Barbara Dykes Ehrlichman, Deputy Hearing Examiner

BEFORE THE HEARING EXAMINER
CITY OF SEATTLE

In the Matter of the Appeals by Neighbors to Mirra Homes Developments from Short Plat Decisions Issued by the the Director of the Seattle Department of Construction and Inspections	Hearing Examiner Files: **MUP-19-019, MUP-19-020**, **MUP-19-021** SDCI 3032834-LU / 3032833-LU / 3032857-LU APPELLANTS CLOSING MOTIONS: CLERICAL CLARIFICATION, RECONSIDERATION, AND COUNTER SUMMARY JUDGEMENT

The Deputy Hearing Examiner issued an Order and Decision on the 7th day of August 2019 granting the Applicants' Motion for Summary Judgement, and thereby dismissing the Short Plat Subdivision combined administrative appeals relative to the Mirra Homes developments. The short plat subdivisions are proposed for three adjacent lots for addresses 3410, 3416, and 3422 23rd Avenue West located within a low-rise multifamily residential zone of Seattle.[i] [Note: this document contains endnotes identified by roman numerals.] Prior to the Appellants likely commencing with a judicial review of this decision and pursuant to RCW 36.70C.040, the Neighbors to Mirra Homes Developments, hereafter the Appellants, respectfully moves for the following:

I. Clerical Clarification of the Order by the Examiner,

II. Reconsideration of Decision on Summary Judgement and Order, and pending 'II',

III. Appellant's countermotion for Summary Judgement on the failed application of the criteria relative to emergency vehicle access.

I. Motion for Clerical Clarification

The appellants' legal counsel believes there may be a clerical error arising from an oversight in the Order that may be corrected under HER 2.25. On page 8 of the Order, the Examiner states within Section 4. "All Other Issues. Summary Judgement should be granted to the Applicants on all outstanding issues." There are two clerical omissions relative to this statement.

A. Firstly, the Examiner has omitted what are outstanding issues. "*Summary Judgement should be granted on all outstanding issues*."[1] Per HER 3.18 Hearing Examiner's Decision (c)(2) Contents, Findings: "A decision of the Hearing Examiner on an appeal shall include, but not be limited to, a statement regarding the following: the individual facts that the Examiner finds relevant, credible, and requisite to the decision, based upon the evidence presented at hearing and *those matters officially noticed*. (This may include recitation of relevant provisions of applicable law.)" [Emphasis added.] As such, the Examiner should clarify the Order with the noted remaining 'outstanding issues' that are being dismissed via this Summary Judgement Order. Collectively, there were ten items in the appeal.[ii]

B. Secondly, page 2 properly states that "Civil Rule 56(c) provides that a motion for Summary Judgement is properly granted when the 'moving party is entitled to a judgement as a matter of law.' The Examiner '*must consider the facts in light most favorable to the nonmoving party, and the motion should be granted only if reasonable persons could reach only one conclusion*.'" [Emphasis added]. What appears to have been omitted from the noted Standard of Review is for the Hearing Examiner to consider that facts most favorable to the Appellants – which is the Neighbors to Mirra Homes, rather than the Applicants representing Mirra Homes. This written clarification omitted from this section is especially relevant in the context of reconsidering the Order as outlined within the following sections.

C. If the Examiner concurs with this important information relative to the review standard, each of the appeal items considered for summary judgment identified within the

[1] Order on Motion for Summary Judgement, page 8, line 1.

"Analysis" section pages 3 to 7 must be considered only in terms of evidence presented by the Applicants (the moving-party) proving that there is no genuine fact. Unfortunately, the Examiner should not have the authority within Summary Judgements to make a case on behalf of the moving party, the Applicants. Hearing Examiner Order items A.6 and B.1 on page 6, item B.2 on page 7, and item B.4 on page 4 (as referenced above) all lack evidence being presented by the moving party. If evidence has been provided by the applicant, we assume it was a clerical omission within the Order that may be corrected.

D. For the above reasons, the Appellants request that the Examiner clarify any clerical omissions that may be considered in subsequent judicial reviews. The following motion for reconsideration will address the reasons for the Examiner to reconsider parts of the decision based on the merits of Appellant with prejudice as the non-moving party. The motion for Clerical Clarification is hereby concluded.

II. Motion for Reconsideration of Decision on Summary Judgement and Order

This motion for reconsideration is timely per Hearing Examiner Rules of Practice and Procedure (HER) 2.04 given the weekend is the 10 days after the date of the Hearing Examiner's decision. Per the requirements HER 3.20 (a), this motion for reconsideration is made for three reasons: (1) Irregularity in the proceedings by which the moving party was prevented from having a fair hearing; (2) newly discovered evidence of a material nature which could not, with reasonable diligence, have been produced at [or, in this case, *before* the] hearing; and (3) a clear mistake was made as to material fact[s].

(1) Irregularity in the Proceedings preventing the Appellant from a Fair Hearing.

A. As noted within the Order, the Examiner should consider the noted Civil Rule 56(c) that indicates that the judicial review of the Examiner '*must consider the facts in light most favorable to the nonmoving party, and the motion should be granted only if reasonable persons could reach only one conclusion.* The Office of the Hearing Examiner should look at another short plat case filed by Dr. Gerald Gerard Bashein.

a. In Short Plat appeal MUP-17-036, the ProTem Examiner ruled on February 16, 2018 in an 'Order Denying Motion to Dismiss' that there is sufficient material fact of difference that ruled out a Summary Judgement. For convenience, the reasoning of this valid ruling has been included within the endnotes.[iii]

b. Accordingly, this Examiner must also consider a Summary Judgement decision on a Short Plat in a way that no other reasonable minds 'could draw different conclusions from the facts presented, and all of the facts necessary to determine the issues are not present. Summary judgment is not proper under these circumstances.'

c. Following the precedent set by MUP-17-036, this appeal order suggests biases against the Appellant or for the Applicant inconsistent with Civil Rule 56(c). These irregularity in the proceedings has resulted in the Appellants Neighbors to Mirra Homes Development from having a fair hearing.

B. The appeal relies on all of the evidence available as will be elaborated herein.

C. It is very unusual for the office of the Hearing Examiner to combine three separate short plat applications into one. It is more common for the Examiner, under HER 2.08, to combine multiple appellants to one application into one appeal case.[2] It is unusual, therefore, for the analysis to lump all three appeal together. Given the southern of the three parent lots is uniquely bounded by a neighbor's significant fir tree, that location requires additional analysis. Evidence shows that an exclusive electrical utility easement runs along the south boundary of MUP-19-020, thereby compromising the existing tree.[3] Similarly, the northern of the three parent lots is bounded by one exceptional street tree and two neighbor's trees.[4] In addition, the two

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[2] Recent examples of multiple appellants to one City department decision includes MUP-15-006 to MUP-17-007, MUP-19-004 to MUP-19-015 , and W-17-006 to W-17-014; there is no example evident in the past 4 years checked of multiple addresses being combined into one appeal. See https://www.seattle.gov/examiner/casesearch.htm

[3] Appeal attachment M: Terrane drawings for 3410 23rd Ave W including 3, 4 and 5 of 5, dated 08/17/18.

[4] Appeal attachment A: Terrane drawings for 3422 2rd Ave W including 3, 4 and 5 of 5, dated 01/14/19.

southernmost lots are dependent on the northernmost lot in over to provide a turnaround at the end of a dead-end alley exceeding the maximum allowed length of 150 feet. By not analyzing each of these lots on their individual configurations is irregular.

D. Time constraints of only thirteen (13) working days for the Hearing Examiner to review the evidence may have truncated the quasi-judicial proceedings for an adequate review. This is also evident with the Appellants' July 18th reply to the Motion for Summary Judgement immediately followed the July 15th consolidation of the three appeals (reference the dates within the partial list of submissions included within the endnotes of this document.)[iv]

Evidence Relied Upon.

A. This motion relies on the pleadings and papers on file argued within the appeal and subsequent Appellant reply to the motion for summary judgement.

B. The Order appears to make frequent references to pleadings and some of the applicable code sections. Yet, the many papers on file and included attachments to the Appellant's pleadings have little or no references within the Examiner's order, possibly suggesting that the appeal proceedings paper records evidence may have been overlooked given that these items were not addressed in the appeal Order. The brevity of the appeal proceedings review is especially evident when it comes to evidence received by the Appellant following the issuance of subpoenas to six individuals professionally involved in the matters leading to the Short Plat decisions. In the prehearing of case MUP-19-021, the decision to consolidate the third appeal was made by the Deputy Hearing Examiner assuring the concerned Appellant that there would be 'plenty of time' without a continuance for the proper discovery to be made from the six subpoenas that were issued on July 15. Given then 7 days of notice provided in the subpoenas, the earliest request for documents could be received was July 22, which was after the July 19th due date. In the case of the Department's civil engineer who requested a conditioned short plat, the response was delayed beyond the 7 days.[v] Although sufficient time would indeed be

provided to gather evidence with the originally scheduled August 12 to August 15 hearing dates, expecting that evidence three weeks earlier in reply to a Summary Judgement via an untimely issuance of a subpoena requested in late June is contrary to the definition of a 'public hearing'.[vi]

C. The Hearing Examiner's analysis skims the surface of the applicant's arguments at face value without considering the standard of proof being the preponderance of the evidence.[vii]

Preponderance of the evidence

D. Questions in the Motion for Reconsideration and the preponderance of the evidence:

a. **Has the Examiner ponder all of the relevant evidence with the decision of Summary Judgement?** No, as elaborated herein.

b. **Did the Applicant's Motion for Summary Judgement challenge all of the elements of the appeal?** No, the examiner attempts to compensate by offering argument instead within section B (page 6) of the Order.

c. **Has the motion for Summary Judgement been granted based on only if all reasonable persons could reach only one conclusion?** No, as demonstrated in section II. B below relative to recent Hearing Examiner case MUP-17-036.

d. **Did the Order consider the evidence presented with the Summary Judgement and reply by the Appellant in prejudice to the non-moving party, the Appellant?** No, there was no element of the appeal where presented the facts that the Examiner reflected in favor of the non-moving party. This is especially a concern for the health, safety and welfare considerations of emergency vehicle access to the proposed alley-right-of-way-facing properties that would be generated by the act of the Short Plat.

e. **Was the evidence that was presented with the appeal but not included within the analysis of the Examiner's Order?** No, section B (pages 5-7) of the appeal on the northernmost lot that aligns with the northern edge of the dead-end unimproved alley right-of-way was not discussed or considered within the Order.

f. **Has the Examiner considered the vehicular access criteria of SMC 23.53.005 and 23.53.025?** Yes, but the Examiner has interpreted that an unimproved alley right-of-way (that the survey drawings identify as only 16-feet in width) qualifies as a street by SMC 23.84A.036.S. This interpretation is likely not to be shared by all within the criteria for Summary Judgement. Accordingly, the Order's dismissal of SMC 23.53.025 may also be outside the criteria for Summary Judgement.

g. **Has the Examiner considered the legal lot definition within in SMC 23.84A.024 when considering access requirements?** No, if a property is subdivided, it is important that each resulting new lot meets all the requirements of SMC 23.84A.024[L].[viii]

h. **Has the Examiner included the criteria SMC 23.24.040.A.7 in the analysis proposed division of land is designed to maximize the retention of existing trees?** Yes. But not in the context of the utility access easements shown on the three short plat submissions.[ix] The appeal item has not been adequately analyzed as elaborated within the endnotes of this document.

i. **Pursuant to SMC 23.24.040, did the Department's Director conferring with appropriate officials in review of the Short Plat criteria to determine whether to grant, condition, or deny a short plat**? No, the evidence clearly shows that the Department had not evaluated the requirements of the land-use codes 23.84A.024, 23.84A.032, 23.53.005, and other codes mentioned herein. Most important, the Fire Department is on record that they have not provided any reviews of proposed lots relative to fire suppression or emergency vehicle access or compliance with the International Fire Code Appendix D for dead-end alley access as indicated in the appeal MUP-19-021.[x]

j. **Shall the Order be reconsidered for a hearing to evaluate the evidence?** Yes.[xi]

(2) Newly discovered evidence of a material nature which could not, with reasonable diligence, have been produced before the hearing.

E. Given the above relative to the lack of evidence reviewed and the Applicant's request to continue the original appeal hearing schedule prior to the consolidation and issuance of subpoena, it should be no surprise that more evidence had been compiled past the date the subpoena was issued – the same date the Appellant's were required to submit their reply to the Motion for Summary Judgement. Therefore, it is necessary for the Examiner Appellants to reconsider a premature decision before scheduled hearing or for the Appellant to be allowed the Offer of Proof (per HER 2.02(r)) so that the record conveys what excluded evidence should be admitted.

   a. Evidence includes all recorded documents already included within the MUP-19-019 record online with the Office of the Hearing Examiner. An end-note further expands on the evidence available that was not available at the time of the Appellants' reply to the Motion for Summary Judgement. [xii]

   b. Inclusive of the above, the Offer of Proof includes up to 107 documents that have been prepared before the hearing as sent to the Applicant and Department.[xiii] Some of these documents, of course, were already submitted by the Applicant or by the Department with their motions and responses.

(3) Clear mistake was made as to material facts

F. The evidence relies on the Examiner considering the full application of the Seattle Municipal Code as applicable to the criteria of the Short Plat Application. As indicated below, the Appellant's ask for the Examiner to look beyond just one section of the code as was clearly done for the appeal issue relative to emergency access.[xiv]

   a. We find the non-substantiated decisions in this case. Despite the differences in the three properties relative to existing trees and alley access, all three of the published 'Analysis and Decision of the Director of the Seattle Department of Construction and Inspections' are identical cut-and-paste analysis and conclusions.[xv]

      i. Planner David Landry states for each that "the above criteria have been met. The short subdivision meets all minimum standards or applicable

exceptions set forth in the Land Use Code. This short subdivision will provide pedestrian and vehicular access." For the land use code, the conclusion only states that the "Future construction will be subject to the provisions of SMC 23.44.008, 25.09.070, 25.11.050 and/or 25.11.060 which sets forth tree planting and exceptional tree protection requirements on single family lots." It fails to include the provisions of 23.84A for rowhouses and easements, and it fails to include the provisions of 23.45.510 and 23.45.512.

ii. As such, the short plat approval does not provide any other opportunity to challenge the code compliance of noncompliant row houses built between the street and the townhouses.[5] Instead, an approval of the Short Plats will become an alibi that there are now are six separate and independent lots. In reality, this is one development site of six structures being developed simultaneously by Mirra Homes with the same architect, same geotechnical engineer, same Department Planner. We find that the Short Plat is deemed the land-use mechanism as for which to circumvent stated land-use codes contrary to the criteria. Especially by the action that the appeals have been combined into one, both the Office of the Hearing Examiner and the Superior Court has the wherewithal and the authority to remand the Department's attempt to circumvent the optics of the project's scale. The application is providing non-compatible housing types (row-houses with townhouses or detached single-family residences) of a quantify exceeding the intentions of the identified zoning (LR1).

b. In this case, the Director has intentionally not complied with the land use code. As stated in correspondence of public record[6], the assigned Department Planner David Landry writes "There is no upzone as part of this application. The applicant

[5] SMC 23.84A.032.R.20(f)

[6] Appeal attachment '5' email from David Landry to appellants on MUP-19-021 Dan Monahan and Megan Whalin "Short Plat application and public comment" dated February 25, 2019 7:56:00 AM.

is doing short plats so they can build rowhouses on the street facing lots and townhouses on the alley facing lots. *Townhouses are only prohibited behind rowhouses if they are on the same lot*. With the short plats they will be on different lots." The Planner has disclosed that they are fully aware of the short plat's intent which is to explain a non-compliant development policy that effectively increases the allowed density without a contract rezone that would be ordinarily require. It is no wonder that the City Council is unaware of the density increases through this manipulative policy – nor do uninformed Seattle residents know of this Department act.[xvi]

c. The requested relief of the appeal included the 'imposition of conditions to assure compliance with the Land Use code relative to multifamily residential standards and Rowhouse Development Rules which prohibit primary dwellings behind row-houses. Specifically, SDCI has written that developers must 'follow the development regulations that are in place at the time they apply for permits'. This review must be remanded to the Department Staff that are responsible for checking to ensure that what is being proposed meets the applicable codes. The Department has no legal obligation to grant a Short Plat approval with the intent of correcting a land use violation.[xvii]

<u>Case law applicable to these appeals: Faben Point Neighbors v. City of Mercer Island</u>

G. The Appellants have appropriately filed an appeal specific to this issue which the Hearing Examiner is obligated to provide a ruling on. This ruling must consider applicable case law statutory construction. As in this case where the Department has offered the City's goal of 'adding more housing within Multifamily zoning areas', neither the Director nor the Applicant has offered a point of law that allows circumventing the dwelling count density limits of SMC 23.45.512 (prior to 2019 amendments); nor have they offered a

point of law that circumvents the row-house development rules of SMC 23.84A.032.R.20.[7]

a. Specifically, the case law that questions the basis of Summary Judgement is this particular appeal is the Mercer Island City Council decision to exceed allowable density per lot development.[8] As in this case where the Mirra Homes development has clearly identified within the public-record MUP applications of their intent to develop these lots with two non-compliant townhomes behind three row-houses on each of the three functionally-related parent lots, the proposed number of dwellings the three adjacent lots – fifteen (15) – far exceeds the allowed zoning code requirements of the Seattle Municipal Code Title 23 of just nine (9) dwellings.[xviii]

b. The Department, as evidence has presented, looks to the practice of lot segregation either by short plats or by lot boundary adjustments as an excuse to exceed the land-use code limits. Like the case of Faben Point Neighbors v. the City of Mercer Island, there is no ambiguity in the code requirements for these three lots being subdivided into six lots in the pursuit of exceeding dwelling capacity limits, but there is only ambiguity in terms of the Seattle Department of Construction and Inspections application of the code as it pertains to Short Plat Subdivisions (discretionary decision) and Lot Boundary Adjustments (non-discretionary decision).[xix]

c. Under the Land Use Petition Act (LUPA), the trial court reversed the City's approval of the subdivision, concluding that the development violated the City's minimum lot dimension requirements, and that the City erroneously interpreted the law in determining otherwise. Similarly, the Appellants have disputed this

[7] These points have been included and elaborated on within both the Appellants' appeals and the consolidated reply to the Applicant's Motion for Summary Judgement.

[8] Faben Point Neighbors (W. Hunter Simpson and Craig E. Tall, Respondents), v. City of Mercer Island and Pacific Properties, Inc. and Samis Foundation. No. 44847-1-I. Decided: August 28, 2000.

subdivision that fails to comply with the first approval criteria of Short Plat approvals.

Other Case law applicable to Hearing Examiner's Authority

H. Should there be any ambiguity of where the Examiner may have the authority in this case, the Examiner should reconsider their decision relative to the Land Use Petition Act, RCW 36.70C, which provides for review of land use decisions.[9] In pertinent part, LUPA provides that a court may grant relief if the party seeking relief can establish that "[t]he land use decision is an erroneous interpretation of the law, after allowing for such deference as is due the construction of a law by a local jurisdiction with expertise." [10]

   a. In terms of density limits within LR1 zones and rowhouse development rules within any Seattle zone, the requirements are unambiguous. Absent ambiguity, there is no need for the agency's expertise.[11] In other words, the Hearing Examiner has the ultimate authority to interpret a statute. Because municipal ordinances are the equivalent of a statute, they are evaluated under the same rules of construction.[12] Interpreting the Zoning Code is not required when the land use code requirement are clearly defined as appealed.[13] All the words of the ordinances must be given effect.[14]

I. In approving the proposed subdivision when the resulting maximum lot density and the proposed rowhouse development violate the City's zoning ordinance, the Department has

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[9] Tugwell v. Kittitas County, 90 Wash.App. 1, 7, 951 P.2d 272 (1997). In addition, the Association of Rural Residents v. Kitsap County, 95 Wash.App. 383, 391, 974 P.2d 863, affirmed in part, reversed in part on other grounds, 141 Wash.2d 185, 4 P.3d 115 (2000).

[10] RCW 36.70C.130(1)(b). Construction of a statute is a question of law and is reviewed de novo. McTavish v. City of Bellevue, 89 Wash.App. 561, 564, 949 P.2d 837 (1998).

[11] Waste Management, 123 Wash.2d at 628, 869 P.2d 1034.

[12] McTavish, 89 Wash.App. at 565, 949 P.2d 837.

[13] Reference SDCI's published 'Seattle's Low-rise Multifamily Zones' document (online www.seattle.gov/Documents/Departments/SDCI/.../MultifamilyZoningSummary.pdf). Reference SMC 23.84A.032. R(20) and vested version of SMC 23.45.512 Table A prior to the Ord. 125791 , § 35, passed a few months ago.

[14] City of Seattle v. State Dep't. of Labor and Indus., 136 Wash.2d 693, 698, 965 P.2d 619 (1998) "Statutes must be interpreted and construed so that all the language used is given effect, with no portion rendered meaningless or superfluous." (citations omitted)).

committed an error of law. In this case, the Department imposed the condition for soil stabilization on the development of the sites with the approval for these three lots. Accordingly, the Examiner must remand the decision to the Department so that the conditions of SMC 23.84A and SMC 23.45 as references above are equally as applicable to future development. As in case law of a municipality adopting the Faben Point subdivision, the Examiner should affirm the superior court's conclusion that the City erroneously interpreted the law and remand this matter to the Department for further proceedings consistent with the decision of the superior court of Washington State.

J. The Departments' lack of enforcement of the Code must not be misconstrued by this Applicant as a sudden philosophical or policy conflict given that for the past few years the Department has allowed lot segregations to supersede the density requirements. As in the minimum lot dimension requirement policy overlook in the above described case law, the appellants urge this Examiner to request the Department to defer to its "reasonable interpretation" of the law.[xx]

K. Department policy with evident conflict with the Seattle Municipal Code Title 23

   a. The Examiner is asked to further consider the evidence offered as proof within the Appellant's reply to the Motion for Summary Judgement.

   b. Title 19A.08.180 of the King County Code recognized this land-use malpractice back in 1999 and specifically wrote provisions to prohibit such acts.[xxi]The Seattle Municipal Code is silent about the policy of circumventing zoning density – making the SDCI policy ripe to challenge as an action working contrary to the Code.

   c. The Offer of Proof indicating Department policy does not constitute law is inherent within the case law example of Faben Point Neighbors v. Mercer Island. The proof that the Department is not enforcing applications that exceed land use provisions prior to reviewing and approving a Short Plat is evident from correspondence from April through July 2018 between the Deputy Mayor, the Department's Director Nathan Torgelson, and Department staff with a Seattle

resident Henry McGuire.[15] In terms of short plats being used as a means to circumvent compliance with the relative SMC 23.84A.032.R code section permitting row-houses to be in front of other primary dwellings, Mr. McGuire persistently asked about the legal grounds for the contract re-zone on a single lot. He expressed concern that the "City effectively acted in conspiracy with the developer to defraud the original property owners who sold at the best price they could get only to have the City up-zone their lot making it more valuable after the sale." He asked, "How do you view all of this? Is single parcel up-zoning City policy? What is your department's legal authority to do this? Do you feel there is an uncompensated taking of intrinsic value from neighbors when spot up-zoning is allowed? Do you think original property owners who sell their lot to a developer have a right to be compensated for having their properties made more valuable by the City after the sale?"

d. In response, the Director states "During the last several years, the questions you have raised about platting smaller lots and various configurations have been contemplated by City staff and the City Council and some changes to the code have been made. I appreciate that the City's Land Use Code is very complex. The Seattle Comprehensive Plan anticipates the need to absorb more housing as the city and the region grows. Much of that housing is planned to occur in Multifamily and Neighborhood commercial zones (and not in single family zones), and City staff and our civic leaders try hard to balance the need to support the creation of more housing while also recognizing that new denser development is changing our neighborhoods." [page 1 of Attachment 'GG']

e. The Director previously stated in an April 4, 2018 reply to Mr. McGuire regarding an historical lot boundary adjustment being used to permit a detached single-family residence behind three rowhouses, "The overall proposal includes a

[15] The original subpoena requested Director Torgelson to testify as to the intent of the correspondence if it was questioned at the scheduled August 12, 2019 appeal hearing. It was ruled that the Department's planner responsible for this Short Plat and other MUP permits could represent Director Torgelson's intent.

lot boundary adjustment (LBA) to reconfigure the two existing legal lots."[16] The Director continues: "*If the LBA is approved*[17], the Seattle Land Use Code *will allow development of rowhouses along 11th Avenue West on one lot and a single-family residence on the other lot along the alley*. This is allowed in the Low-rise 1 (LR1) zoning district which is a multifamily zone and has been the zoning designation for this property for many years." The statement infers that if the Lot Boundary Adjustment (LBA) is not approved, then the rowhouses with the single-family would not be approved.[xxii]

L. The Appellant requested of the Department by subpoena for all interpretations issued since 2005 regarding departures, exceptions or Variances from the Short Plat subdivision requirements of Chapters 23.09, 23.24, 23.53 and 23.84. As evident within Appeal Attachment 21 dated July 22, 2019, only three documents were sent. Despite the expansive use of the Short Plat policy to circumvent the zoned density limits, there were no discovery findings of significance that would indicate a Departmental or Citywide policy to allow additional housing with a variance to the code requirements. Given the Department and Deputy Mayor have been alerted of this act for over a year, one could assert the action is intentional. If lot segregation is indeed a method of contact rezoning, then it should be moved from policy to law through City Council action. One does not need to declare an already non-compliant act by further adding similar language in the Code. Thus, this issue must be remanded by the Examiner back to the Department.

M. Subdivision proposed will not create a Legal Lot without emergency vehicle access.

   a. The appellant acknowledges the examiner's interpretation of the alley being considered the access to the alley-facing lots. By definition, legal lots[18] must have access to a street. As indicated in the appeal, there is a review comment recorded

[16] To clarify, the response neglected to clarify that the 'two existing legal lots' were actually one purchased taxable lot consisting of two historical parcels partially shared with adjacent taxable lots.

[17] The LBA for 1829 and 1831 11th Avenue West was subsequently approved to convert one taxable lot as recognized by King County parcel records into two separate taxable lots that promoted a concept that there was separate lots orientated to allow rowhouses along the street and a single-family along an existing improved alley.

[18] Unit Lots – as most often used in fee-simple multifamily lot subdivisions, are not legal lots.

on November 1, 2019 that states the fire department's concern that this project is not approved "if the approved fire apparatus access road does not meet the distance requirements set forth in SFC Section 503.1.1."

b. The Examiner has ruled (page 4) that the alley is defined as a public right-of-way per SMC23.84A.002-A. As such, it is assumed that the alley will be the approach for emergency access vehicles in lieu of a vehicle access easement through the street-facing portions of the subdivision. The Examiner states that no requirement in the platting criteria to provide special emergency access when the lots already abut the public street or alley edge.

c. Table A for 23.53.015 requires that the minimum right-of-way for existing non-arterial streets within LR1 zone is 40 feet. The existing alley right-of-way width is only 16 feet and does not qualify as a street.

d. Likewise, the Examiner must consider new alleys being created though the platting process are covered by SMC 23.53.030.

e. The Examiner must consider, however, if the alley is through street-to-street, or if it is a dead-end. In this case, the alley is a dead-end approaching from the south (Bertona) and it is over 150 in length to the two northern development lots. There is no possibility of extending the alley north to the Ruffner cross-street due to ECA steep slopes and potential landslide area.

f. The alley is unimproved as is. There are no conditions within the Short Plat decision to improve the alley and provide turnarounds to meet emergency access vehicle requirements. Instead, the only condition was mandating soil retention structures and a sequence of construction.

g. CRITICAL POINT: SMC 23.53.015 addresses improvement requirements for non-arterial streets with less the minimum right-of-way and dead-end streets. Subsection C, 2, c and d for 'Fire Access' requires access to be provided that meets the fire access road in Chapter 10 on the Seattle Fire Code, and that a vehicle turnaround be provided for dead-end streets. The Examiner or the

Applicant or the Department do not have the authority over the Department of Transportation and the Fire Department[19] to determine acceptable alternative means of emergency vehicle access for this development and five (5) other existing potential development build-out lots that back this dead-end portion of the alley.[20]

h. As diagrammed within appeal MUP-19-021, the Fire Code dead-end turnaround access requirements are identified within Figure D103.1 of the International Fire Code referenced by the City of Seattle Fire Code. If the Examiner's ruling is that alley access is what has been provided, than the minimum width of 20 feet exceeds the 16-foot width alley right-of-way width as required. Since no other parcel within this block has provided a short plat prior to this, they alley access to the new alley-fronting lots has not yet been required. Until such dead-end fire apparatus access turnarounds are provided, the Appellants' argument that the subdivisions proposed are not legal lots should be considered by the Examiner as the extent of their authority in this matter.

i. Thus, the Examiner must look beyond just whether or not if an alley exists, regardless if it is improved or unimproved. The Examiner must also analyze from the Seattle Municipal Code, Seattle Fire Code, and the evidence of the documents submitted by the surveyor, Terrane, to ascertain if the subdivided property adjacent to the alley complies with access requirement. The Appellant has provided evidence and was prepared with expert witnesses to clearly indicate that alley will not be compliant with the code requirements. Given the adjacent alley is partially improved to the first 100 feet, the remaining 150 feet length the northern point of the existing dead-end must be improved according to SMC Section 23.53.030. The three street-facing proposed lots must also have alley access. Per

[19] Both SDOT and SFD have been subpoenaed and requested to provide records on this short plat access.

[20] The Fire Code requirements have been included within the original appeal of MUP-19-021 given it is the most likely to require a turnaround easement and that the Applicant's geotechnical reports suggested a under-sized turnaround on the 3422 23rd Ave W property which is neither repeated or conveyed in any way on the Terrance application drawings or the architect's site plan and development drawings.

Code, "proposed new lots must have sufficient alley frontage to meet access standards."[21]

j. The Examiner shall consider[22] Code 23.24.035 - Vehicular access to new lots shall be from a dedicated street, unless the Director determines that the conditions exist, and permits access by a permanent private easement. Dedicated streets, sidewalks, and alleys shall meet the requirements of Chapter 23.53 and the Right-of-Way Improvements Manual.[23]

k. The Examiner shall consider Code 23.53.005 – At least 10 feet of the lot must abut a street, or requirements of 23.53.025.F must apply.[24]

l. The Examiner shall consider Code 23.24.040.A.9 if indeed the unimproved alley is to be improved as a means of providing parking access. "If the property proposed for subdivision is adjacent to an alley, and the adjacent alley is either improved or required to be improved according to the standards of Section 23.53.030, then *no new lot shall be proposed that does not provide alley access,* except that access from a street to an existing use or structure is not required to be changed to alley access. Proposed new lots shall either have *sufficient frontage on the alley* to meet access standards for the zone in which the property is located or *provide an access easement from the proposed new lot or lots to the alley that meets access standards* for the zone in which the property is located.

m. The examiner shall consider Appeal attachment 'I' issued with the appeal, which is a document titled "Vehicle Access Easement Standards" published on October 31, 2017 by SDCI Community Engagement. It states that the Department "require projects to meet these standards even for if the developments do not require or

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[21] SDCI's Tip 231A 'Application Requirements for Short Subdivisions and Unit Lot Short Subdivisions' Updated February 10, 2016, page 3.

[22] Or, in all cases, remand to the Department to consider.

[23] Private easements shall meet the requirements of Section 23.53.025.

[24] Code requirements of SMC 23.53.025F has been satisfied and was not challenged with the appeal. Where a lot proposed for residential use abuts an alley but does not abut the street [as with the appealed properties] where alley access is an exercised option, a pedestrian access easement may be provided of at least 5 feet in width.

provide parking. Even if the development does not have parking, projects need to provide adequate access for emergency vehicles."

n. The Examiner shall consider remanding conditions of the Department's approval if the existing alleyway is required to be improved to provide emergency vehicle access in-lieu of a vehicle access easement.

III. Countermotion for Summary Judgement on the Failed Application of the Criteria relative to Emergency Vehicle Access

The Appellants have argued within their appeals, motion responses, and herein that the life, safety, and welfare of the residents sharing the block will be potentially compromised without a clear indication of emergency vehicle access. No other property on the block has proposed subdividing the legal lot providing only access from the alley without also having access to the street of a complaint width and improved to provide access for fire-fighting apparatus. Other than an unsubstantiated declaration from the Department and an attempt at providing interpretations through the Examiner for the Applicant without expert testimony, the evidence clearly shows the matter is violates the requirements of the Code SMC 23.24, SMC 23.53, Seattle Fire Code Appendix D, and exhibits of evidence to the matter and as described herein in addressing the Examiner's interpretation.

Given the standard of proof being met with the preponderance of the evidence indicating the lack of any proposed acceptable fire access as approached from a dead-end alley, the Appellant's so move for a quick resolution by Summary Judgement in favor of the appeal relative to this matter of the criteria for emergency vehicle access.[xxiii]

IV. Concluding Reconsideration Actions

Disregarding the above pleadings, should the Deputy Hearing Examiner determine that the reconsideration or the Motion for Summary Judgement on the issue of Emergency Access should not have merit, then the Office of the Hearing Examiner shall prepare records of the case for State judicial review per HER 2.30 including (1) Department's decision or action being appealed; (2) Appeal statement; (3) Evidence received or

considered; (4) and Findings, conclusions and decision of the Hearing Examiner. No appeal recordings exist relative to evidence being presented.

We submit that the Examiner has authority in the requests of the consolidated appeal. Per HER 2.23 (c) "If the Hearing Examiner remands a matter for additional information, analysis, or other material, the Hearing Examiner shall retain jurisdiction in order to review the adequacy of the information, analysis, or other material submitted in response to the remand. The decision shall expressly state that jurisdiction is retained and what information, analysis, or other material is to be provided, and may indicate when it is to be submitted."

Dated this 19th day of August 2019.

Respectfully submitted,

David Moehring,

Neighbors to Mirra Homes Developments
3444B 23rd Avenue West
Seattle, Washington 98199

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

Neighbors copied to this appeal:
DANIEL+KAZUYO MONAHAN
3436 23RD AVE W 98199
and
MEGAN+TIMOTHY WHALIN
3434 23RD AVE W 98199

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

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

Discussion Endnotes:

[i] Recognizing this combined appeal includes combined appeals of MUP-19-021 (which includes the applications for addresses 3420 and 3422 23rd Avenue W), and includes the functionally-related addresses and corresponding appeals of MUP-19-020 which includes the applications for addresses 3410 (with SDCI's conditional approval of #6690478-CN) and 3412 (with #6689288-CN), as well as the parent case MUP-19-019 includes the applications for addresses 3416 (with #6689291-CN) and 3418 (with #6684561-CN).

[ii] The ten items of the combined appeals MUP-19-019, -020 and -021 include:

1) MUP-19-021, section item A (for Criteria 4): Failure of Applicant to document how Short Plat criteria is achieved, thereby not serving the public interest. [See also MUP-19-019, item A.d]
2) MUP-19-021, item B (for Criteria 2): Submissions showing all easements except fails to record the required vehicle access easements including required width and height. [See also MUP-19-019, item A.b and A.c]
3) MUP-19-021, item C (for Criteria 2): City's continued failure to enforce vehicle access easements to create legal lots. [See also MUP-19-019, item A.b and A.c]
4) MUP-19-021, item D (for Criteria 5): Use of Short Plat to Circumvent SEPA review thresholds; consequence to out-of-sequence administration of multiple simultaneous applications being deemed as 'independent reviews' prior to SEPA. [See also MUP-19-019, item A.e]
5) MUP-19-021, item E (for Criteria 1): Administrative errors in allowing non-compliant 15 dwelling proposal with Department policy use of Short Plats to circumvent density limits. [See also MUP-19-019, item A.a]
6) MUP-19-021, item F (for Criteria 5): Short Plat administrative errors with pending ECA of functionally-related development. [See also MUP-19-019, item A.e]
7) MUP-19-021, item G (for Criteria 2 and 5): Inadequate utility easements. [See also MUP-19-019, item A.b]
8) MUP-19-021, item H (for Criteria 6): Short Plat orientation requiring easements that do not consider the maximum retention of existing trees. [See also MUP-19-019, item A.f]
9) MUP-19-021, item I (for Criteria 5 and Conditional Approval): Type I conditional approval without Type II SEPA determination. [See also MUP-19-019, item A.e]
10) MUP-19-021, item J (for Criteria 1): Short Plat to circumvent Code-designated maximum dwelling count within LR1 zone and ignore rowhouse development rules. [See also MUP-19-019, item A.a]
11) MUP-19-021, items K and L (for Criteria 4): Short Plat over-development within ECA potential landslide zone. [See also MUP-19-019, item A.d]

[iii] Note that the Examiner must consider a Summary Judgement decision on a Short Plat in a way that no other reasonable minds 'could draw different conclusions from the facts presented, and all of the facts necessary to determine the issues are not present.' As such, the Examiner of MUP-17-036 concluded decidedly that "Summary judgment is not proper under these circumstances." See the following copy and pasted excerpt from this decision.

Considering all facts and reasonable inferences in the light most favorable to the nonmoving party, the pending motion must be denied. Consistent with his obligations, Mr. Eustis submitted the pending appeal, believing that the appeal is well grounded in fact, is warranted by existing law or a good faith argument, and that the appeal is not interposed for any improper purpose, such as to harass or to cause unnecessary delay.

With reference to conflicting points of view regarding the facts and regulations that should be considered in addressing this appeal, the parties clearly have a dispute as to whether the challenged short plat approval was properly issued by the Department. Essentially, the applicant asserts that it complied with applicable land use regulations and policies, and the appellant alleges they did not. At this point in the process, the evidence is sufficient to establish genuine questions of material fact. On this basis, the applicant's motion must fail.

Here, reasonable minds could draw different conclusions from the facts presented, and all of the facts necessary to determine the issues are not present. Summary judgment is not proper under these circumstances. Reasonable inferences can be drawn from the record that creates a genuine question of material fact that cannot be answered through information and evidence submitted with the applicant's pending motion. Similarly, the record and pleadings were not developed sufficiently to grant the appellant the extraordinary, affirmative relief that he requested in his response opposing the motion.

CONCLUSION AND ORDER.

The applicant's motion must fail because there are genuine issues of material fact that remain to be answered. Viewing the evidence in a light most favorable to the non-moving party, reasonable minds could draw different conclusions from the facts. At this time, all of the facts necessary to determine the issues presented are not present. For these reasons, applicant's pending Motion to Dismiss is denied, and this matter will go forward to hearing, on March 2, 2018, the date already established and announced during the Pre-

From MUP-17-036 "Order Denying Motion to Dismiss" posted on 2/16/2018 at 10:14:25 AM

[iv] Per HER 3.13, (a) Each party in an appeal proceeding has the right to notice of hearing, *presentation of evidence*, rebuttal, objection, cross-examination, argument, and other rights determined by the Hearing Examiner as necessary for the *full disclosure of facts and a fair hearing*. [Emphasis added.] From the website of the Office if the Hearing Examiner, this is a partial list of transactions between the consolidation of three appeals to the date of the Hearing Examiner's order on the Summary Judgement:

Prehearing Order for Consolidated Cases	7/15/2019 10:46:54 AM
Amended Order Consolidating Hearing	7/15/2019 11:54:54 AM
Decision and Order on Revised Request for Subpoenas	7/15/2019 11:57:05 AM
Subpoenas	7/15/2019 12:08:44 PM
Applicant Witness & Exhibit List	7/15/2019 12:17:23 PM
Department Witness & Exhibit List	7/15/2019 12:29:29 PM
Appellant Preliminary Witness & Exhibit List	7/15/2019 4:49:16 PM
Appellant Response to Applicant Motion Supplement	7/18/2019 10:01:46 AM
Applicant Reply ISO Motion	7/19/2019 3:19:40 PM
Declaration of Brooke Friedlander	7/19/2019 3:19:47 PM
SDCI Response to Subpoenas	7/22/2019 12:29:40 PM

SDCI Response to Subpoena & Certificate of Service	7/30/2019 12:15:35 PM
Appellant List on Mirra	7/31/2019 4:44:32 PM
Appellant Wit and Exh List on Mirra_Amended	8/1/2019 7:46:02 AM
Subpoena, Affidavit of Service, & Certificate of S	8/3/2019 8:26:15 PM
Declaration of McGuire and McChesney	8/5/2019 11:06:29 AM
Order on Motion for Summary Judgment	8/7/2019 9:52:35 AM

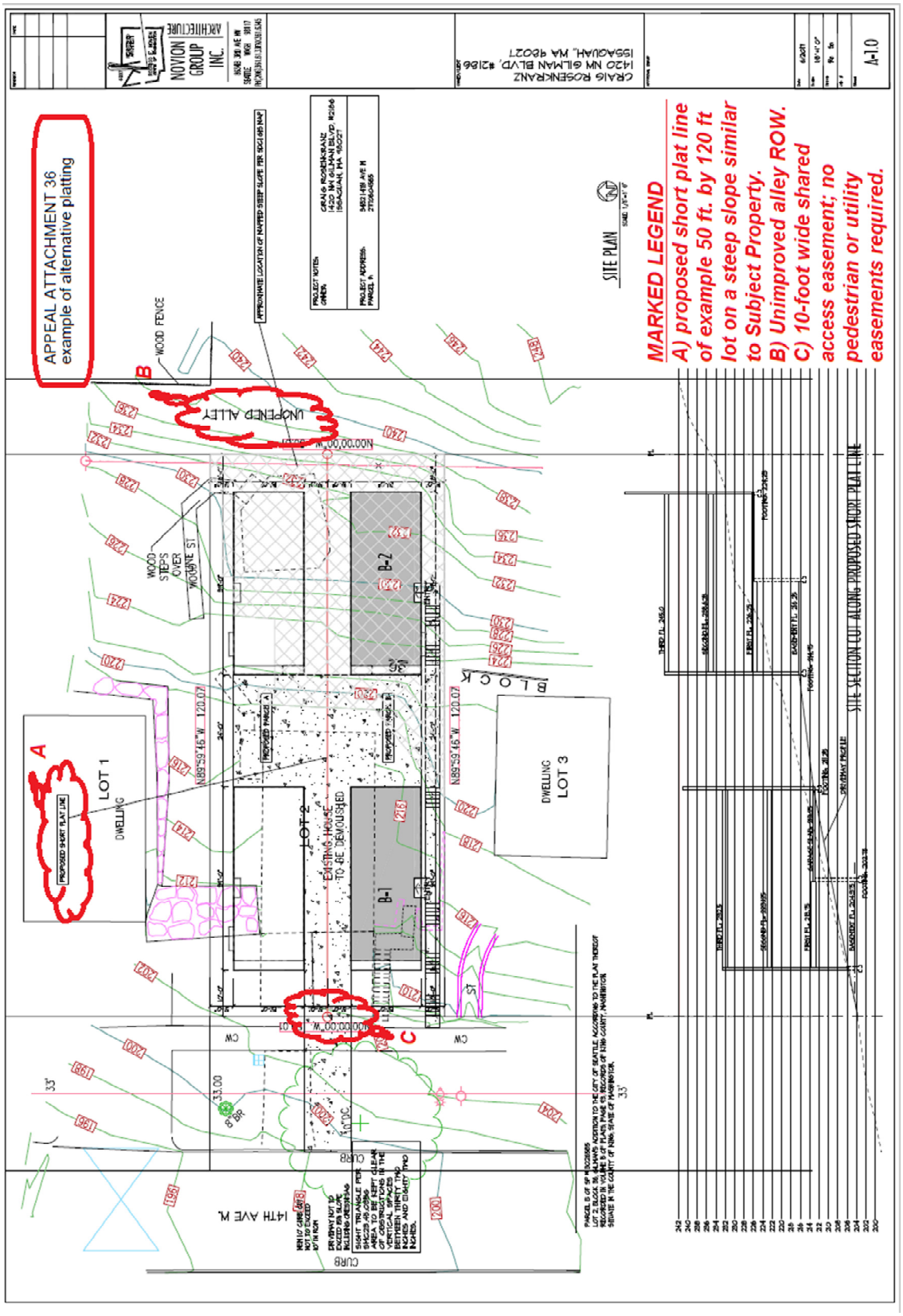
[v] Department's civil engineer Hiro Ikeda who requested a conditioned short plat was unable to provide a response by July 30. The response was delayed beyond the 7 days.

[vi] Even without all of the discovery supporting evidence received by the Appellant by the due date of the Summary Judgement response, the Motion for Summary Judgement was inadequate to counter the appellant clearly demonstrating the applicable standard of proof that the Department's decision and action did not comply with the law authorizing the decision or action.

[vii] H.E.R. 3.17 states that "Unless otherwise provided by applicable law, the standard of proof is a preponderance of the evidence." As apparent in the following endnote 'iv' and outlined within the (a) Appellant's appeal, (b) responses to Motions, and (c) final hearing exhibit list, there are numerous exhibits of evidence for each appeal item.

[viii] The legal lot definition of the land-use code section in SMC 23.84A.024."L" requires that each subdivided lot provides the following:
• A parcel of land that qualifies as a separate development;
• The lot abuts to a public or private street; or the lot shall be accessible from an exclusive unobstructed permanent access easement; and
• The lot may not be divided by a street or alley.
The east half of the lots that are proposed to be subdivided has not met this criteria that requires "A lot shall abut upon and be accessible from a private or public street sufficiently improved for vehicle travel or abut upon and be accessible from an exclusive, unobstructed permanent access easement."

[ix] Given the southern of the three parent lots is uniquely bounded by a neighbor's significant fir tree, the Terrane drawings clearly identifies an exclusive electrical utility easement serving the proposed east lot running along the south boundary of MUP-19-020, thereby compromising the existing significant fir tree. The Examiner notes that the tree is not Exceptional, which is correct. The criteria, however, requires that the short plat consider the maximum retention of existing trees - exceptional, significant, Heritage or within tree groves. Similarly, the northern of the three parent lots is bounded by one exceptional street tree and two neighbor's trees as shown on the submission existing lot survey drawings. As we know from Seattle Light with either overhead power and buried trenched underground power lines, these utilities and trees rarely co-exist.
That is why the Appellant argues that an alternative configuration of subdividing the lots where each lot will have both street and right-of-way frontage will eliminate the conflict with the tree retention criteria. From the subpoena discover request of the architect (received after the Appellants' reply to the Motion for Summary Judgement (reference timing issues discussed within this Motion), there was no alternatives considered to maximize the retention of existing trees by eliminating the need for utility and pedestrian easements conflicting with street and bordering neighbor tree driplines and critical root feeder zones. This is clearly not an issue that may be dismissed with Summary Judgement.
As an illustration and proof, the Attachment 36 was submitted to the Applicant and the Department with the Final Exhibit List due a few days before the Order was announced (below). [Notes in red color have been added by the author of this document.]


APPEAL ATTACHMENT 36
example of alternative platting
MARKED LEGEND
A) proposed short plat line of example 50 ft. by 120 ft lot on a steep slope similar to Subject Property.
B) Unimproved alley ROW.
C) 10-foot wide shared access easement; no pedestrian or utility easements required.
SITE PLAN
SITE SECTION CUT ALONG PROPOSED SHORT PLAT LINE
UNOPENED ALLEY
WOOD FENCE
WOOD STEPS OVER WOODWAY ST
LOT 1
DWELLING
LOT 2
EXISTING HOUSE TO BE DEMOLISHED
DWELLING
LOT 3
B-1
B-2
BLOCK
14TH AVE W.
PROPOSED SHORT PLAT LINE
CURB
CRAIG ROSENKRANZ
1420 NW GILMAN BLVD. #2186
ISSAQUAH, WA 98027
NOVION GROUP INC. ARCHITECTURE
A-1.0

[x] Per SMC 23.24.040.A – "The Director shall, after conferring with appropriate officials, use the following criteria to determine whether to grant, condition, or deny a short plat: (1.) Conformance to the applicable Land Use Code provisions, as modified by this Chapter 23.24A. Therefore, the Examiner must consider that the proposed development could satisfy the requirements of both the short plat regulations and the zoning code – especially when the intent of the application is known.

[xi] In summary, the Hearing Examiner is asked to consider the evidence relative to five criteria within SMC 23.24.040 by a careful review of the documents submitted with the three Short Plan applications:

a. Criteria 1: The Department has failed to demonstrate full conformance and apply conditions to the applicable Land Use Code provisions, as evident in Appeal Attachments 4, 5, 11, 12, 17, 18, 21, CC, F, GG, HH, M, MM, N, NN, O, OO and the Seattle Municipal Code.

b. Criteria 2: The Department has failed to demonstrate full conformance and apply conditions for adequate access for vehicles and fire protection as provided in Section 23.53.005 Access to lots as evident by Appeal Attachments 3, 8, 12, 16, 23, 24, 26, 31, C, D, G, I, II, M, MM, N, NN, O, OO and P.

c. Criteria 4: The Department has failed to demonstrate serving the public use and interests by permitting the proposed division of land as evident by Appeal Attachments 29 and GG.

d. Criteria 5: The Department has failed to demonstrate full conformance and apply conditions to the applicable provisions of Section 25.09.240, Short subdivisions and subdivisions, in environmentally critical areas as evident by Appeal Attachments E, G, and H.

e. Criteria 6: The Department has failed to assert that the proposed division of land is designed to maximize the retention of existing trees as evident as evident by Appeal Attachments 6, 26, 27, 28, C, and J ; and including the architect's drawing sets that show all street trees to be removed, and as evident by the architect's correspondence to the Department Planner ignoring the bordering tree on the neighbor's lot to the south, and as evident by the lack of alternative layouts to avoid impacting these tree's driplines.

[xii] Relative to the Appellant's case, the recorded documents of evidence already included within the MUP-19-019 record online includes the following:

a. All applicable sections of the Seattle Municipal Code Title 23.

b. Attachments A to H included within the appeals of MUP-19-019(P) and MUP-19-020(P) posted May 10, 2019.

c. Attachments 1 and A to H included within the appeals of MUP-19-021(P) posted on May 30, 2019.

d. Declaration with McGuire Attachments and Attachments J to M posted for MUP-19-019(P) on July 1, 2019. This shall include the Declaration by Henry McGuire dated July 31, 2019 (posted August 5, 2019).

e. Declaration of David Moehring, Architect, in Support of the Appellant's argument against the Motion to Dismiss and Summary Judgement dated July 1, 2019. It included attachments for record identified as 'J' through 'Q' as well as a diagram describing the four step process the Department policy has allowed to bypass row-house development rules.

[xiii] The actual exhibits were provided to the Applicant and the Department. Per the Pre-Hearing Order, just the list of exhibits were provided to the Hearing Examiner. Accordingly, the evidence being provided as an Offer of Proof includes those documents posted to the Office of the Hearing Examiner on July 31 ('Appellant List on Mirra') and amended immediately thereafter before 8am on August 1 ('Appellant Witness and Exhibit List on Mirra Amended'). Note that the Appellant Witness and Exhibit List on Mirra includes not only a list, but of what relevance the exhibit has relative to the issues identified within the appeals. Evidence in this case includes the following documents:

1) Attach_1_3410 23rd Ave W - BP Intake + 60% SIP.pdf
2) Attach_1_3410 23rd Ave W - BP Intake + 60SIP.pdf
3) Attach_2_Exhibit A of SMC 23-84A-024.pdf
4) Attach_3_2018-3-9 Appllts Supp Authority.pdf
5) Attach_4_AA_Moehring Declaration_01July2019.pdf

6) Attach_5_LU Short Plat application and public comment.pdf
7) Attach_6_1-DyingTreeAssessment_3420 23rd Ave email.pdf
8) Attach_6_2-DyingTreeAssessment_3420 23rd Ave WPDF.pdf
9) Attach_6_3422 23rd Ave West Landscape Plan_5.3.19-L2.pdf
10) Attach_6-DyingTreeAssessment_3420 23rd Ave_Photo.pdf
11) Attach_7_cam213A.pdf
12) Attach_8-Exclusive_definition.pdf
13) Attach_10_King County Title.pdf
14) Attach_11_1.pdf
15) Attach_11_2.pdf
16) 12.1_4307 Linden Ave N.pdf
17) 12.2_3032713-LU Approved Plan Set_No Alley.pdf
18) 12.3_924 NW 51 Example Plan Set.pdf
19) 12.4_Baker Street Plan Set.pdf
20) 12.5_Plan Set_example.pdf
21) Attach_13_1_6694807-EX_InformationalLetter.pdf
22) Attach_13_GEO_Scott_6694812-EX.pdf
23) Attach_14_ZONING Cover.pdf
24) Attach_14_ZONING Maps.pdf
25) Attach_16_McAndrews Decl_signed with Ex. A.pdf
26) Attach_17_MultifamilyZoningSummary.pdf
27) Attach_18_dpdp018956_sallyclark_memo.pdf
28) Attach_19_2018-1-19 Appellant's Supplemental Authority HOLD.pdf
29) Attach_20.1_MUP-19-019, MUP-19-020, & MUP-19-021 Request for Subpoenas 71519.pdf
30) Attach_20_AA_Subpoenas.pdf
31) Attach_21_1_Subpoena_SDCI-1.pdf
32) Attach_21_Subpoena_Interpretation_MUP-19-019_ETAL_Final.pdf
33) Attach_22_email_from_dmm.pdf
34) Attach_23_2012SeattleFireAppendixD.pdf
35) Attach_24_1_Plans for 3032857.pdf
36) Attach_24_2_Plans for 3032833.pdf
37) Attach_24_3_3032834 plans.pdf
38) Attach_24_Cover Letter_SFD.pdf
39) Attach_26_Aug01_MirraHomes_23rdAveW_Kick-OffPacket.pdf
40) Attach_27_1_Subpoena_Tony_Shoeffner.pdf
41) Attach_27_2_Subpoena_Tony_Shoeffner.pdf
42) Attach_27_2019-76 Mirra Homes 3410 protection report.pdf
43) Attach_28_ZZ-2018-71 Mirra homes 3424 23rd Ave W Report.pdf
44) Attach_29_1_WendyRobardssignedDeclaration.pdf
45) Attach_29_2_gbsignedDeclaration.pdf
46) Attach_31_figb18.pdf
47) Attach_32_South_LotB_SEPA_ChecklistUnsigned_Rev.pdf
48) Attach_33_DavidMoehringProfile2017.pdf
49) Attach_34 JayLaVassarResume062010.pdf
50) Attach_35 Michael Oxman Resume_2017.pdf
51) Attach_36_3452_incoming_Site.pdf
52) Attach_A_3410_3032833-LU.pdf
53) Attach_A1_3032940-lu noa & parties-checklist.pdf
54) Attach_AA_1_3424_3032878-LU.pdf
55) Attach_AA_2_3420_3032941-LU.pdf
56) Attach_AA_3_Published_Decision.pdf
57) Attach_B_3416_3032834-LU.pdf
58) Attach_B1_3032877-LU.pdf
59) Attach_B2_3032834-LU notofapp.pdf
60) Attach_BB_3420to3424_Permit and Property Records.pdf
61) Attach_C_ annotated photos_sept2018.pdf
62) Attach_C-1_Alley_images With fir.pdf
63) Attach_CC_ZZ_large sign 3032878-3032941.pdf
64) Attach_CC1_large sign_3410.pdf
65) Attach_D1_SDCI002_CorrectionLetter_20190226_073946.pdf
66) Attach_D2_SDCI002_CorrectionLetter_20181210_142107.pdf

67) Attach_D3_SDCI002_CorrectionLetter_20190301_101447.pdf
68) Attach_D4_SDCI002_CorrectionLetter_20190301_113054.pdf
69) Attach_D5_SDCI002_CorrectionLetter_20190419_101447.pdf
70) Attach_D6_SDCI002_CorrectionLetter.pdf
71) Attach_D7_ZZ_WAC20181384.pdf
72) Attach_D8_ZZ_SDCI002_CorrectionLetter_20181126_111502.pdf
73) Attach_DD1_ZZ_3420_SDCI002_CorrectionLetter_20181126_113935.pdf
74) Attach_DD2_ZZ_3424_SDCI002_CorrectionLetter_20181114_141157.pdf
75) Attach_DD3_ZZ_SDCI002_CorrectionLetter_20181126_111502.pdf
76) Attach_E_ZZ_181111-SDOT.pdf
77) Attach_F_3410_Site.pdf
78) Attach_G_ZZ_18-243 3410-3420 23rd Ave W GeoRpt.pdf
79) Attach_G_ZZ_Poster of above: geotech site plan.pdf
80) Attach_G1__geotech site plan.pdf
81) Attach_GG_McGuire2018_subdivisions.pdf
82) Attach_H_ZZ_geotech_2.pdf
83) Attach_HH_Plat Maps_KCPV.pdf
84) Attach_I_ Vehicle Access Easement Standards.pdf
85) Attach_II_geometric_design_highways_and_streets_AASHTO_reduced.pdf
86) Attach_J1_ZZ_Mirra homes Arborist Report.pdf
87) Attach_J2_ 3032833-LU - 3410 23rd Ave W .pdf
88) Attach_K 3410-3420 23rd Ave W.pdf
89) Attach_L1_3032833-LU and 3032834-LU.pdf
90) Attach_L2_3032833-LU and 3032834-LU.pdf
91) Attach_L3_3410-3420 23rd Ave W.pdf
92) Attach_L4_Townhouse and Duplex project.pdf
93) Attach_M_ZZ_Poster_Easements_Oct17.pdf
94) Attach_M_ZZ_RH_South_SEPASubmission_Oct17.pdf
95) Attach_MM_ZZ_jwa493_3412_TH_South_SEPASubmission_Oct17.pdf
96) Attach_N_ZZ_418_RH_Middle_SEPASubmission_Oct24.pdf
97) Attach_NN_jwa493_3416_TH_Middle_SEPASubmission_Oct24.pdf
98) Attach_O_ZZ_North_Plan Set_3422.pdf
99) Attach_OO_ZZ_jwa493_3424_North_TH_SEPASubmission_Oct16.pdf
100) Attach_P_Moehring-_email.pdf
101) Attach_P1_email25June2019.pdf
102) Attach_Q_LR1_Rowhouses_Code_Summary_Aug2017.pdf
103) Attach_R_AA_Appellant Reply SDCI Resp 3422 Subpoenas w AttachR.pdf
104) Attach_S_AA_Appellant Opposition to Motion Summary Judgement and MTD.pdf
105) Attach_N_ZZ_418_RH_Middle_SEPASubmission_Oct24-smallvers.pdf

[xiv] In all matters, the Washington State Supreme Court precedent favoring the vested rights doctrine and holding that compliance with the land use regulations that are in effect when the developer submits a plat application limit a local jurisdiction's discretion in considering a preliminary plat proposal. [Friends of Cedar Park Neighborhood v. City of Seattle, 156 Wn. App. 633, 234 P.3d 214 (Div. I, 2010).] In the case law Short Plat appeal MUP-17-036, the published Examiner 'Findings of Fact, Conclusions of Law, and Decision', page 4, line 15, the Examiner states "As noted by the appellant, the 'analysis' part of the challenged approval is minimal, at best. The entire 'Analysis' merely cuts and pastes some of the Seattle Municipal Code criteria for approval of short subdivisions, limited to items 1 through 8, found in SMC 23.24.040, followed by a short paragraph described by Mr. Suder as a summary statement, which includes the following conclusion: "the above criteria have been met.""

[xv] Given the ambiguity of the Department and their Applicable code SMC 25.09.260.D. The Director shall issue written findings of fact and conclusions to support the Director's decision. The process and procedures for notice of decision and appeal of this administrative conditional use shall be as prescribed for Type II land use decisions in Chapter 23.76.

[xvi] Residential development disclosure significance in past Short Plat appeal.

Unlike prior attempts to bring to the Hearing Examiner a short plat used for the purposes of circumventing rowhouse development rules, this application reveals the intent and reveals, therefore, that it does not comply with Title 23.84A land-se requirements. In Short Plat appeal MUP-17-036, the published Examiner 'Findings of Fact, Conclusions of Law, and Decision', page 11, item 36, the Examiner states "The Appellant's arguments about potential development on the site is built on speculation regarding what the applicant might choose to do with the two lots created by the short plat. At the short subdivision stage, the location of residential units (whether they are houses, townhouses or some other option), garages and other features on the lots is often unknown, as it is here. The concern in reviewing a short subdivision is access to the lots being created, and the Applicant demonstrated that access to Parcel B meets all Code requirements."

[xvii] In other words, a developer should be denied an application on a Master Use Permit that assumes that a subsequent Short Plat may be approved allowing them to bypass rowhouse development rules that are enforced on any other application that has not files for a Short Plat. Property owners have a right to develop land only if that development complies with applicable regulations. Per Appellant's reply to the Motion for Summary Judgement correspondence between the Department and Henry McGuire, on 4/10/18, SDCI's Roberta Baker wrote "SDCI has a responsibility to review permit applications to ensure *that developers follow the development regulations that are in place at the time they apply for permits*. The regulations we enforce encompass construction codes that provide standards for life safety, as well as land use regulations that govern the use and size of development private property. Property owners have a right to develop land if that development complies with applicable regulations. As mentioned before, this permit application is currently under review by department staff. Staff are responsible for checking to ensure that what is being proposed meets the applicable codes. I understand that some plan corrections have already been requested, however, if plans are eventually resubmitted, and reflect compliance with all codes that our department enforces, we will have a legal obligation to grant approval for the development, by issuing the requested permit." [Emphasis added at the key point that a lot development must follow the development regulations at the time they apply for permits. That being the case, in no instance should there ever be a submittal has proposed rowhouses between the street and other townhomes or primary dwellings in advance of a short plat being reviewed and granted as attempted here by Mirra Homes on three adjacent lots.

[xviii] SDCI Tip 213A 'Application Requirements for Short Subdivisions and Unit Lot Short Subdivisions' Updated February 10, 2016 confirms that the requirements applied to the parent lot prevail over lots subsequently created after subdivision. The document states "A short subdivision or short plat is a process that divides land into nine or fewer parcels of land (see Chapter 23.24 of the Seattle Municipal Code). The short subdivision process is less complicated than the more formal subdivision process. There is not a specific limit on the number of parcels that can be created through a subdivision (see Tip 213C, Subdivision Process and Requirements). You can do a typical short subdivision to create separate legal building lots, but not a unit lot subdivision. A unit lot subdivision divides a specific development proposal on a parent lot into separate unit lots that allow for separate ownership. *SDCI will evaluate the development standards for any future changes for the entire parent lot.*" [Emphasis added]. This referenced document permitting checklist requires submittals to include: "Width of rights-of-way and condition (paved, curb/gutter/sidewalk) of any abutting street/alley and/or easements; if the right-of-way is not improved with a hard surface, show proposed improvements to nearest street within 100 feet of property meeting this requirement."

[xix] Per SDCI Tip 201 'Master Use Permit (MUP) Overview Updated March 26, 2019, "Type I decisions are non-appealable decisions made by Seattle DCI which require the exercise of little or no discretion. Examples include *lot boundary adjustments,* street /alley improvement exceptions, temporary uses for less than four weeks, streamlined design review and zoning review on construction permit applications. Type II decisions are discretionary decisions made by SDCI which are subject to administrative appeals.

Examples include environmental review (SEPA), design review, variances, *short plats* and shoreline substantial development permits. Shoreline decisions may be appealed to the Shoreline Hearings Board, and other Type II decisions may be appealed to the City's Hearing Examiner." [Emphasis added]. Appellants' note: it is highly questionable – although outside the realm of this appeal – that significant lot boundary adjustments should be considered non-discretionary decisions whereas Short Plats are properly considered discretionary decisions.

The facts of the Mercer Island case law show that Pacific Properties proposed to create six lots, four on the waterfront and two inland. This is analogous to this appealed case where Mirra Homes seeks to create six lots from three existing lots. The City of Mercer Island's zoning code required that each subdivided lot meet certain minimum width and depth requirements. Of the six lots proposed by Pacific Properties, six of the four of the lots did not meet the code's minimum dimension requirement. Likewise, the Mirra Homes development exceeds the code's allowable density limits of the parent lots and three of the proposed subdivided lots would not have legal means of emergency vehicle access along a dead-end, unimproved alleyway. Although the Mercer Island City Council voted to approve the preliminary subdivision, neither the Planning Commission nor the City Council prepared written findings or conclusions that supported this action. Similarly, the Department has not published within their short plat decision that it would be allowed to circumvent the SMC code requirements. It should be noted that there is no other reason for the developer, Mirra Homes, to subdivide the lots. They have already prepared fully designed architectural and engineering drawings, as well as have submitted for application SEPA review documents for 15 dwellings on the three lots located with a SEPA ECA designated landslide area.

[xx] The nature of this appeal should not be taken lightly from the Office of the Hearing Examiner, as it exposes for the first time where the intent of the short plat is clearly documented in order to circumvent rowhouse development rules and maximum dwelling density within lowrise multifamily zones. Past policy is not a precedent as mentioned by the Seattle ProTem Hearing Examiner for the case MUP-17-036. In the Mercer Island case study, the City's six-year history of erroneously interpreting its zoning code does not alter the analysis. Misunderstanding or misinterpretation of a statute or ordinance by those charged with its enforcement does not alter its meaning or create a substitute enactment. Both the City and the developers are bound by the ordinances as written. See, e.g., Dykstra v. Skagit County, 97 Wash.App. 670, 677, 985 P.2d 424 (1999) (local government entity's prior erroneous enforcement of a land use regulation does not foreclose proper exercise of authority in subsequent cases), review denied, 140 Wash.2d 1016, 5 P.3d 8 (2000). In Clark County Natural Resources Council v. Clark County Citizens United, Inc., 94 Wash.App. 670, 677, 972 P.2d 941, review denied, 139 Wash.2d 1002, 989 P.2d 1136 (1999), this court explained: "Although a court will defer to an agency's interpretation when that will help the court achieve a proper understanding of the statute, "it is ultimately for the court to determine the purpose and meaning of statutes, even when the court's interpretation is contrary to that of the agency charged with carrying out the law." Here, in our view, the Board misread the statute and exceeded its authority. If we were to defer to its ruling, we would perpetuate, not correct, its error. Under these circumstances, we hold that deference is not due."

[xxi] King County Code prohibits the use of land segregation process to exceed the allowed density of the original lot. Reference http://www.kingcounty.gov/council/legislation/kc_code/22_Title_19A. KCC States: "19A.08.180 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)."

[xxii] Similar to the practice of Short Plats in order to circumvent density limits and rowhouse development rules is the use of Lot Boundary Adjustments including one taxable lot that may have an historical reference to two or more parcels being recorded within the lot. Although the context of Mr. McGuire's inquiries are on Lot Bouindary adjustments being used by developers to circumvent density rules, the Department policy to use Short Plats to achieve the same result applies here. Noteworthy with the Department's non-compliant use of historical Lot Boundary Adjustments is code RCW 58.17.040 (6) – as referenced by SMC 23.28 - which states: "A division made for the purpose of alteration by adjusting boundary lines, between platted or un-platted lots or both, *which does not create any additional lot*, tract, parcel, site, or division which contains insufficient area and dimension to meet minimum requirements for width and area for a building site." Also noteworthy is WAC 458-61A-109 (2)(a) which states, "A boundary line adjustment is a legal method to make *minor changes to existing property lines* between two or more contiguous parcels. Real estate excise tax may apply depending upon the specific circumstances of the transaction. Boundary line adjustments include, but are not limited to the following:

1. Moving a property line to follow an existing fence line;
2. Moving a property line around a structure to meet required setbacks;
3. Moving a property line to remedy a boundary line dispute;
4. Moving a property line to adjust property size and/or shape for owner convenience; and
5. Selling a small section of property to an adjacent property owner." Emphasis added.

[xxiii] As a case study to compare, the Examiner is encouraged to review the development located at 1112 13th Ave in which the Department required that the Applicant provide an access easement for application #3025383 with the application #3027267 in order to provide a turnaround for maneuvering vehicles (image above). Unlike this application for Short Plat Subdivisions which included no easement for emergency access, the example specifically included a description of the emergency access easement. For this case with the dead-end alley being the point of access as identified by the Examiner, that easement would require an additional 4 feet to the width of the alley right-of-way to achieve the minimum 20-foot width, and the easement would include a dimensioned emergency and non-emergency vehicle turnaround hammerhead or cul-de-sac area. Note that indicated in a correction response (below) for this example #3025383, even the proposal to have the client relinquish parking should not have eliminated the need for an access easement. The SDCI notice published October 31, 2017 (Attachment I) may have been triggered, in part, from code enforcement issues experienced by the Department.

From: Smith, Jeremy
Sent: Thursday, October 19, 2017 1:20 PM
To: Smith, Jeremy <Jeremy.Smith@seattle.gov>
Subject: RE: 3027267 - 8 sided lot correction

Brandon,

After sending this, and feeling awfully hard-skinned, I went to talk with Andy and Bill, and decided that this being a Type I, I'll allow the configuration. Additionally, due the fact that the building permit on the 1112 13th has its building permit, we won't functionally relate these things. What we will need to see is the recorded easement for access, that includes a turnaround for backing. So…disregard my previous e-mail. I decided to look for a solution that felt more reasonable than the let of the code….one that I would get to via an alternate interpretation.

Jeremy Smith
Land Use Planner
Seattle Department of Construction and Inspections

UTILITY & EMERGENCY ACCESS EASEMENT

AN EASEMENT FOR UTILITIES, INCLUDING BUT NOT LIMITED TO UNDERGROUND WATERLINE, POWER, GAS TELEPHONE, TELECABLE, SANITARY SEWER, STORM SEWER, FOR BUILDING REPAIR AND MAINTENANCE AND FOR EMERGENCY ACCESS TO CITY OF SEATTLE FIRE DEPARTMENT BENEFICIAL TO ALL LOTS WITHIN THIS UNIT LOT SUBDIVISION

THE NORTH 16 FEET OF LOT 2 AND THE SOUTH 18 FEET OF LOT 3, BLOCK 16, SUPPLEMENTARY PLAT OF EDES AND KNIGHTS ADDITION TO THE CITY OF SEATTLE, ACCORDING TO THE PLAT THEREOF RECORDED IN VOLUME 2 OF PLATS, PAGE 194, RECORDS OF KING COUNTY, WA.

EXCEPT THOSE PORTIONS BEING MORE PARTICULARLY DESCRIBED AS FOLLOWS:

COMMENCING AT THE S.W. CORNER OF SAID LOT 2; THENCE N 01°22'19" E ALONG THE WEST LINE OF SAID LOT FOR A DISTANCE OF 49.21 FT.; THENCE S 88°34'33" E, 7.75 FT. TO THE **POINT OF BEGINNING**; THENCE N 01°25'27" E, 23.58 FT.; THENCE S 88°34'33" E, 27.35 FT.; THENCE S 01°25'27" W, 10.00 FT.; THENCE S 88°34'33" E, 7.49 FT.; THENCE N 01°25'27" E, 10.00 FT.; THENCE S 88°34'33" E, 27.35 FT.; THENCE S 01°25'27" W, 10.00 FT.; THENCE S 88°34'33" E, 7.49 FT.; THENCE N 01°25'27" E, 10.00 FT.; THENCE S 88°34'33" E, 27.35 FT.; THENCE S 01°25'27" W, 23.58 FT.; THENCE N 88°34'33" W, 27.35 FT.; THENCE N 01°25'27" E, 10.00 FT.; THENCE N 88°34'33" W, 7.49 FT.; THENCE S 01°25'27" W, 10.00 FT.; THENCE S 88°34'33" E, 27.35 FT.; THENCE N 01°25'27" E, 10.00 FT.; THENCE N 88°34'33" W, 7.49 FT.; THENCE S 01°25'27" W, 10.00 FT.; THENCE N 88°34'33" W, 27.35 FT. TO THE **POINT OF BEGINNING**.

Source: SDCI EDMS for #3025383-LU project is located at: 1112 13th Ave, document titled "Plan Set" posted on 02/07/18 for Master Use Permit. http://web6.seattle.gov/dpd/edms/GetDocument.aspx?id=3599163

Certificate of Service

I, David Moehring, certify under penalty of perjury under the laws of the State of Washington that on this date I sent true and correct copies, via e-mail, of the attached the Neighbors to Mirra Homes Developments **Appellants' Closing Motions** to every person listed below, in the matter of the **Short Plat Subdivision decisions issued for 3410 to 3422 23rd Ave West,** Hearing Examiner File No.s MUP-19-019 and MUP-19-020 and MUP-19-022.

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Dated August 19, 2019

David Moehring
Appellants' representative, Neighbors to Mirra Homes Developments
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