cumulative effects of multiple construction projects within the toe of a slope within unstable soils is well documented, especially in combination periods of with heavy or consistent rainfall. As such, the Department's condition for soil stabilization as part of the Short Subdivision has a merit that cannot be dismissed when applicable to ECA-2.

The Applicant's attorney must be alerted by the Hearing Examiner that libel statements toward the Appellants' intent without proof or substance such as "submitting thousands of public comments located miles from his townhome" or "Moehring is on a crusade to halt new residential developments in the City at all costs" are simply ridiculous, are statements without any basis of fact, and are just cause for Helsell Fetterman LLP to be recused from these and future similar proceedings. In addition, Helsell Fetterman LLP has violated a signed agreement with the applicant for MUP-16-016 and MUP-17-018 and now suggests to this Hearing Examiner that these related cases were dismissed on lack of merit rather

than mutual negotiation. The motion also lists MUP-17-023 and -17-024 where Mr. Moehring provided landuse code representation for two groups of signed neighbors – but the cases were regrettable dismissed due to a ruling that as the representing appellant being 2 miles away, the neighbors did not have standing to appeal. MUP-18-001 was indeed a short subdivision within 1.5 blocks that also sought to circumvent SMC density rules while clearing all four trees on the property. Finally, MUP-18-022 did not involve a short plat but a SEPA DNS on a sloped lot a block north of the Appellant's residence. All of these cases indeed had merit and I challenge the Applicant to provide the Hearing Examiner a briefing of the technical flaws of these cases and what legal mechanisms were used to dismiss some of the cases.

VI. ADDITIONAL EVIDENCE IN SUPPORT OF APPEAL

Refer to the figures and references within, the attachments to this response, the declarations of David Moehring and Henry (Hank) McGuire, the attachments in the original appeal.

VII. CONCLUSION

The applicants' dismissive nature to this appeal reflects only the interests of their short-term client, Mirra Homes. Mirra has also formed an LLC for this development to that they may demolish, level, build and sell out at the highest financial gain… with no liability at the close of the venture. The Department is generating their own waivers and disclaimers with this short-term entity who seeks to have the Department bypass several key criteria that impact the neighbors that consider this block their home and their security. All of the appellants support healthy new and code-compliant growth within the city despite the libelous

accusations of the Applicant. Also, contrary to the unsupported conclusion of the Applicant with their Motion to Dismiss, the Hearing Examiner may safely conclude that (a) the Neighbors to Mirra Homes has raised at least six (6) valid issues on appeal; and that (b) the Appellants have requested relief of a Type II discretionary decision within the (i) the Hearing Examiner has jurisdiction to grant, and (ii) the relief directly relates to that valid issue raised within the appeal:

A. Vacation of the Analysis and Decision for short plat approval;

B. The imposition of conditions requiring an access easement to provide exclusive access to east lot subdivisions given there exist no improved alleyway with the capacity to accommodate emergency vehicles.

C. The imposition of conditions requiring an improved alley with adequate turnaround access that does not impose on neighboring properties.

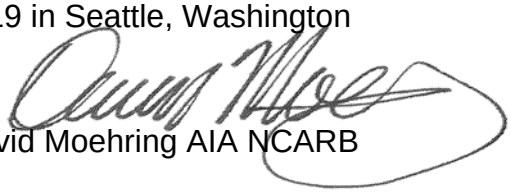
D. The imposition of conditions to assure compliance with the Land Use code relative to other parking and access requirements for multifamily developments per SMC 23.84A and conformance with 23.24.045 given the subdivision is for the purposes of creating separate lots of record.

E. The imposition of conditions to assure compliance with the multifamily residential standards and Rowhouse Development Rules; and

F. The timely review of the SEPA determination for this property prior to establishing platting conditions that rely on stabilizing the short subdivision.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Signed this 1st day of July, 2019 in Seattle, Washington



David Moehring AIA NCARB

Appellants:

DAVID and BURCIN MOEHRING
3444 B 23RD AVE W
Seattle WA 98199

LONGHUA YOU and YAYUN WANG
3404 B 23RD AVE W
Seattle WA 98199

WENQIAN MA and XIAO QIN
3404 A 23RD AVE W
Seattle WA 98199

Copied only:
BENJAMIN and KERRY LOUISE CHEW
2255 78th Ave Southeast
Mercer Island, WA 98040