BEFORE THE HEARING EXAMINER
CITY OF SEATTLE

In the Matter of the Appeals of

NEIGHBORS TO MIRRA HOMES DEVELOPMENTS

from decisions issued by the Director, Seattle Department of Construction and Inspections

Hearing Examiner Files:

MUP-19-019(P), MUP 19-020(P) & MUP 19-021(P)

Department References:
3032834-LU, 3032833-LU, & 3032857-LU

ORDER ON MOTIONS FOR CLARIFICATION, RECONSIDERATION, AND SUMMARY JUDGMENT

On August 7, 2019, the Deputy Hearing Examiner ("Examiner") granted Applicants' and Owners' Brooke Friedlander, Andy McAndrews, Mirra 111 LLC, and Terrane, Inc. ("Applicants") summary judgment motion requesting dismissal of the appeals filed by Neighbors to Mirra Homes Developments ("Appellant") on three short subdivision approvals by the Director of the Seattle Department of Construction and Inspections ("Department"). The appeals were dismissed.

On August 19, 2019, Appellant filed "closing" motions for clarification and reconsideration. Appellant has also attempted to file a counter motion for summary judgment, which is untimely and will not be considered. Applicants opposed Appellant's motions, and the Director of the Seattle Department of Construction and Inspections ("Department") joined in the Applicants' opposition. The Appellant filed a reply and Applicants filed a sur-reply.

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

Motion for Clarification

Appellant requests clarification on three issues: 1) the meaning of the phrase "[s]ummary judgment should be granted on all outstanding issues" at p. 8 of the order; 2) whether the Examiner considered the facts in a light most favorable to the Appellant, the non-moving party; and, 3) whether the Examiner should have only considered the evidence of the Appellant on certain issues.

With respect to the first issue, the Examiner granted summary judgment to the Applicants on multiple grounds. As noted in the order, Appellant made many duplicative arguments in different parts of its response. Not all of those duplicative arguments were explicitly addressed, since that

would have made the order lengthy, repetitive, and unnecessarily difficult to understand. The grant of summary judgment "on all outstanding issues" simply clarified that the Examiner had considered all of the pleadings and determined that the grant of summary judgment is appropriate in this case.

With respect to the second and third issue, Appellant makes more of a legal argument than a request for clarification. As often occurs when summary judgment is granted, the non-moving party (the Appellant) accuses the decision-making body of not considering the facts in its favor. Here, however, almost all of the issues decided were issues of law. Most of the appeal issues raised by Appellant were either out of the jurisdiction of the Examiner or reliant on a mis-reading of code. As a result, summary judgment was granted.

In the briefing, Appellant did not appear to understand the limited scope of issues that can be addressed on an appeal of a short subdivision application. For example, one theme repeatedly sounded by the Appellant is that the subdivision applications were a means of subverting the rowhouse development rules. In making that argument, it is clear that the Appellant does not understand that the Examiner has no jurisdiction over the type of development that may eventually be applied for on these lots. The jurisdiction of the Examiner is limited to consideration of whether the application meets the code requirements for division of land. The Examiner's jurisdiction is narrow; the Examiner can only review those items specifically set out in the code that are timely appealed. The Examiner may not take on policy questions like how an Applicant may, or may not, be able to "get out of complying with the rowhouse development rules." That is something that may be addressed with elected officials or the Department, but not by the Examiner in this appeal.

As to the claim that the Examiner should have only considered Appellant's evidence, that too has no merit. When faced with Applicants' arguments on summary judgment, Appellant was required to but failed to raise any material fact on which the parties differed upon in interpretation. The Applicants' motion for summary judgment was based upon legal principles. Only with respect to the issue pertaining to the tree at the south property line of one of the plats did the Applicants bring in evidence to counter Appellant's argument, and that evidence was not refuted by the Appellant. A nonmoving party may only avoid summary judgment if it sets forth specific facts, which sufficiently rebut the moving party's contentions, and disclose the existence of a genuine issue as to material fact.[1] The Appellant did not disclose any genuine issue of fact, nor did it rebut the moving party's contentions. Summary judgment was properly granted.

The Examiner **DENIES** the Motion for Clarification.

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[1] *Meyer v. Univ. of Wash.*, 105 Wn.2d 847, 852, 719 P.2d 98 (1986).

Motion for Reconsideration

Appellant makes arguments under three of the four grounds for reconsideration permitted under the Hearing Examiner Rules of Procedure ("HER"): (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 hearing; and (3) clear mistake as to a material fact. *See* HER 3.20.

(1) Irregularity of proceedings.

The Appellant makes several related arguments under this ground. First, Appellant states that it is very unusual to "combine three separate short plat applications into one."[2] The Appellant misapprehends the meaning of "consolidation." The short plat applications were not combined into one; the identical appeals of three adjacent short plats were consolidated for hearing. This was done in accordance with HER 2.08 which states, "All cases under the jurisdiction of the Hearing Examiner relating to the same matter should be consolidated for hearing." Consolidation does not actually join the cases together, and the Examiner does not have the authority to do so. They are still three separate cases but are simply consolidated for hearing. Moreover, Appellant never objected to consolidation for hearing.

Appellant argues that the presence of trees on certain borders of the three plats justify hearing them separately. However, Appellant fails to cite any authority for this point. Appellant also argues that the existence of a dead-end alley in one of the plats also justifies different consideration. It refers to a fire code standard that, as stated in the Order on Summary Judgment, is not within the jurisdiction of the Examiner. All three plats meet the requirements of code with respect to frontage on a street or alley. There is no provision in the short plat code that references that section of the fire code to these divisions of land with access to public right-of-way. The Examiner cannot apply the fire code without explicit code authorization to do so. Nor can the Examiner order the Applicants provide more improvements than what is required by the short plat code.

Finally, the Appellant argues that there was too little time to adequately review the evidence. Again, the Appellant provides no citation to authority. Proceedings before the Examiner are by their nature, expeditious. HER 2.06. As noted by the Applicants, SMC 23.76.024.I requires the Examiner to reach a decision in a case after hearing in ten working days. Appellant also argues that there was not enough time to submit evidence that it received after issuing subpoenas. If that was the case, the Appellant should have filed a motion to extend time for response, or for filing motions. There is no merit to these arguments as a basis for reconsideration.

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[2] *Appellant's Closing Motions: Clerical Clarification, Reconsideration and Counter Summary Judgment* at 4, lines 16-17 (August 19, 2019).

The Appellant has failed to meet its burden to show that reconsideration should be granted due to an irregularity in the proceedings. The Examiner **DENIES** the Motion for Reconsideration on this ground.

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

The Appellant argues that the Examiner should have considered all the evidence before making any decision on the summary judgment. It provides a notebook with hundreds of pages of documents that it apparently expects the Examiner to comb through without any guidance from it as the submitting party. The Appellant never states what evidence produced is of a "material nature."

Despite having provided a huge number of documents, the Appellant does not cite to any of these documents in its briefing, nor does it provide any argument with respect to how particular evidence supports its position. In addition, the Appellant fails to demonstrate how such evidence would be "newly discovered." Appellant was required to submit evidence in response to summary judgment that would require denial of the summary judgment motion but failed to. There is no duty of the decision-maker to review any evidence that is not cited as a material fact or a document that supports a decision in favor of that party. The Appellant has failed to meet its burden to show that reconsideration should be granted due to newly discovered evidence of a material nature. The Examiner **DENIES** the Motion for Reconsideration on this ground.

(3) Clear mistake made as to material facts.

The Appellant reiterates its issues related to existing trees, alley access, and "noncompliant row houses." Each of these complaints was addressed in the August 7, 2019 order. The Examiner will not repeat the basis of those rulings; rather, the reader is referred to that order.

Appellant has failed to meet its burden to show that reconsideration should be granted due to a clear mistake made as to material facts. The Examiner **DENIES** the Motion for Reconsideration on this ground.

Order

The Appellant's motions for clarification, reconsideration, and counter motion for summary judgment are all **DENIED** in case numbers MUP-19-019 (P), MUP19-020 (P) , and MUP 19-021.

Entered this 3rd day of September, 2019.

Barbara Dykes Ehrlichman
Deputy Hearing Examiner

Concerning Further Review

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

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

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

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BEFORE THE HEARING EXAMINER
CITY OF SEATTLE

CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on this date I sent true and correct copies of the attached **Order on Motions for Clarification, Reconsideration, and Summary Judgment** to each person listed below, or on the attached mailing list, in the matters of **Neighbors to Mirra Homes Developments**, Hearing Examiner Files: **MUP-19-019 (P), MUP-19-020 (P), & MUP-19-021 (P)** in the manner indicated.

Party	Method of Service
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Dated: September 3, 2019

Galen Edlund-Cho
Legal Assistant