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

ORDER ON MOTION FOR SUMMARY JUDGMENT

Applicants and Owners Brooke Friedlander, Andy McAndrews, Mirra 111 LLC, and Terrane, Inc. ("Applicants") move for summary judgment, and request that the Deputy Hearing Examiner ("Examiner") dismiss the appeals filed by Neighbors to Mirra Homes Developments ("Appellant") on three short subdivision approvals by the Director of the Seattle Department of Construction and Inspections ("Department"). The Department joined the Applicants' motion. Appellant filed an opposition brief, and Applicants filed a reply brief.[1]

For purposes of this decision, all section numbers refer to the Seattle Municipal Code ("SMC" or "Code") unless otherwise indicated. Having considered the evidence in the record, the Examiner enters the following order.

Background

Appellant challenges three short plats in the Magnolia neighborhood addressed as 3410 23rd Avenue West, 3416 23rd Avenue West, and 3422 23rd Avenue West ("the property"). Each short plat divided one lot into two. Appellant's challenges are based principally upon five code criteria for approval of a short plat found at SMC 23.24.040.A:

1. Conformance to the applicable Land Use Code provisions, as modified by this Chapter 23.24;
2. Adequacy of access for pedestrians, vehicles, utilities, and fire protection as provided in Section 23.53.005 and Section 23.53.006;

. . .

[1] Because MUP-19-021(P) was also consolidated for hearing during the motion briefing schedule, the Applicants filed a Supplement to Applicants' and Owner's Motion to Dismiss Land Use Appeal and for Summary Judgment (filed July 15, 2019). The Appellant was permitted to file an additional response to the Applicants' supplemental brief, and the Applicants were permitted an additional reply.

4. Whether the public use and interests are served by permitting the proposed division of land;
5. Conformance to the applicable provisions of Section 25.09.240 in environmentally critical areas and Section 23.60A.156

. . .

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

Applicants move for summary judgment on each of these issues. Applicants challenge MUP-19-021(P) on an additional issue. Finally, the Appellant raises several issues it believes preclude summary judgment. All of these issues will be addressed below.

Standard of Review

Quasi-judicial bodies, like the Examiner, may dispose of an issue summarily when there is no genuine issue of material fact. *ASARCO Inc.* v. *Air Quality Coalition,* 92 Wn.2d 685, 695-698, 601 P.2d 501 (1979). Rule 1.03 of the Hearing Examiner Rules of Practice and Procedure ("HERs") states that for questions of practice and procedure not covered by the HERs, the Examiner "may look to the Superior Court Civil Rules for guidance."

Civil Rule 56(c) provides that a motion for summary judgment is properly granted where "the moving party is entitled to a judgment as a matter of law." The Examiner "must consider the facts in the light most favorable to the nonmoving party, and the motion should be granted only if reasonable persons could reach only one conclusion." [2]

> Summary judgments shall be granted only if the pleadings, affidavits, depositions or admissions on file show there is no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law. A material fact is one upon which the outcome of the litigation depends. In ruling on a motion for summary judgment, the court's function is to determine whether a genuine issue of material fact exists, not to resolve any existing factual issue. One who moves for summary judgment has the burden of proving that there is no genuine issue of material fact, irrespective of whether he or his opponent, at the trial, would have the burden of proof on the issue concerned.[3]

Once the moving party submits affidavits establishing it is entitled to summary judgment as a matter of law, the burden on summary judgment shifts to the nonmoving party,.[4] A nonmoving party may only avoid summary judgment if it sets forth specific facts, which sufficiently rebut the moving party's contentions, and disclose the existence of a genuine issue as to material fact.

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[2] *Labriola v. Pollard Group, Inc.*, 152 Wn.2d 828, 832-833, 1000 P.3d 791 (2004).
[3] *Hudesman v. Foley*, 73 Wn.2d 880, 886-887, 441 P.2d 532 (1968)(citations omitted).
[4] *Meyer v. Univ. of Wash.*, 105 Wn.2d 847, 719 P.2d 98 (1986).

Analysis

A. Applicants' Arguments re: Summary Judgment

1. Are the short plat decisions in conformance with the Land Use Code? (SMC 23.24.040.A.1)

The Applicants argue that the issues brought forward by the Appellant regarding conformance with the Land Use Code actually concern building code compliance. Applicants state: "the Short Subdivisions are only dividing a single parcel into two separate lots; they do not authorize any construction or development."[5]

The Appellant argues that the configurations of the planned development on the lots fail to conform to SMC 23.84A.032.20(R). However, building configuration on each lot cannot be litigated in this appeal.[6] The appeal issues raised may relate only to the decision appealed, which, as the Applicants state, is the land division of one single parcel into two separate lots (in each appeal). These approvals do not include any decisions about placement of buildings on lots. Appellant's issues with respect to the conformance of the decisions with SMC 23.24.040.A.1 should be **DISMISSED.**

2. Are the short plat decisions in conformance with SMC 23.24.040.A.2 by providing adequate access for pedestrians, vehicles, utilities, and fire protection as required by SMC 23.53.005 and SMC 23.53.006? (SMC 23.24.040.A.2)

The Applicants argue that the short plat decisions comply with SMC 23.24.04.A.2 because they adhere to SMC 23.53.005 and SMC 23.53.006. The applicable part of SMC 23.53.005 states:

> A. Street or private easement abutment required.
>
> 1. For residential uses, at least 10 feet of a lot line shall abut a street or 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 Applicants argue the short subdivisions comply with both 23.53.005.A.1 because the plat drawing shows that there is at least ten-foot of frontage abutting either the street or the alley on each lot in all three subdivisions. The Applicants also argue that the plats comply with SMC 23.53.006.A because the drawings for each plat show a five-foot pedestrian easement along the northern five feet of each parcel.

The Appellant argues that the lots abutting the alley in each of the short plats must contain an emergency access easement, on the theory there is no direct "street" access to the lots on Parcel B.

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[5] *Applicants' and Owner's Motion to Dismiss Land Use Appeal and for Summary Judgment at 5 (June 10, 2019).*
[6] *Reply in Opposition to Applicants' and Owner's Appeal and for Summary [Judgment] at 4-6 (July 1, 2019).*

The Appellant assumes that the alley is insufficient as street access. That assumption is incorrect. As stated above, the Code requires that each lot abuts at least 10 feet of "a street or private permanent vehicle access easement meeting the standards of Section 23.53.025." The issue turns on the definition of "street" in the Land Use Code, which is the following:

> 23.84A.036- "S" "Street" means a right-of-way that is intended to provide or that provides a roadway for general vehicular circulation, is the principal means of vehicular access to abutting properties and includes space for utilities, pedestrian walkways, sidewalks and drainage. Any such right-of-way shall be included within this definition, regardless of whether it has been developed or not.

(Emphasis added). An alley is also defined as a "public right of way. . . which is used or intended as a means of vehicular and pedestrian access to the rear of abutting properties." SMC 23.84A.002-"A." As indicated by the definition of street, a public right-of-way can qualify as access, whether it is developed or not. Appellant erroneously assumes that SMC 23.53.025 applies. It does not. That section only applies to private access easements. Emergency access easements are required only when there is a private access easement, which public entities would not be permitted to access without an easement allowing them to do so.

There is no requirement in the platting criteria to provide special emergency access when the lots already abut a public street or alley edge. This issue should be **DISMISSED.**

3. Do the short plat decisions serve the public use and interest by permitting the proposed divisions of land? (SMC 23.24.040.A.4)

The Applicants argue that this criteria is so general it can only refer to all of the other criteria of SMC 23.24.040.A. The Appellant criticizes the argument made by the Department for approval under this criteria: that the proposal creates the potential for new housing opportunities in the City. The Appellant argues that this proposal only serves the developer and does not serve the interests of the public living in the immediate area. The Appellant then returns to the argument that the density does not meet the provisions of the Land Use Code. That argument was already dismissed above.

This land divisions will eventually result in additional housing opportunities in the City. The Appellant's argument should be **DISMISSED.**

4. Do the short plat decisions conform to applicable provisions of Section 25.09.240, "Short subdivisions and subdivisions, in environmentally critical areas" and Section 23.60A.156? (SMC 23.24.040.A.5)

The Applicants argue that the appeal is devoid of any explanation of why the Appellant believes the short plat decisions do not comply with SMC 25.09.240 and 23.60A.156. As noted by the Applicant, SMC 23.60A.156 is entirely inapplicable because it relates to land division in a shoreline district, which is not present in this case. SMC 25.09.240 prevents lots from being divided in such a manner that allows a newly divided lot to contain all critical areas, without

buildable area. The policy behind the code provision is that lot division may not be used as a mechanism for avoiding compliance with critical areas requirements.

The Appellant argues that because the lots are in a potential slide area, the Applicants have failed to comply with this criteria. The Appellant is incorrect. Each lot will be required to comply with all applicable environmentally critical areas requirements as part of the building permit process. The issue contemplated by this code criteria is whether the lot configuration leads to any one lot being composed entirely of critical areas, a result that would allow circumvention of environmentally critical areas requirements. The Appellant does not allege that this will be the result of the appealed short subdivisions. Therefore, the Appellant's claim should be **DISMISSED.**

5. Are the short plats designed to maximize the retention of existing trees? (SMC 23.24.040.A.8)

The Applicants argue that Appellant's claim should be dismissed because it is conclusory and does not allege or demonstrate that any different division of land would better maximize the retention of existing trees. The Appellant's response centers upon a specific fir tree to the south of the lot line of the property at 3610 23rd Avenue West. According to the Applicants' arborist, the fir tree is 26 inches in diameter but not an exceptional tree. That characterization has not been challenged by the Appellant.

The Appellant provides a couple of drawings depicting alternative building arrangements and speculates that these arrangements could better protect the existing tree. Again, however, the appeals centers upon the division of land, not the configuration of buildings. This criteria is intended to deal more with whether the lots can be divided in such a way that would maximize the retention of existing trees; for example, placing lot lines so trees are located in setbacks or back yards. It is not intended to scrutinize future building configurations that are not otherwise at issue in the appeal.

The Applicants respond in part by submitting a declaration from Brooke Friedlander, an employee of Mirra III, LLC(the owner of the short plats), stating that the tree will be retained.[7] She provided a report submitted by the arborist providing specific instructions concerning how to protect the tree roots during construction and opining that the tree will survive.[8] She also submitted a proposed landscaping plan that demonstrates that the proposed building will encroach only five percent into the tree's dripline.[9]

The Appellant does not make any other argument about specific trees on the property, although it does allege a failure to protect existing trees at a different subdivision, which is not the subject of this appeal and is therefore irrelevant. A nonmoving party may only avoid summary judgment if it sets forth specific facts, which sufficiently rebut the moving party's contentions, and disclose

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[7] *Declaration of Brooke Friedlander in Further Support of Applicants' and Owner's Motion to Dismiss Land Use Appeal and for Summary Judgment at 1-2 (July 19, 2019).*
[8] *Id. at Exhibit B.*
[9] *Id. at Exhibit A.*

the existence of a genuine issue as to material fact. The Appellant has failed to do so with respect to this issue; therefore, the Appellant's claim should be DISMISSED.

6. Should the issues raised by the Appellant in MUP 19-021(P) be dismissed?

Most of the issues raised in MUP 19-021(P) are duplicative to issues raised in the other two MUP appeals and should be issued for the same reasons those issues are dismissed in the other two appeals. One issue deserves additional discussion.

The Appellant makes the argument in its response that these plat applications are "functionally-related" and therefore the State Environmental Policy Act ("SEPA") should be invoked to examine these three separate applications as "functionally-related." The Applicants argue, and the Examiner agrees, that this issue is not one that can be raised as a part of an appeal of a short plat. The Examiner has limited jurisdiction over SEPA review, which is described more specifically below. It does not include determining whether a unified SEPA review should have been completed for three proposals that are otherwise exempt. Moreover, the Appellant cites no authority for this proposition. Therefore, the Appellant's claim should be DISMISSED.

B. Appellant's Arguments that Applicants' Motion Excluded Portions of the Appeal

1. Should the appeal be heard on the issue of whether the short plats are timely?

The Appellant alleges in its response that:

> [T]he short plats are not timely, as they assume that the pending Type II SEPA determinations 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 [sic] 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 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.[10]

Appellant offers no support for this proposition. As pointed out by the Applicants, short plat review is exempt from SEPA. Furthermore, the only jurisdiction the Examiner possesses with reference to SEPA is to consider timely appeals of threshold determinations and the adequacy of an Environmental Impact Statement ("EIS"), neither of which is at issue here. Even if the Appellant stated a legal basis for its argument, the Examiner has no jurisdiction over every SEPA decision made by a responsible official; only those on threshold determinations and the adequacy of an EIS that are properly appealed. This argument should be rejected as a basis for avoiding summary judgment.

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[10] *Reply in Opposition to Applicants' and Owner's Motions to Dismiss Land Use Appeal and Summary Judgment at 19 (July 1, 2019).*

2. Should the appeal be heard on the issue of whether short subdivisions within low-rise multi-family zones are a means of bypassing the multi-family rowhouse development rules?

The Appellant argues that:

> Of greatest significance, however, and very likely the driving motive for almost all short subdivisions within low-rise multifamily zones . . . , the Motion for Summary Judgment is silent about the appeals' objections to the use of short plats as a means of bypassing rowhouse development rules. . . .

Again, Appellant does not recognize the limited jurisdiction of the Examiner. The Examiner does not have the authority to express opinions about alleged misuses of the Land Use Code that are not tied to a particular decision on appeal. Here, the questions properly addressed on appeal relate to whether each of the Director's decisions properly analyzed the proposal under the criteria for approval of a short plat (SMC 23.24.040.A). Each decision only provided the Applicants with approval of a division of land, nothing more. There are no issues that can be properly raised concerning rowhouse development in this appeal. This argument should be rejected as a basis for avoiding summary judgment.

3. Does the Examiner possess the authority to consider a summary judgment motion?

The Appellant argues that there is no provision under the Hearing Examiner's Rules of Procedure ("HER") explicitly allowing for summary judgment motions, citing to HER 2.16 as authority for that proposition. On that basis, Appellant urges that the summary judgment motion should be denied.

It is true that while the words "summary judgment" are not contained within HER 2.16, the rule does not limit the types of motions which may be brought. Moreover, HER 2.16(e) explicitly refers to "dispositive motions," and summary judgment motions are commonly recognized as one type of dispositive motion. Finally, HER 1.03(c) states:

> When questions of practice or procedure arise that are not addressed by these Rules, the Hearing Examiner shall determine the practice or procedure most appropriate and consistent with providing fair treatment and due process. The Hearing Examiner may look to the Superior Court Civil Rules for guidance.

This rule allows the Hearing Examiner to address matters of procedure that are not explicitly set out in the HER. Summary judgment is a common device used in civil litigation to narrow down issues, or to allow for dismissal of appeals with no merit. In this case, the use of the summary judgment procedure is fitting and appropriate to dismiss this appeal. This argument should be rejected as a basis for avoiding summary judgment.

4. All Other Issues.

Summary judgment should be granted to the Applicants on all outstanding issues. The Appellant raises no material questions of fact, nor does it provide any compelling argument why summary judgment should not be granted to Applicants as a matter of law.

Order and Decision

The Applicants' motion for summary judgment is **GRANTED**. The appeals in case numbers MUP-19-019 (P), MUP19-020 (P) , and MUP 19-021 are **DISMISSED** and the hearing set for August 12, 2019 is **CANCELLED.**

Entered this 7th day of August, 2019.

Barbara Dykes Ehrlichman
Deputy Hearing Examiner

Concerning Further Review

NOTE: It is the responsibility of the person seeking to appeal a Hearing Examiner decision to consult Code sections and other appropriate sources, to determine applicable rights and responsibilities.

The decision of the Hearing Examiner in this case is the final decision for the City of Seattle. In accordance with RCW 36.70C.040, a request for judicial review of the decision must be commenced within twenty-one (21) days of the date the decision is issued unless a motion for reconsideration is filed, in which case a request for judicial review of the decision must be commenced within twenty-one (21) days of the date the order on the motion for reconsideration is issued.

The person seeking review must arrange for and initially bear the cost of preparing a verbatim transcript of the hearing. Instructions for preparation of the transcript are available from the Office of Hearing Examiner. Please direct all mail to P.O. Box 94729, Seattle, Washington 98124-4729. Office address: 700 Fifth Avenue, Suite 4000. Telephone: (206) 684-0521.

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