

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

APPLICANT AND OWNER'S
RESPONSE IN OPPOSITION TO
MOEHRING'S MOTION FOR
RECONSIDERATION

I. INTRODUCTION AND RELIEF REQUESTED

After Moehring's appeal was dismissed in its entirety by Hearing Examiner Ehrlichman, he filed a motion (a) for clerical clarification, (b) reconsideration of the order on motion for summary judgment, and (c) for summary judgment on the emergency vehicle access issue. This motion should be denied. First, Moehring has failed to identify any clerical error that warrants clarification or reconsideration of the order. Second, he has failed to demonstrate that he is entitled to reconsideration of the order under HER 3.20. Third, the motion for summary judgment is untimely based upon the prehearing order, the Examiner lacks jurisdiction to consider the motion because the appeal has been dismissed, and it should be denied on the merits.

1 **II. STATEMENT OF FACTS**

2 This matter concerns three consolidated land use appeals of SDCI's approval of three
3 short subdivisions under permit numbers 3032834-LU, 3032833-LU & 3032857-LU¹ (the
4 "Short Subdivision") for the properties located at 3410 23rd Avenue West, 3416 23rd Avenue
5 West and 3422 23rd Avenue West (the "Property"). The Short Subdivisions sought to
6 subdivide the three parcels into two lots each. Mirra filed a motion to dismiss and for
7 summary judgment for permit numbers 3032834-LU and 3032833-LU. Thereafter, SDCI
8 issued a Decision² for permit number 3032857-LU that David M. Moehring subsequently
9 appealed.³ Mirra then filed a supplement to the motion to dismiss the third consolidated
10 appeal. On August 7, 2019, Hearing Examiner Barbara Ehrlichman issued an Order on
11 Motion for Summary Judgment (the "Order") that dismissed the consolidated appeals in
12 their entirety. 12 days later, Moehring filed a motion for (a) clerical clarification, (b)
13 reconsideration, and (c) summary judgment.

14 **III. STATEMENT OF ISSUES**

15 1. Whether the motion for clerical clarification should be denied because
16 Moehring has failed to identify any clerical error? **Yes.**

17 2. Whether the motion for reconsideration should be denied because Moehring
18 has failed to identify any basis under HER 3.20 for granting reconsideration? **Yes.**

19 3. Whether the motion for summary judgment should be denied because it is
20 untimely, the Hearing Examiner lacks jurisdiction to entertain the motion, and it is without
21 merit? **Yes.**

22 **IV. EVIDENCE RELIED UPON**

23 This response is based upon the pleadings and papers filed in this matter.

24 _____
25 ¹ The third Short Subdivision is attached as Exhibit A.

² The third Decision is attached as Exhibit B.

³ Moehring's third appeal is attached as Exhibit C.

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V. AUTHORITY

A. Moehring fails to identify any clerical error that warrants granting his motion for clerical clarification.

Moehring confuses the difference between a decision and an order. A decision, issued after a hearing, must contain certain information. Under HER 3.18 a decision must contain background, findings, conclusions, a decision and postscript. There is no similar requirement for orders that are issued to address motions. HER 2.02(s) defines an “Order” as: “a ruling, instruction, or other directive *issued by the Hearing Examiner in response to a request or motion by a party*, or on the Hearing Examiner's own initiative. Where allowed by law, an order may direct how the Hearing Examiner's decision is to be implemented and may be issued as part of that decision or separately” (emphasis added). Moehring claims that the Order should specifically identify the “outstanding issues” that were dismissed in Section B.4. First, as discussed above, HER 3.18 does not govern orders on motions. Second, even if it HER 3.18 did apply, there is no requirement that the outstanding issues be specifically identified in Section B.4 of the Order.

Moehring further argues that a clerical error was committed because the Order does not specifically state that on Mirra’s motion for summary judgment the facts should be considered in the light most favorable to Moehring. This argument ignores the fact that the Order correctly states the standard on a motion for summary judgment that: “The Examiner ‘must consider the facts in the light most favorable to the nonmoving party...’” Because Moehring is the nonmoving party, the Order correctly acknowledges that the facts must be viewed in his favor.

Finally, Moehring fundamentally misunderstands that Mirra filed a motion to dismiss and a motion for summary judgment. He argues that the summary judgment standard should have been applied to issues A.6, B.1, B.2 and B.4. These objections to the Director’s

1 Decision, however, concern legal issues. In other words, these issues do not concern
2 disputes of material fact. As such, there is no requirement that specific factual evidence be
3 presented on these issues because they are legal in nature.

4 **B. Moehring's motion for reconsideration should be denied because he has (a)**
5 **failed to identify any irregularity in the proceedings, (b) failed to identify newly**
6 **discovered evidence of a material fact, and (c) failed to identify a clear mistake**
7 **as to a material fact.**

8 1. There were no irregularities in the proceeding.

9 HER 3.20(a)(1) provides that the Hearing Examiner may grant a party's motion for
10 reconsideration of a Hearing Examiner decision if one or more of the following is shown:

11 (1) Irregularity in the proceedings by which the moving party was prevented from having a
12 fair hearing. The HER do not define or describe "irregularities." However, under CR

13 60(b)(1) irregularities occur when there is a failure to adhere to some prescribed rule or
14 mode of proceeding, such as when a procedural matter that is necessary for the orderly
15 conduct of trial is omitted or done at an unseasonable time or in an improper manner.

16 *Mosbrucker v. Greenfield Implement, Inc.*, 54 Wn. App. 647, 652, 774 P.2d 1267, 1270
17 (1989). CR 60(b)(1) contains similar language to HER 3.20(a) and provides in part that "the
18 court may relieve a party or the party's legal representative from a final judgment, order, or
19 proceeding for... [m]istakes, inadvertence, surprise, excusable neglect or irregularity in
20 obtaining a judgment or order." Thus, case law interpreting CR 60(b)(1) is instructive on
21 how this tribunal should interpret and apply HER 3.20(a). And Moehring has failed to
22 allege any facts that could be considered an "irregularity in the proceedings."

23 Moehring repeats the arguments raised in section A above that the evidence should
24 have been viewed in his favor. It was. The Order clearly states that: "The Examiner 'must
25 consider the facts in the light most favorable to [Moehring]...'"

1 The next argument raised by Moehring is that it was unusual for the appeals to be
2 consolidated. This, too, is incorrect. Because the three Director's Decisions concerned
3 adjoining short plats that concerned similar issues, it was proper for the Examiner to
4 consolidate the three appeals. The consolidation makes even more sense because Moehring
5 raised nearly identical objections to the Director's Decisions in his three appeals. In the
6 interest of judicial economy, it was appropriate to consolidate the appeals and does not
7 constitute irregularities in the proceeding.

8 More importantly, Moehring never once objected to the first two appeals being
9 consolidated or when the third appeal was consolidated. On July 8, 2019, a prehearing
10 conference took place before Hearing Examiner Vancil for MUP 19-021. Examiner Vancil
11 expressed support for consolidating MUP 19-021 with the prior consolidated appeals;
12 Moehring supported that idea because it would reduce the amount of work he would have to
13 perform. The third appeal was then consolidated under an Order Consolidating Hearing on
14 July 15, 2019. Moehring did not object when that order was issued and did not object until
15 after his appeals were dismissed. Moehring's late objection to consolidating the three
16 appeals is disingenuous at best.

17 Moehring further argues that 13 working days was not adequate time for the
18 Examiner to review the evidence and issue her Order. This is more than sufficient time for
19 issuing the Order and is not a valid basis for granting reconsideration. SMC 23.76.024.I
20 requires that the Hearing Examiner issue a written decision within 10 working days after the
21 hearing. And a full hearing requires the Examiner to review exponentially more evidence
22 and testimony than a motion.

23 2. There is no newly discovered evidence of a material nature.

24 Moehring claims that he received certain documents in response to his subpoena
25 after his deadline to respond to Mirra's motion. Even assuming this allegation is true, it is

1 not sufficient to warrant reconsideration because Moehring fails to establish, much less
2 allege, that the documents were material or that they would have any bearing on the Order.
3 He fails to attach one single document to his motion, material or otherwise. Thus, Moehring
4 has failed to allege that there was any newly discovered evidence that is of a material nature.

5 3. There was no clear mistake of a material fact.

6 Moehring fails to allege, much less demonstrate, that the Hearing Examiner made a
7 clear mistake of a material fact. Moehring devotes the entirety of this section to rehashing
8 the prior legal arguments raised in his appeal and response to Mirra's motion to dismiss and
9 for summary judgment. He primarily focuses on whether the Short Subdivisions circumvent
10 the allowed density for rowhouse units in LR1 zones. This is a purely legal argument.

11 Similarly, Moehring's arguments related to alley access and compliance with SMC
12 23.53 are purely legal in nature. Moehring does not identify a single mistake of material
13 fact that warrants reconsideration of the Order.

14 C. Moehring's motion for summary judgment should be denied because it is
15 untimely, the Hearing Examiner lacks jurisdiction to entertain the
16 motion, and it is without merit.

17 At the prehearing conference that took place on May, 29, 2019 – over two months
18 ago – Moehring did not inform the Hearing Examiner that he intended on filing any
19 dispositive motion. The Examiner then entered an Amended Prehearing Order that required
20 the Applicant and City to file a prehearing dispositive motion by June 10. After the third
21 appeal was consolidated, the Examiner issued a Prehearing Order for Consolidated Cases
22 that required the Applicant and City to file a supplement to the dispositive motion no later
23 than July 15. At no point did Moehring request permission to file a dispositive motion.
24 Thus, his motion for summary judgment is untimely.

25 On August 7, 2019, the Hearing Examiner issued the Order that dismissed
Moehring's appeal in its entirety. Once Moehring's appeal was dismissed, he lost the ability

1 to seek summary judgment on any of his appeal issues. Hence, the Hearing Examiner does
2 not have jurisdiction to consider Moehring's tardy motion for summary judgment on an
3 appeal that has already been dismissed.

4 Even if the Examiner were to consider Moehring's motion for summary judgment on
5 the merits, it must be denied. Moehring makes vague allegations that the Short Subdivisions
6 do not comply with SMC Chapters 23.24 and 23.53 due to inadequate fire access because
7 there is a dead-end alley. While this allegation lacks almost any factual substance,
8 Moehring seems to claim that the alley is not adequate and that access must be provided
9 from the street. As stated in section A.2 of the Order:

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

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

22 Moehring has failed to meet the standard for summary judgment. He fails to address, much
23 less rebut, the reasoning contained in the Order or otherwise provide a cogent explanation
24 for why he is entitled to summary judgment. This mandates dismissal of his motion for
25 summary.

26 VI. CONCLUSION

27 HER 3.20 identifies four narrow grounds under which reconsideration may be
28 granted; Moehring has alleged three of them: (1) Irregularity in the proceedings by which
29 the moving party was prevented from having a fair hearing; (2) Newly discovered evidence

1 of a material nature which could not, with reasonable diligence, have been produced at
2 hearing; and (3) Clear mistake as to a material fact. Moehring has not raised any new
3 arguments that were not previously raised in his three appeals or in his response to Mirra's
4 motion. His motion for reconsideration simply rehashes old arguments that have already
5 been dismissed by the Hearing Examiner. Thus, the motion for reconsideration should be
6 denied and the Order should be affirmed.

7 Respectfully submitted this 23rd day of August, 2019.

8
9 HELSELL FETTERMAN LLP

10 By: s/ Brandon S. Gribben

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15 LLC
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on August 23, 2019, the foregoing document was sent for delivery on the following party in the manner indicated:

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DATED this 23rd day of August, 2019

s/Gennifer Holland

Gennifer Holland, Legal Assistant