

**BEFORE THE HEARING EXAMINER  
CITY OF SEATTLE**

In the Matter of the Appeal of

**DAVID MOEHRING**

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

Hearing Examiner File:  
**MUP-18-001 (P)**

**ORDER ON MOTION TO  
DISMISS**

This matter concerns the appeal of an approval of a short subdivision (“Decision”) issued by the Director, Seattle Department of Construction and Inspections (“Director” or “Department”). The appeal was filed by David Moehring (“Appellant”). The applicant Loren Landerholm of Sound Equities Incorporated (“Applicant”) filed a motion to dismiss the appeal. The Appellant filed a response to the motion, and the Applicant filed a reply to the response.<sup>1</sup> The Hearing Examiner has reviewed the file in this matter including the motion documents. For purposes of this decision, all section numbers refer to the Seattle Municipal Code (“SMC” or “Code”) unless otherwise indicated.

Hearing Examiner Rules of Practice and Procedure (“HERs”) rule 3.02.a provides:

An appeal may be dismissed without a hearing if the Hearing Examiner determines that it fails to state a claim for which the Hearing Examiner has jurisdiction to grant relief or is without merit on its face, frivolous, or brought merely to secure delay.

In addition, quasi-judicial bodies, like the Hearing Examiner, may dispose of an issue summarily where there is no genuine issue of material fact. *ASARCO Inc. v. Air Quality Coalition*, 92 Wn.2d 685, 695-698, 601 P.2d 501 (1979). HER 1.03 states that for questions of practice and procedure not covered by the HERs, the Hearing Examiner “may look to the Superior Court Civil Rules for guidance.” Civil Rule 56(c) provides that a motion for summary judgment is properly granted where “the moving party is entitled to a judgment as a matter of law.” The Hearing Examiner “must consider the facts in the light most favorable to the nonmoving party, and the motion should be granted only if reasonable persons could reach only one conclusion.” *Labriola v. Pollard Group, Inc.*, 152 Wn.2d 828, 832-833, 100 P.3d 791 (2004).

The Applicant moves to dismiss the appeal in whole on the basis that the 1) appeal raises issues that are factually and/or legally without merit; 2) Appellant requests relief over which the Hearing Examiner has no jurisdiction; and 3) appeal has been brought merely to secure delay.

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<sup>1</sup> The Department filed a “Reply to Appellant Response to Motion to Dismiss.” However, the Department did not join the Applicant in its motion to dismiss, and is therefore not entitled to file a reply brief. The Department’s Reply to Appellant Response to Motion to Dismiss has not been considered by the Hearing Examiner, and is not part of the record.

The Appellant's Notice of Appeal raises the following issues:

- a. The Analysis and Decision is based upon an erroneous application of the short subdivision approval criteria at SMC 23.24.040.A including:
  - i. Failure to conform to other applicable land use code provisions (.040.A.1), including failure to provide adequate access and adequate area to meet amenity area requirements and failure to allow for conformance to requirements of rowhouse development;
  - ii. Failure to provide adequacy of access for vehicles (.040.A.2), by failure to provide exclusive access for each of the proposed lots (23.84A.024);
  - iii. Failure to serve the public use and interests on account of failure to conform to other land use code provisions (.040.A.3);
- b. The Analysis and Decision lacks support by adequate reasoning in that the decision contains no findings of fact, the analysis is conclusory and fails to consider all applicable criteria and land use code provisions, and the decision fails to show how the decision criteria have been satisfied. The decision differs in no material respect from other decisions approving short plats in LR 1 zones.
- c. SDCI's approval of the challenged short plat and its approval of similar short plats in the LR 1 zone conflicts with purpose, intent, and requirements for rowhouse development.
- d. The decision fails to identify or require conditions to be applied in the granting of the subdivision to assure subsequent development resulting from the subdivision does not result in non-compliance with all relative sections. Especially the following:
  - i. SMC 23.84A.024 - "L" for easement access requirements;
  - ii. SMC 23.84A.032 – "R" (20) for rowhouse development rules;
  - iii. SMC 23.45.512 for Density Limits in Lowrise Zones (Figure 1).
  - iv. Tree Protection rules – preservation of existing trees (see Figure 2 on page 5).
- e. The decision intentionally ignores the developer's primary intent of the subdivision, which is to circumvent allowable zoning density by the use of a short plat subdivision. The SDCI does not typically approve of any development for a site of this size where the number of dwellings exceed the permissible calculated density of three dwellings on an LR1 Lot of this size. Reference [http://www.kingcounty.gov/council/legislation/kc\\_code/22\\_Title\\_19A](http://www.kingcounty.gov/council/legislation/kc_code/22_Title_19A), which specifically 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)."*

Notice of Appeal at 2-3.

HER 3.01.d.3 requires that a Notice of Appeal include "A brief statement of the appellant's issues on appeal, noting appellant's specific objections to the decision or action being appealed." The purpose of identifying issues in the Notice of Appeal is to alert opposing parties to the issues to be addressed at the hearing. Generally, any issue not raised in the Notice of Appeal, may not be raised later in the hearing process. Similarly, broad catch-all language that does not identify a specific issue such as alleging that the Decision is inadequate for its "failure to conform to other applicable land use code provisions," fails to provide the specificity required under HER 3.01.d.3, and cannot be relied upon to shoehorn in new (more specific) issues. To the degree Appellant has attempted to introduce new issues in his response that were not identified in the Notice of Appeal, those issues are dismissed. In addition, "issues" in the Notice of Appeal that are mere generalized statements should be dismissed, including Notice of Appeal issue a (i) in part, and Notice of Appeal issue a (iii) in its entirety.

Several of Appellant's issues relate to future development of the subject property. Appellant argues that because the Decision is a precursor to other development permits required for development of the subject property, that the issue of future development allowed by those permits should be allowed in the appeal of the Decision. Appellant further alleges that the segmentation of land use review should be considered phased development, and that such is not appropriate in this case. Lay observers commonly believe that all aspects of a proposal should be considered under a single permit review process. However, Washington law in every jurisdiction in the state provides for permitting which addresses various elements of what may be viewed by an observer as a single development proposal. This multi-permit system is not considered phased or piece-meal review. Appeals of any single permit are limited to issues concerning that permit and its criteria for approval. In this case, Notice of Appeal issues a (i), c and d (i-iv) in whole or in part concern future development that is not the subject of the Decision, and to the degree that they concern future development should be dismissed.

A subdivision is subject to the following criteria of approval, and others listed in SMC 23.24.040:

1. Conformance to the applicable Land Use Code provisions, as modified by this Chapter 23.24;
2. Adequacy of access for pedestrians, vehicles, utilities, and fire protection as provided in Section 23.53.005, Access to lots, and Section 23.53.006, Pedestrian access and circulation;
3. Adequacy of drainage, water supply, and sanitary sewage disposal;
4. Whether the public use and interests are served by permitting the proposed division of land;
5. Conformance to the applicable provisions of Section 25.09.240, Short subdivisions and subdivisions, in environmentally critical areas;
6. Whether the proposed division of land is designed to maximize the retention of existing trees.

Notice of Appeal issue a (ii) raises issues specific to SMC 23.24.040.A.2, and the motion should be denied as to that issue.

There is no requirement under the Code that the Decision include specific findings of fact. Therefore, Notice of Appeal issue b should be dismissed.

Notice of Appeal issue d (iv) raises issues specific to SMC 23.24.040.A.6, and the motion should be denied as to that issue.

The King County Code is not applicable to short plats within the jurisdiction of the City of Seattle. Therefore, Notice of Appeal issue e should be dismissed.

The Applicant provides no supporting evidence for its contention that the appeal has been brought merely to secure delay. On that basis the motion should be denied.

In his response brief Appellant attempts to raise a legal issue concerning ownership of the property that is the subject of the short subdivision. To the degree Appellant has attempted to present a new motion in its response brief, that motion is denied for failure to comply with the Hearing Examiner rules and this matter's prehearing order concerning motions.

The Notice of Appeal requests the following relief:

- a. Vacation of the Analysis and Decision;
- b. Correct the SDCI Director's failure to include conditions assuring compliance with Land Use Code requirements.
- c. 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.
- d. 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.
- e. Require a completed site plan showing the adequate width of easements for access required for pedestrians, vehicles, utilities and fire protection as provided in Section 23.53.005, Access to lots, and Section 23.53.006, Pedestrian access and circulation.
- f. Require a decision which is granted on a condition that subsequent development does not exceed the allowed dwelling density of the parent lot (Figures 1 and 7).

Notice of Appeal at 4.

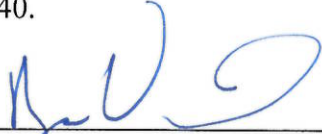
"The Hearing Examiner may affirm, reverse, remand, or modify the Director's decision." SMC 23.76.022. Therefore, the Hearing Examiner has jurisdiction to vacate the Decision, or to modify the Decision with conditions. The Hearing Examiner lacks jurisdiction to grant the relief requested in items c through f listed in the Notice of Appeal.

The Appellant's motion to dismiss is **DENIED** in part and **GRANTED** in part.

Notice of Appeal issues a (i), a (iii), b, c, d (i-iii) and e are **DISMISSED**.

Notice of Appeal issues a (ii) and d (iv) remain, to the degree they do not relate to future development, but concern only the criteria under SMC 23.24.040.

Entered this 15<sup>th</sup> day of March, 2018.



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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 Motion to Dismiss to each person listed below, or on the attached mailing list, in the matter of David Moehring. Hearing Examiner File: MUP-18-001 (P) in the manner indicated.

Party	Method of Service
<b>Appellant</b> David Moehring dmoehring@consultant.com	<input type="checkbox"/> U.S. First Class Mail, postage prepaid <input type="checkbox"/> Inter-office Mail <input checked="" type="checkbox"/> E-mail <input type="checkbox"/> Fax <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Legal Messenger
<b>Applicant Legal Counsel</b> Brandon Gribben bgribben@helsell.com	<input type="checkbox"/> U.S. First Class Mail, postage prepaid <input type="checkbox"/> Inter-office Mail <input checked="" type="checkbox"/> E-mail <input type="checkbox"/> Fax <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Legal Messenger
<b>Department</b> Joseph Hurley SDCI Joseph.hurley@seattle.gov	<input type="checkbox"/> U.S. First Class Mail, postage prepaid <input type="checkbox"/> Inter-office Mail <input checked="" type="checkbox"/> E-mail <input type="checkbox"/> Fax <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Legal Messenger

Dated: March 15, 2018

  
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Alayna Johnson  
Legal Assistant