

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) &
MUP 19-021 (P)

Department References:

3032834-LU, 3032833-LU &
3032857-LU

REPLY IN FURTHER SUPPORT OF
APPLICANTS' AND OWNER'S
MOTION TO DISMISS LAND USE
APPEAL AND FOR SUMMARY
JUDGMENT

I. INTRODUCTION

This Reply is being submitted in response to Moehring's response to the motion to dismiss and for summary judgment and to his response to the supplement to the motion. In his responses to the motion and supplement, Moehring fails to rebut the arguments raised in the motion-in-chief. His objections raise issues that fall well outside the purview of the Examiner and are not germane to SDCI's approval of the Short Subdivisions. Thus, the Decisions should be affirmed and the appeals dismissed with prejudice.

1 **II. REPLY TO MOEHRING’S RESPONSE TO MOTION**

2 **A. Density issues related to development of the Property are outside the scope of an**
3 **appeal of the Short Subdivisions (Decision Criteria No. 1).**

4 Moehring argues in his response that the proposed rowhouse development exceeds
5 the density allowed under the Land Use Code. As discussed in the motion-in-chief, the
6 Short Subdivisions do not authorize any construction. They simply subdivide the Property
7 into two separate buildable lots. Thus, this objection is without merit and should be
8 dismissed.

9 **B. The Short Subdivisions comply with the access requirements under SMC**
10 **23.53.005 and 23.53.006 (Decision Criteria No. 2).**

11 Moehring claims, without evidence, that the Short Subdivisions should not be
12 approved because: “None of [the Short Subdivisions] include an emergency access easement
13 as required by the code...”¹ Nowhere in the code is there a requirement that a short
14 subdivision provide an emergency access easement and Moehring cites to none. The
15 Preliminary Assessment Report No. 012652-18PA states: “Provide all vehicle access to the
16 site via the alley. Provide trash via the alley, coordinate with SPU.” No turnaround is noted,
17 much less required.

18 Moehring goes on to discuss the easement width requirements under SMC 23.53.025
19 and alley improvements under 23.54.030.D.1. Neither of these issues are relevant to the
20 Short Subdivisions. The easement width requirements under SMC 23.53.025 are based
21 upon the number of dwelling units. Because the Short Subdivision does not authorize the
22 construction of any dwelling units, this objection is without merit. Similarly, alley
23 improvements are not reviewed, much less required, during the short plat review process.
24 Alley improvements are addressed during the review of the construction permit (assuming

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¹ See Moehring’s Response, 7:12-13.

1 the lots are developed) and a Street Improvement Permit would be required and complied
2 with by Mirra. So, this objection is equally without merit.

3 Finally, Moehring appears to argue that there should be a fire access turnaround on
4 the Property itself because there is a dead-end fire apparatus access road. It is unclear
5 exactly what Moehring is referring to here, but it is clearly without merit. The suggestion
6 that a fire access turnaround should be provided on this property when each parcel has
7 frontage on either 23rd Avenue West or an alley is without merit on its face.

8 **C. The Short Subdivisions serve the public use and interest (Decision Criteria No.**
9 **4)**

10 Moehring claims that the Short Subdivisions do not serve the public use and interest
11 because the proposed development exceeds the density requirements allowed under the Land
12 Use Code. As discussed at length in the motion-in-chief, the proposed development does
13 not violate the density limits. More importantly, the Short Subdivisions that are the subject
14 of these consolidated appeals do not authorize any development. Hence, this objection is
15 without merit.

16 **D. The Short Subdivisions comply with SMC 25.09.240 (Decision Criteria No. 5).**

17 The only SEPA requirement applicable to the approval of the Short Subdivisions is
18 SMC 25.09.240, which requires that each lot created “contains an area outside all
19 environmentally critical areas and buffers...” SDCI has issued an Approved Relief from
20 Prohibition on Steep Slope Development under permit numbers 6694811-EX (3410 23rd
21 Avenue West), 6694810-EX (3412 23rd Avenue West), 6694807-EX (3416 23rd Avenue
22 West), 6694808-EX (3418 23rd Avenue West), 6694814-EX (3420 23rd Avenue West) and
23 6694812-EX (3422 23rd Avenue West) for all six of the resulting subdivided lots. Moehring
24 fails to address, much less dispute, this fact in his response. This objection must be
25 dismissed.

1 **E. The Short Subdivisions are designed to maximize the retention of existing trees**
2 **(Decision Criteria No. 6)**

3 Moehring claims that SDCI failed to consider whether the Short Subdivisions are
4 designed to maximize the retention of existing trees because “the location of the 26-inch
5 diameter at breast height (dbh) existing fir tree is not shown.”² Short Subdivision No.
6 3032833 clearly depicts the 26” Douglas Fir (T-4) on sheet 3 of 5. So, this argument is
7 without merit.

8 Moehring goes on to discuss purported tree removal that occurred at other
9 developments that are wholly-unrelated to the Short Subdivisions. This argument, even if it
10 was true, is not relevant to the approval of the Short Subdivisions and whether they meet the
11 approval criteria.

12 The sole argument raised by Moehring in support of his claim that the Short
13 Subdivisions are not designed to maximize the retention of existing trees is that there is a
14 potential configuration of the southernmost property (3410 23rd Avenue West – Short
15 Subdivision No. 3032833-LU) that would potentially result in the retention of the 26”
16 Douglas Fir tree that is located on the abutting property to the south. This claim is without
17 merit for at least three reasons.

18 First, Moehring has not demonstrated that the Douglas Fir on the abutting property to
19 the south will be harmed or removed during construction. That is because the Douglas Fir
20 tree will *not* be removed during development of the property. The two alternative
21 configurations provided by Moehring are not relevant because (a) they reference old plan
22 sets that are no longer current, and (b) the Douglas Fir tree is being retained during
23 construction. The Douglas Fir is located on the neighbor’s property that abuts 3410-3412
24 23rd Avenue West. The diagram provided by Moehring (figure 8) mistakenly refers to 3416
25 23rd Avenue West – the middle parcel. Thus, the only Short Subdivision subject to

² See Moehring’s Response, 13:18-19.

1 Moehring's objection that it does not maximize the retention of existing trees is 3410 23rd
2 Avenue West (Short Subdivision No. 3032833-LU).

3 Second, the Short Subdivisions do not authorize the construction of any buildings so
4 Moehring's argument is without merit. The tree protection measures under SMC 25.11 do
5 not apply to the approval of a short subdivision. But, as discussed above, the Douglas Fir
6 will be retained during construction. *See* Declaration of Brooke Friedlander ("Friedlander
7 Decl."), Exs. A and B. An arborist has recommended a tree protection plan that will be
8 implemented by Mirra during construction. The arborist report also concludes that the
9 Douglas Fir, a non-exceptional tree, will recover from the development activities.

10 Third, the Douglas Fir is not located on the Property. The approval criteria under
11 SMC 23.24.040.A.7 (Whether the proposed division of land is designed to maximize the
12 retention of existing trees) is plainly referring to trees that are located on the property.

13 For all three of these reasons, this objection is without merit and should be
14 dismissed.

15 **F. The Motion-in-Chief addressed each of the issues raised by Moehring.**

16 Moehring argues that the motion did not address his objection that SDCI cannot
17 require additional site stabilization measures unless the project goes through SEPA review.
18 To the extent this objection is related to the Approved Relief from Prohibition on Steep
19 Slope Development, that objection was addressed in the motion under Section V.F and was
20 not rebutted by Moehring. To the extent that Moehring is arguing that the Short
21 Subdivisions need to go through SEPA review, that argument is equally without merit.

22 The SEPA regulations contained in SMC Chapter 25.05 do not apply to the approval
23 of Short Subdivisions. SMC 23.24.040 contains the approval criteria for the Short
24 Subdivisions. Nowhere in that code section is there any mention of SEPA regulations. That
25 is because SEPA review is only triggered in certain circumstances for "new residential,

1 nonresidential, and mixed-use developments, as well as grading, demolition, additions, and
2 changes of use.”³ Because the Short Subdivisions do not authorize any construction,
3 grading, demolition, additions or changes of use, SEPA does not apply.

4 **G. Summary judgment is allowed under the HER and is appropriate in this**
5 **matter.**

6 Moehring argues that the HER do not allow for motions for summary judgment.
7 This is not correct. HER 1.03 states that for questions of practice and procedure not covered
8 by the HER, the Examiner “may look to the Superior Court Civil Rules for guidance.” CR
9 56(c) provides that a motion for summary judgment is properly granted where “the moving
10 party is entitled to a judgment as a matter of law.” Thus, a summary judgment motion is
11 allowed under the HER.

12 Moehring goes on to argue that the documents submitted in support of the motion to
13 dismiss and for summary judgment should not be considered because they were not authored
14 by Colt Boehme whose declaration to which they were attached. This, too, is incorrect. Mr.
15 Boehme does not need to have authored the documents for them to be admissible and
16 considered by the Hearing Examiner. HER 2.17 – Evidence – states that: “Evidence,
17 including hearsay, may be admitted if the Examiner determines that it is relevant to the issue
18 on appeal, comes from a reliable source, and has probative (proving) value.” The
19 documents attached to the Boehme Declaration satisfy these criteria. So, they are
20 admissible.

21 **H. The motion to dismiss should be granted.**

22 Moehring ends his response by repeating previously raised arguments as to why the
23 motion to dismiss should not be granted. For example, he repeats his argument that the
24 Short Subdivisions somehow seek to evade the Land Use Code because rowhouses might be
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³ See TIP 208: <http://www.seattle.gov/DPD/Publications/CAM/Tip%20208.pdf>.

1 developed on one parcel and townhouses might be developed on the other parcel. This
2 argument has repeatedly been rejected by multiple Hearing Examiners in Moehring's many
3 land use appeals. As stated in the motion to dismiss, the Short Subdivisions do not authorize
4 the construction of any developments so Moehring's argument that what might be developed
5 in the future is irrelevant to this appeal. Regardless, once the Short Subdivisions are
6 approved, the Land Use Code allows development of rowhouses on the lot abutting 23rd
7 Avenue West and development of townhouses on the separate, rear lot.

8 Next, Moehring argues that the increased density limits that were recently passed by
9 the City don't apply to this project and, even if they did, the property would be subject to
10 MHA. As discussed in the initial motion, the Short Subdivisions do not authorize any
11 construction so the density limits and MHA requirements are not germane to his land use
12 appeal. Regardless, the applications for the Short Subdivisions were submitted and vested
13 before MHA was enacted for this area so any fees would not apply.

14 **III. REPLY TO MOEHRING'S RESPONSE TO SUPPLEMENT TO MOTION**

15 In his response to the supplement to the motion, Moehring does not raise any new
16 arguments that were not previously raised in his response to the initial motion. These issues
17 have been thoroughly briefed and are addressed in the motion-in-chief and in the above
18 reply to the motion. For the sake of brevity, they will not be addressed for a third time here.

19 **IV. CONCLUSION**

20 Moehring has failed to raise a valid objection to the Decisions or otherwise
21 demonstrate that the Short Subdivisions do not meet the approval criteria under SMC
22 23.24.040.A. His objections are without merit on their face and are brought merely to
23 secure delay. Second, there are no issues of material fact that preclude an award of
24 summary judgment. Third, Moehring has requested relief that either (a) the Hearing
25 Examiner does not have authority to grant, or (b) he has failed to raise a valid objection that

1 would warrant the relief requested. For all of these reasons, Moehring's appeals should be
2 dismissed with prejudice and the Decisions should be affirmed by the Examiner.

3 Respectfully submitted this 19th day of July, 2019.

4 HELSELL FETTERMAN LLP

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on July 19, 2019, the foregoing document was sent for delivery on the following party in the manner indicated:

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DATED this 19th day of July, 2019

s/Gennifer Holland

Gennifer Holland, Legal Assistant