Deputy Hearing Examiner Ryan Vancil

BEFORE THE HEARING EXAMINER
CITY OF SEATTLE

In the Matter of the Appeal of: DAVID M. MOEHRING, from a decision issued by the Director, Department of Construction and Inspections.	Hearing Examiner File: MUP-18-001 Department Reference: 3028431 3641 22nd Avenue West APPLICANT'S REPLY TO APPELLANT'S RESPONSE TO MOTION TO DISMISS

COMES NOW, the applicant, Loren Landerholm and Sound Equities Incorporated ("Sound Equities"), by and through their undersigned attorney, Brandon S. Gribben of Helsell Fetterman LLP, and replies to appellant David Moehring's ("Moehring") Response to Sound Equities' Motion to Dismiss the Amended Appeal as follows:

On January 29, 2018, Sound Equities filed a motion to dismiss based on three separate and independent grounds, to wit: (a) the issues raised by Moehring in the Amended Appeal are without merit on their face, (b) were brought merely to secure delay, and (c) the Hearing Examiner does not have jurisdiction to award the relief requested. In his response, Moehring fails to rebut any of the arguments raised in Sound Equities' motion, mandating dismissal of his appeal.

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A. Moehring does not have standing to challenge Sound Equities' status as the applicant. And even if he had standing, he waived any rights he had by failing to raise it in his Amended Appeal.

Moehring claims that Sound Equities does not have standing to challenge the appeal because Moehring has not received evidence that Sound Equities has authority from the property owner to apply for a short plat. Moehring's challenge to Sound Equities' standing as the applicant is nothing more than an attempt to distract from the fact that his underlying objections to SDCI's Decision are baseless.

This issue should be disregarded by the Hearing Examiner for three primary reasons. First, a neighbor-appellant of a land use decision does not have standing to question whether the owner or applicant is authorized to apply for a particular permit. That is the sole province of SDCI. SDCI is vested with this authority under the Code, and the Decision confirms that Sound Equities is authorized to apply for the short plat.

Second, even assuming *arguendo* that Moehring could challenge the applicant's authority in a land use appeal, Moehring waived any rights that he might have had by failing to raise that issue in his Appeal. He also failed to raise that issue in his Amended Appeal. Moehring has already had two bites at the apple and the time to amend his appeal has long since passed. Thus, Moehring is limited to those issues raised in his Amended Appeal, which do not included challenging the applicant's standing.

Finally, the issue before the Hearing Examiner is, among other things, whether the Amended Appeal should be dismissed because it is without merit on its face. The issue of whether Sound Equities has standing as the applicant is not the subject of any motion before the Examiner, and thus, should not be considered.

B. The Permit for the short plat complies with the Code requirements governing approval of short plats.

Moehring alleges that the short plat does not indicate the location and size of the existing buildings or identify the trees that are located on the Site. Either Moehring is not

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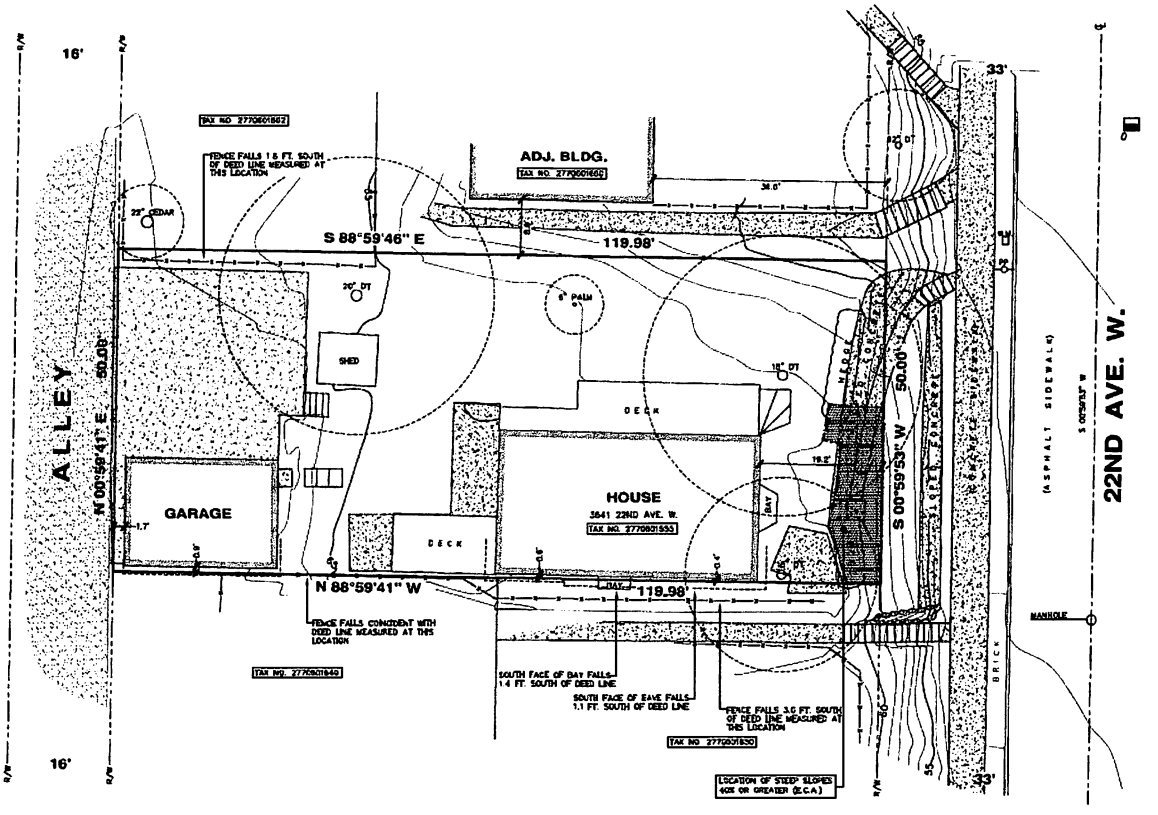
being candid with the Hearing Examiner or he has failed to perform even the most perfunctory review of the short plat. The short plat plainly identifies the location of existing structures and trees.[1]

SHORT SUBDIVISION NO. 3028431



Moehring goes on to allege that the short plat does not identify access for the public and emergency vehicles. This argument also falls flat. The short plat clearly shows that Parcel A will have access from 22nd Avenue West, and that Parcel B will have access from the Alley. In fact, all 15 properties to the south of the Site up to West Ruffner Street have access *only* from the Alley. The overhead views from the King County Parcel Viewer confirm this fact. Not only is access allowed from the Alley under the Code, SDCI has

[1] See Motion to Dismiss, Ex. B.

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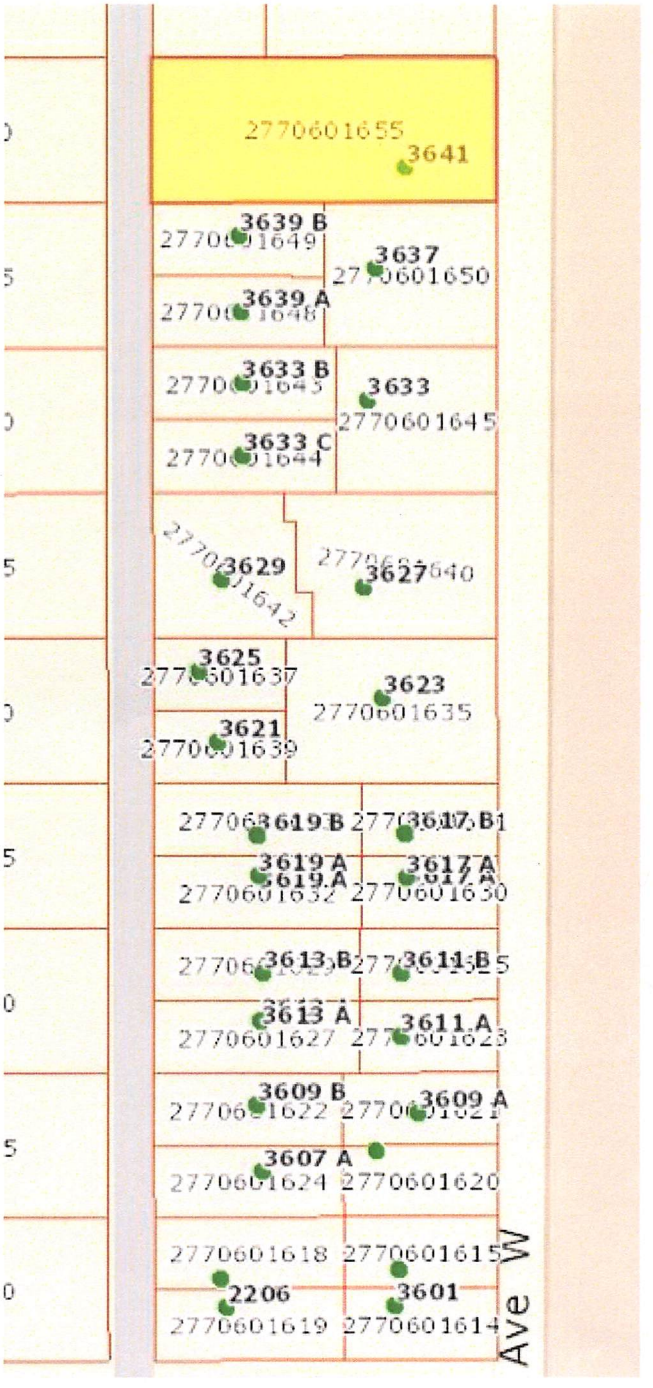
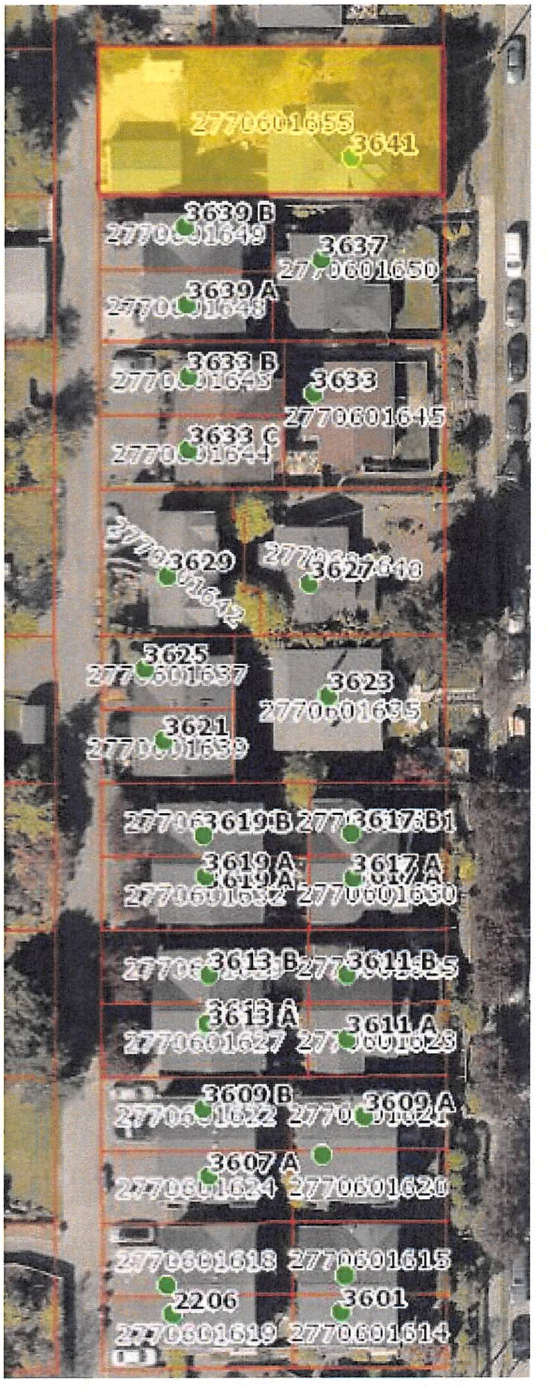
permitted it for the 15 properties to the south of the Site (as well as countless other properties in Seattle).





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Moehring next makes the bizarre argument that the short plat is incomplete because it does not show roads that are not dedicated to the public. This short plat concerns an existing residential parcel that is being subdivided into two lots. The Site does contain any roads, public or otherwise. And Moehring's argument betrays his fundamental misunderstanding of the Code and its requirements.

Moehring goes on to allege that "[p]er SMC 23.53.025, access for emergency access vehicles must be at least 20 feet wide."[2] This Code provision concerns easements serving at least 3, but fewer than 5, single-family dwelling units. It is proposed that Parcel B will have a 2-unit townhouse. Thus, this Code provision does not apply to the Site.

It is undisputed that the short plat is designed to maximize the retention of existing trees. Moehring alleges that subdividing the Site longitudinally, into two lots 25 feet wide and ~120 feet long, would better maximize the retention of trees. It would not. This configuration would potentially result in the loss of more trees.

Moehring's argument is also directly contradicted by other arguments he makes in his Response. For example, Moehring argues[3] that the proposed configuration of the short plat would cause the loss of trees because there are easements along the north border and south border for pedestrian access, utilities easement, and Seattle City Light Easement. It has not been determined that the various easements would result in the loss of trees because that is part of the building permit, not the land use permit. Moehring's proposed longitudinal division of land would result in the loss of more trees because the long, skinny lot, would result in a building footprint that would result in the loss of any trees located in or near the easement areas.

[2] Moehring Response, 6:22-23.
[3] Moehring Response, page 8.

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In any event, Moehring failed to allege in his Amended Appeal that the short plat was not designed to maximize the retention of trees. Thus, he is precluded as a matter of law as raising it as a defense to this motion to dismiss.

Moehring argues that the approximately 16 foot Alley to the west of the Site does not substitute a street.[4] Moehring relies on SMC 23.53.010, Table A, for the argument that a right-of-way for a street in an LR1 zone is 50 feet. SMC 23.53.010 is titled: "Improvement requirements for new streets in all zones." This Code provision clearly does not apply to the short plat because the short plat is not creating a new street; it is only dividing a parcel into two separate lots.

C. <u>This is an appeal of a land use permit, the construction of the residential units on the Site is governed by the construction permits.</u>

While confusing, it appears that Moehring is claiming that Sound Equities' argument that the land use permit does not allow development of the land is only applicable to phased developments under SMC 23.47A.007. Later in his Response, Moehring states that: "it is correct that the Short Plat will not authorize any type of development on the site."[5] It is unclear what exactly Moehring is arguing, but two things are clear: (a) the short plat is not a phased development, and (b) the Permit does not authorize any development of the land.

Next, Moehring argues that the development must be considered as one under Director's Rule 18-2017. Firstly, DR 18-2017 is a draft rule that has not been passed by SDCI.[6] Second, the draft rule concerns whether two developments should be considered as one for SEPA exemptions and design review thresholds. SDCI's Decision and the Amended Appeal have nothing to do with SEPA or design review.

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[4] Moehring Response, page 14.
[5] Moehring Response, 17:11-12.
[6] A copy of the draft Director's Rule 18-2017 is attached as Exhibit A.

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Moehring then argues that the proposed development on the Site exceeds the density that is allowed under the Code. As discussed *ad naseum* in Sound Equities' Motion to Dismiss and this Reply, the Permit does not authorize any development of the land. And if it does not allow any development, it cannot conflict with the density requirements under the Code. Moehring even acknowledges as much in his Response.

Even if Moehring's argument is accepted at face value, it does not demonstrate the violation of the Code's density requirements. Moehring argues that the proposed Parcel A, which will be 3,022 square feet, only allows development of one rowhouse, because it contains only 2,275 square feet of buildable area.[7] While Sound Equities disputes this specific allegation, even assuming it is true, SMC 23.45.512, Table A, states that there are no density limits for rowhouses in LR1 zones if the *lot* is 3,000 square feet or larger; it does not apply to buildable lot area.

D. <u>The Code does not mandate that the Decision contain findings of fact or any particular level of analysis.</u>

Moehring concedes this point and does not provide any authority in support of this specious argument.

E. <u>The King County Code does not govern approval of short plats in the City of Seattle.</u>

Moehring concedes this point as well and does not provide any authority for the proposition that the King County Code applies to property in the City of Seattle.

F. <u>The Hearing Examiner does not have authority under SMC 23.76.022 to award numerous forms of relief that Moehring requests.</u>

Sounds Equities' motion to dismiss argued that, except for vacating the Decision, the Hearing Examiner did not have authority to award the relief that Moehring requests.

[7] Moehring's Response, page 11.

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Moehring seeks the following relief that the Hearing Examiner does not have the authority to grant, or which has already been submitted by Sound Equities and considered by SDCI:

a. Correct the SDCI Director's failure to include conditions assuring compliance with the Land Use Code requirements.

b. Require a certified arborist evaluation to be submitted so that the Director may apply the required criteria of whether the proposed division of land is designed to maximize the retention of existing trees. This report must also consider all smaller trees that are within environmentally critical areas.

c. Require a completed site plan with the existing trees shown that have the potential to be retained, including alternative approaches to the lot subdivision so that the Director may apply the required criteria of whether the proposed division of land is designed to maximize the retention of existing trees.

d. Require a completed site plan showing the adequate width of easements for access required for pedestrians, vehicle, utilities and fire protection as provided in Section 23.53.005, Access to lots, and Section 23.56.006. Pedestrian access and circulation.

e. Require a decision which is granted on a condition that subsequent development does not exceed the allowed dwelling density of the parent lot.

Moehring fails to identify any Code provision in his Response that vests the Hearing Examiner with authority to award the above relief. Further, while Moehring argues that Sound Equities should be required to show where existing trees are located, as discussed above, sheet 3 of the short plat clearly identifies the location of existing trees and structures.

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II. CONCLUSION

In a vain attempt to avoid dismissal of his appeal, Moehring misinterprets, misstates and misrepresents the Code and the approval requirements for short plats. While Moehring appears to genuinely oppose certain development that the Code authorizes, his remedy is to lobby City Council and the Mayor's Office to change the City's land use laws. The simple fact remains that the short plat is allowed under the Code and meets all applicable short plat approval requirements. Thus, Moehring's Amended Appeal should be dismissed because it fails to raise a valid objection to the Director's Decision, is without merit on its face, requests relief that the Hearing Examiner lacks jurisdiction to award, and was brought merely to secure delay. It is respectfully requested that the Hearing Examiner dismiss the entire Amended Appeal with prejudice.

Respectfully submitted this 13th day of February, 2018.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on February 13, 2018, the foregoing document was sent for delivery on the following party in the manner indicated:

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EXHIBIT A

SDCI Director's Rule 18-2017

Applicant:	Page	Supersedes:
City of Seattle Department of Construction and Inspections	1 of 3	NA
	Publication:	**Effective:**
Subject: Determining if two or more development proposals are considered as one for applying State Environmental Policy Act categorical exemptions and Design Review thresholds	**Code and Section Reference:** SMC 25.05.060; SMC 23.41.004	
	Type of Rule: Code Interpretation and procedural rule	
	Ordinance Authority: SMC 3.06.040	
Index: Zoning/Land Use Procedural Requirements	**Approved** **Date** Nathan Torgelson, Director, SDCI	

PURPOSE:
This Rule describes when two or more development proposals must be treated as a single development proposal for the purposes of applying State Environmental Policy Act (SEPA) categorical exemptions and Design Review thresholds.

BACKGROUND:
In accordance with WAC 197-11-800, Seattle's SEPA Ordinance provides categorical exemptions from SEPA review for development proposals that are below the specified levels. When separate development proposals are closely related, they are evaluated as one proposal for purposes of SEPA if the proposals:

a. Cannot or will not proceed unless the proposals (or parts of the proposals) are implemented simultaneously with them; or
b. Are interdependent parts of a larger proposal and depend on the larger proposal as their justification or for their implementation.

Design Review is required for "development proposals" exceeding certain thresholds set forth in SMC 23.41. "Development proposal" is not defined in the Land Use Code.

The Department receives applications for development proposals on abutting or adjacent lots that are potentially related to one another. We must determine whether the development proposals should be evaluated separately or as a single proposal for the purpose of applying SEPA categorical exemptions. The same issue arises in determining whether development proposals are subject to Design Review.

RULE: The same rules apply for determining whether multiple development proposals are evaluated as a single development proposal for purposes of applying SEPA categorical exemptions and Design Review thresholds.

1. Two or more projects under review at the same time are treated as a single development proposal if any of the following are true:
   - Any feature physically spans the property lines between lots, such as shared structures, shared driveways, shared pedestrian access (including easements to rights-of-way), shared drainage and utility designs, foundation footings, or retaining walls
   - A driveway accesses a parking area(s) for more than one development proposal, regardless of whether the parking is required
   - Parking for a development proposal, including maneuvering, aisle requirements, or other parking-related easements, whether the parking is required or not, is proposed to be provided (or partially provided) on the site of another development proposal, whether or not the sites abut each other
   - Proposed structures are joined, or share a common wall for purposes of reduced setbacks
   - Proposed developments share required open space and/or amenity area
   - The design of two or more development proposals are dependent on grading, construction of retaining walls, and/or foundation design across the lot lines
   - One site is required to permanently access, construct and maintain the structures and/or development features on an abutting or adjacent site
   - Other features lead SDCI to conclude that the projects are interdependent

2. The following features are not to be taken into consideration in determining whether two or more development proposals are to be evaluated as a single development proposal:
   - Physical connections to a common public right-of-way (such as a street, sidewalk, or alley) or to a public drain or public utility lines in the right-of-way
   - Common developer, property owner, or marketing/sales scheme for the development proposals
   - Exclusive easements for vehicular or pedestrian access (including easements to rights-of-way) designed to restrict shared access

- Similar or identical design
- Simultaneous construction on abutting lots, even by the same crew
- A common architectural or landscaping design
- Utility-only easements crossing one development site to serve abutting or adjacent lots
- Shared temporary construction access
- Other features lead SDCI to conclude that the projects are independent

3. If separate applications for development under review at the same time are determined to be one proposal under this rule, then the total combined development proposed in the applications will be considered when determining whether SEPA and/or Design Review are required based on the SEPA exemption levels and Design Review thresholds. Development proposals that are submitted for review to SDCI are considered "under review" until permits are issued by SDCI or the permit application is withdrawn by the applicant.