BEFORE THE HEARING EXAMINER
CITY OF SEATTLE

In the Matter of the Appeal of	Hearing Examiner File:
DAVID MOEHRING	**MUP-18-001 (P)**
from a Decision issued by the Director, Seattle Department of Construction and Inspections	Department reference: Project 3028431
	SDCI Closing Statement

Summary

The subject appeal is of an approval of a short subdivision ("Decision") issued by the Director, Seattle Department of Construction and Inspections ("SDCI"). There are two issues on appeal: 1) Whether the short subdivision as approved by SDCI provides adequate access for vehicles under Seattle Municipal Code Section 23.24.040.A.2) if each lot in the proposed subdivision has use of the access easements proposed; and 2) Whether the short subdivision decision fails to identify or require conditions to be applied to ensure preservation of existing trees.

Burden of Proof

SMC Section 23.76.022.C.7 sets forth the standard of review for administrative appeals of "Type II" Master Use Permit approvals, such as the subject short subdivision decision. Subsection C.7 provides in part as follows: "The Director's [i.e. of SDCI] decisions . . . shall be given substantial weight . . .." Thus, the appellant has the burden of proof to show that the SDCI decision is clearly erroneous. Under the clearly erroneous standard, the Hearing Examiner must be left with the definite and firm conviction that a mistake has been committed by SDCI in its analysis and decision.

As is clear from a review of the facts and analysis presented by SDCI and the project applicant's representative at the hearing, the appellant has failed to meet this burden. The appellant requests that the Hearing Examiner remand the decision with instructions to prepare a complete analysis and recommendation that has applied all the criteria required to grant a decision. However, the record at hearing shows clearly that the appellant has failed to offer sufficient information about either of the two issues on appeal to justify a remand of the SDCI decision. The record shows no

errors in the application of Code to the facts, or in the decision-making process, to demonstrate that the decision should be reversed or remanded.

Argument

A review of the testimony and record submitted at the hearing of the subject appeal shows that the SDCI project decision was properly analyzed and should be affirmed by the Hearing Examiner. The appellants' two arguments are addressed and refuted below:

1. The proposed short subdivision meets access requirements for pedestrians, vehicles, utilities, and fire protection as provided in 23.53.005 and including exclusive access for each of the proposed lots per 23.84A.024;

Based on the questions asked by the appellant at the hearing, it appears that his argument is that the proposed lots lack adequate access, either because Parcel A is proposed without a vehicle access easement to the alley or that Parcel B is proposed without any street frontage. The appellant misreads these Code requirements.

Section 23.24.040.A.2 in the short subdivision criteria requires adequate access for "pedestrians, vehicles, utilities, and fire protection as provided in Section 23.53.005, Access to lots, ..." Section 23.24.040.A.8.d further provides as follows:

> "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."

Neither of these criteria specifically require vehicular access. They require access meeting Land Use Code standards as set forth elsewhere in the Code. The proposed short subdivision shows a 5-foot-wide pedestrian access easement that serves both proposed lots. This easement meets access requirements for both proposed lots and enables both proposed lots to meet the definition of "lot" as set forth in Section 23.84A.024 as follows:

> "'Lot' means … a parcel of land that qualifies for separate development or has been separately developed. A lot is the unit that the development standards of each zone are typically applied to. 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." [Emphasis added.]

Each proposed lot meets the definition, because each has the use of an access easement. Note that this definition does not require a vehicle access easement, only an access easement. The pedestrian easement serves as an access easement. As discussed at the hearing by SDCI Land Use Planner Supervisor Bill Mills, even thought the easement provides mutual access over each of the two lots in the short subdivision, it qualifies as an "exclusive" access easement, as the term "exclusive" is defined in Webster's Third International Dictionary. That definition says, in part, that the word "exclusive" is "limiting or limited to possession control, or use (as by a single individual or organization or by a special group or class)." [Emphasis added.] See Exhibit 7.

The Webster's definition makes clear that "exclusive" is not a term that limits possession, control or use to one individual only, but also contemplates limits to a special group or class, as in the specific number of properties entitled by the terms of a proposed short subdivision to use an easement for driveway or access purposes. Case law in Washington clearly supports the use of a definition from Webster's Third International Dictionary over a definition from a legal dictionary.[1]

Two more Code sections are relevant to the analysis of access. Section 23.53.005 sets forth standards for access to lots, and 23.53.005.A.1 provides as follows:

> "A. Street or private easement abutment required
> 1. For residential uses, at least 10 feet of a lot line shall abut a street or a private permanent vehicle access easement meeting the standards of Section 23.53.025, or the provisions of subsection 23.53.025.F for pedestrian access easements shall be met." [Emphasis added.]

Section 23.53.025 sets forth development standards for access easements, and provides in part:

> "F. Pedestrian Access Easements. Where a lot proposed for a residential use abuts an alley but does not abut a street and the provisions of the zone require access by vehicles from the alley, or where the alley access is an exercised option, an easement providing pedestrian access to a street from the lot shall be provided meeting the following standards:
> 1. Easement width shall be a minimum of five (5) feet;
> 2. Easements serving one (1) or two (2) dwelling units shall provide a paved pedestrian walkway at least three (3) feet wide;
> 3. Easements serving three (3) or more dwelling units shall provide a paved pedestrian walkway at least five (5) feet wide;"

[1] See *Griffin v. Thurston County*, 165 Wn.2d 50, 57, 196 P.3d 141 (2008) (Interpreting the word "requirement" as it appeared in the county code with *Webster's Third New Int'l Dictionary*). *Sleasman v. City of Lacey*, 159 Wn.2d 639, 653-44, 151 P.3d 990 (2007) (Affirming the appellate court's citation of *Webster's Third New Int'l Dictionary* to determine meaning of "developed" as it appeared in city ordinance). *Seattle-First Nat. Bank v. Snell*, 29 Wn. App. 500, 506, 629 P.2d 454 (1981) (Interpreting "drive-in bank" as used in the Seattle Municipal Code with *Webster's Third New Int'l Dictionary*).

Both lots meet the standards for street frontage or private easement abutment. Proposed Parcel A has street frontage. Parcel B fronts only an improved alley but also provides a 5-foot-wide pedestrian access easement to the street that meets the standards of Section 23.53.025.F. The Hearing Examiner has previously approved lots with alley frontage only if that lot also has a pedestrian access easement to a street. See Matter of the Appeal of Sunset Addition Neighbors Association, Hearing Examiner File No. S-95-004 (1995) (See Exhibit 17). Thus, proposed Parcel B should be determined to meet access standards, too. Since it has direct alley frontage on an improved alley, Parcel B will also have suitable vehicle access to any proposed parking via alley access.

It is further worth noting, particularly in a multifamily zone, that Parcel A also has suitable access to the alley and can provide vehicle access off the alley. Section 23.45.536 provides in part as follows:

> "B. Location of parking
>
> 1. If parking is required, it shall be located on the same lot as the use requiring the parking, except as otherwise provided in this subsection 23.45.536.B.
>
> * * *
>
> 6. Parking accessory to a residential use may be located on a lot within 800 feet of the lot where the residential use that requires the parking is located, provided that:
>
> a. the lot is not located in a single-family zone; and
>
> b. the requirements of Section 23.54.025 are met."

In this case, it is clear that Parcel A has access over Parcel B and to the alley, and that off-site parking could be provided on Parcel B for the use of Parcel A. The proposed short subdivision is similar to many others in the immediate neighborhood and elsewhere in the City.

2. The decision correctly determined that the division of land is designed to maximize the retention of existing trees

One of the criteria for approval of a short subdivision is Section 23.24.040.A.6, which is "whether the proposed division of land is designed to maximize the retention of existing trees." SDCI stands by the testimony of Land Use Planner Joe Hurley to the effect that there is no alternative division of land that better maximizes the retention of existing trees. [MW1]

It is not SDCI practice to require an applicant to provide potential alternative land divisions if it is clear from the site survey provided with the plat application that any reasonable division could result in removal of some existing trees due to potential future development. The appellant has failed to demonstrate that there is a reasonable alternative division that would better maximize the retention of trees. Thus, the SDCI decision is not clearly erroneous. The testimony of appellants' witness Michael Oxman is largely irrelevant because it relates to whether potential future development might impact the trees on site, and future development is not part of the proposed short plat application.

When asked how he could be sure that there was not a division of land better suited to the retention of trees, Mr. Hurley, an architect with 25 years' experience, pointed out that "graphic problem solving" was an essential component of architectural practice, and that he was confident that his exploration of potential alternatives was thorough. There is no evidence in the record to show that Mr. Hurley erred in his analysis of the arrangement of lot lines on the proposed short subdivision.

Two additional points;1. Retention of trees is one of many criteria that SDCI weighs when making a decision on a short plat, and 2. This criterion applies to the proposed division of land with respect to maximizing the retention of trees, not future development of the site. In this context, "maximize" does not mean to retain trees to the maximum extent possible. Instead, it calls for a conclusion that the lots resulting from the short plat are making the best use of the division of land so that trees *could* be retained, when the lots are developed. Previous Hearing Examiner decisions have upheld this analysis of the criterion.[i] On balance, the appropriate conclusion was that this short subdivision met the approval criteria.

Conclusion

Based on all the facts and analysis in this matter, the SDCI MUP decision in Project 3028431 is supported by the evidence in the record and is not clearly erroneous. The SDCI decision should be affirmed.

Entered this 19th day of April, 2018.

Joseph Hurley, Senior Land Use Planner
Department of Construction and Inspections

cc. David Moehring (appellant)
Brandon Gribben (for applicant)

[i] See, e.g., Matter of Appeal of Doug Harman, MUP-05-012 (2005); Matter of Appeals of Robert Meucci and Jack Johnson, MUP-02-036 (2002).

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from a decision issued by the Director,	)	Department Reference:
Department of Construction and Inspections	)	3028431
	)	3641 22nd Avenue West
	)	
	)	**Certificate of Service**

The undersigned certifies the following:

1. I am a Senior Land Use Planner at Seattle Department of Construction and Inspections (SDCI), representing SDCI in the above-entitled appeal proceeding; I am over the age of majority and am able to testify as to the matters stated herein;
2. On Thursday, April 19, 2018, I delivered the SDCI Closing Statement on the appeal in this matter, by e-mail only, to the following named parties:

Via E-Mail Only

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Brandon Gribben
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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 19th day of April 2018.

Joseph Hurley, Senior Land Use Planner, SDCI