Hearing Examiner Ryan Vancil

BEFORE THE HEARING EXAMINER
CITY OF SEATTLE

In the Matter of the Appeal of: DAVID 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 POST-HEARING BRIEF

COMES NOW the applicant, Loren Landerholm of Sound Equities Incorporated ("Sound Equities"), by and through its undersigned attorney, Brandon S. Gribben of Helsell Fetterman LLP, and submits the following post-hearing brief.

I. INTRODUCTION

This matter concerns an appeal of Seattle Department of Construction and Inspections ("SDCI") Director's Decision[1] (the "Decision") that approved the proposed short subdivision under permit #3028431[2] (the "Permit" or "Short Plat") for the property located at 3641 22nd Avenue West (the "Property"). The Permit sought to subdivide the Property into two parcels of land consisting of 3,024 square feet and 2,975 square feet. SDCI approved the Permit on December 18, 2017.

[1] Decision, Ex. 1.
[2] Short Plat, Ex. 4.

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David M. Moehring ("Moehring") subsequently appealed the Decision. Sound Equities filed a motion to dismiss the appeal. The vast majority of that motion was granted by Examiner Vancil leaving two discrete issues to be decided at the land use hearing: (a) whether the Short Plat failed to provide adequate access for vehicles under SMC 23.24.040.A.2, by failing to provide exclusive vehicle access for each of the proposed lots under SMC 23.84A.024, and (b) whether the Short Plat was designed to maximize the retention of existing trees.

The land use appeal hearing on Mr. Moehring's two remaining appeal issues took place before Examiner Vancil on April 12, 2018. Mr. Moehring did not introduce any evidence or testimony that the short plat did not provide adequate access for vehicles. Furthermore, Mr. Moehring failed to allege, much less identify, an alternative short plat that was better designed to maximize the retention of existing trees. Because Mr. Moehring failed to demonstrate that the Director's Decision was clearly erroneous, the Hearing Examiner must affirm the Decision and dismiss the Appeal with prejudice.

II. STATEMENT OF FACTS

The land use hearing took place before Examiner Vancil on April 12, 2018. Mr. Moehring called one witness: Michael Oxman, an arborist. Mr. Oxman discussed the various trees identified on the Short Plat and generally how well they tolerate nearby excavation and disturbance activities. Mr. Oxman did not submit an arborist report or other report of the trees located on or near the Site. The only document prepared by Mr. Oxman was his resume.[3]

While Mr. Oxman appeared to be a knowledgeable arborist, he admitted several crucial facts: (a) he never stepped foot on the Site or adjacent properties; (b) he never measured the tree diameters; (c) he did not locate the root zones of the trees; (d) he did not

[3] Oxman Resume, Ex. 8.

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identify the dripline of the trees; and (e) he did not conduct any physical inspection of the trees. Mr. Oxman further admitted that he did not know what was being developed on the Site or whether any of the trees were going to be removed. He also admitted that it is possible to excavate and install utilities around the tree root zones while still being able to retain the tree. The most condemning lack of evidence, however, was Mr. Oxman's failure to present an alternative short plat that was better designed to maximize the retention of existing trees.

SDCI and Sound Equities both called William Mills, a Strategic Advisor and Land Use Planner Supervisor at SDCI, and Joseph Hurley, a Land Use Planner at SDCI who drafted the Decision, to testify at the hearing. Mr. Mills discussed the vehicular and access easement standards at length and confirmed that the Short Plat complied with all aspects of the Land Use Code. Mr. Hurley testified that he agreed with Mr. Mills' analysis on the vehicular access issue. Mr. Hurley also testified that he reviewed the Short Plat specifically to determine whether it was designed to maximize the retention of existing trees. Mr. Hurley confirmed that he reviewed the Short Plat and was not able to identify an alternative configuration that was better designed to maximize the retention of existing trees. Again, Mr. Moehring also failed to identify a better proposed division of land.

Sound Equities called two additional witnesses: Ryan Ringe, its arborist, and Loren Landerholm, its principal. Mr. Landerholm testified briefly on the Short Plat. Mr. Ringe testified that he had overseen numerous development projects where trees were retained even though excavation and installation of utilities took place in the root zone.

The Argument section below contains a more extensive discussion of the relevant testimony that each witness gave during the hearing.

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III. ISSUES PRESENTED

Examiner Vancil's Order on Motion to Dismiss (the "Order") dismissed the vast majority of the Appeal leaving only two appeal issues:

- Appeal issue (a)(iii): 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).
- Appeal issue (d)(iv): 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: Tree Protection rules – preservation of existing trees (see Figure 2 on page 5).

The appeal issues were further limited by the Order which provided that: "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." The two appeal issues are properly stated as follows:

1. Whether the short plat provided adequate access for vehicles under SMC 23.24.040.A.2 and SMC 23.84A.024 where the front lot (Parcel A) has exclusive access from 22nd Avenue West and the rear lot (Parcel B) as exclusive access to the improved alley? Yes.

2. Where Mr. Moehring failed to allege, much less identify, an alternative short plat that better maximized the retention of existing trees, was the Short Plat designed to maximize the retention of existing trees under SMC 23.24.040.A.6? Yes.

As discussed in greater detail below, each of the issues presented should be answered in the affirmative, and the Hearing Examiner should affirm the Director's Decision and dismiss the Appeal with prejudice.

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IV. ARGUMENT

A. The Director's Decision must be affirmed because Mr. Moehring failed to demonstrate that the Decision was clearly erroneous.

The Hearing Examiner has jurisdiction over this matter under SMC 23.76.022. Under SMC 23.76.022(7), "substantial weight" must be given to the Director's Decision on Type II Master Use Permits. The party appealing the Director's decision bears the burden of proving that the decision is "clearly erroneous." *Brown v. Tacoma*, 30 Wn. App. 762, 637 P.2d 1005 (1981). For a decision to be clearly erroneous, the Hearing Examiner must be "left with a definite and firm conviction that a mistake has been committed." *Moss v. Bellingham*, 109 Wn. App. 6, 13, 31 P.3d 703 (2001). Mr. Moehring has woefully failed to meet this high burden and the Hearing Examiner should affirm the Decision.

B. The Short Plat complies with the requirements under SMC 23.24.040.A.2 and SMC 23.84A.024 because the front lot has exclusive access to 22nd Avenue West and the rear lot has exclusive access to the improved alley. Mr. Moehring failed to introduce any evidence disputing these facts, much less evidence that could lead to the conclusion that the Decision was clearly erroneous.

Mr. Moehring claims that the Short Plat does not comply with SMC 23.24.040.A.2 and SMC 23.84A.024 because the resulting lots do not have exclusive vehicle access. This is flat wrong. The Site is located between 22nd Avenue West to the east and an improved alley to the west. The Short Plat will subdivide the Site into two lots whereby the front lot (Parcel A) will have frontage on and access to 22nd Avenue West and the rear lot (Parcel B) will have frontage on and access to the improved alley. Parcel B will also have exclusive access to 22nd Avenue West by way of an exclusive pedestrian easement over the north 5 feet of Parcel A, and Parcel A will have exclusive access to the improved alley over the same easement.

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1. Parcel A and Parcel B have exclusive vehicle access.

SMC 23.24.040.A.2 provides that: "The Director shall, after conferring with appropriate officials, use the following criteria to determine whether to grant, condition, or deny a short plat: 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." SMC 23.53.005 – Access to lots – provides that: "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."

There are several ways that a parcel can meet the requirements of SMC 23.53.005. For example, a parcel can have at least 10 feet of a lot line abutting a street. Parcel A meets this requirement because its entire 50 foot western lot line abuts 22nd Avenue West. A parcel can also meet the requirements of SMC 23.53.005 by either (a) having at least 10 feet of a lot line abut a private permanent vehicle access easement, or (b) meeting the provisions of SMC 23.53.025.F for pedestrian access easements. Parcel B meets this second requirement because it is benefited by a pedestrian access easement over Parcel A. The entire 50 foot eastern boundary of Parcel B also has frontage on the improved alley to the west.

Mr. Moehring also alleges that the Short Plat does not meet the Land Use Code's definition of a "Lot." SMC 23.84A.024 defines a Lot 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).

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With respect to access, the definition of a "Lot" requires that a parcel of land either (a) provide vehicular access to a private or public street, or (b) provide permanent access through an exclusive and unobstructed easement. The second alternative only requires access, not vehicle access.

Similarly, SMC 23.24.040.A.8.d, which only requires that new lots provide access to an alley, not vehicle access, provides that:

> Every lot except unit lots and lots proposed to be platted for individual live-work units in zones where live-work units are permitted, shall conform to the following standards for lot configuration, unless a special exception is authorized under subsection 23.24.040.B:
>
> d. 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.

(emphasis added). This code provision is consistent with the definition of a "Lot" because both provisions only require access, which may be satisfied by a pedestrian access easement.

Parcel A meets the definition of a "Lot" because Parcel A has direct vehicular access to 22nd Avenue West, a public street. Parcel B meets the definition of a "Lot" because (a) it provides direct vehicular access to the improved alley,[4] and (b) it provides an exclusive, unobstructed permanent pedestrian access easement over Parcel A.

Mr. Mills discussed SDCI Interpretation No. 95-001 (the "Interpretation"), which he was involved in drafting.[5] Interpretation No. 95-001 presented the following question:

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[4] SMC 23.84A.002 states: "Alley" means *a public right-of-way not designed for general travel and primarily used or intended as a means of vehicular and pedestrian access to the rear of abutting properties.* An alley may or may not be named. (emphasis added)

[5] Interpretation No. 95-001, Ex. 16.

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"Whether a building site may be created with alley but not street access." In the Interpretation, the property owner applied for a short plat to subdivide one parcel into three parcels of land. Parcels B and C would have frontage on 29th Avenue West, but Parcel A would only have frontage on the alley.

The Interpretation relied in part on SDCI's many prior short plat approvals which created lots that did not have street frontage, vehicular access was provided from the alley, and pedestrian access was provided directly to the nearest street with a pedestrian access easement.[6] Examples of these short plats included DCLU Project No. 8907953, which approved subdivision of one parcel into six parcels where only three of the parcels had frontage on a street.[7]

The Interpretation also relied on DCLU (now SDCI) Project No. 9305075 in support of its conclusion that a lot may be created that only has access from the alley. The short plat in Project #9305075 created three lots out of two: two lots (Parcels A and B) with frontage on 29th Avenue South and one lot (Parcel C) with frontage on an alley. The short plat also provided "a ten-foot-wide pedestrian and utility easement, crossing over Parcels A and B, connect[ing] Parcel C to the Street."[8] This decision was appealed to the Hearing Examiner who held that: "The plat would allow adequate pedestrian and vehicular access to the site."[9]

The Interpretation contained the following conclusions, which are relevant to SDCI's interpretation and application of the Land Use Code in this matter:

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[6] *Id.*, Findings of Fact #15.
[7] *Id.*
[8] Ex. 11, Findings of Fact #16.
[9] *In the Matter of the Appeal of 29th Avenue Community Council*, MUP-94-001, decided April 11, 1994, a copy of which is attached as Exhibit A.

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- If an existing alley is located adjacent to a lot, as in the case of Lots 7 and 8, the Land Use Code does not require a lot line to abut on a street or vehicle access easement.[10]
- So long as the newly created parcel meets the definition of "lot" (Finding of Fact No. 10), by abutting upon a street or an access easement (pedestrian or vehicular is not specified), then it should qualify as a lot.[11]
- Proposed Parcel A will abut the improved alley to the west of the property, but will not abut a street or vehicular easement…Thus, a pedestrian access easement, as shown in the proposed short subdivision, is not only an allowable option, but is required.[12]
- [L]ots that do not front on a street may meet the access standards of Section 23.24.035 by other means, as proposed Parcel A does [by providing a pedestrian access easement].[13]
- Sections 23.24.035 (C) and (D), stating that convenient pedestrian and vehicular access is required to every lot in a short plat by way of a dedicated street or permanent appurtenant easement, and stating that access to lots shall be from a street unless certain conditions are met, have previously been regarded as satisfied in [SDCI] short plat decisions if vehicular access through an improved alley leads to a street, and separate pedestrian access is also provided by easement. Support for this [SDCI] practice is found in the definition of "alley" (Finding of Fact No. 13), which specifically states that alleys are primarily used for both vehicular and pedestrian access to the rear

[10] *Id.*, Conclusion #2.
[11] *Id.*
[12] *Id.*, Conclusion #3.
[13] *Id.*, Conclusion #4.

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of abutting properties. This definition, in itself, indicates that the Code contemplates the existence of lots which have their principal means of access from an alley only.[14] (emphasis in the original)

The analysis continues culminating in SDCI's decision that: "Vehicular access from the improved alley to the west, combined with a pedestrian access easement across proposed Parcel B, meets the access requirements of the Land Use Code for Parcel A."[15]

The Interpretation was appealed to the Hearing Examiner in the *Matter of the Appeal of Sunset Addition Neighbors Association*, Hearing Examiner File S-95-004.[16] The Hearing Examiner affirmed the Interpretation in its entirety.

Even though it is Mr. Moehring's burden to demonstrate that the Decision is clearly erroneous, the evidence introduced at the hearing overwhelmingly establishes that the Short Plat complies with the Land Use Code, including the vehicular access and access easement standards.

2. Parcel B has access to 22nd Avenue West by way of an exclusive pedestrian access easement over Parcel A.

As discussed above, Mr. Moehring claims that the Short Plat does not comply with the Land Use Code because it does not provide exclusive access for vehicles. This claim is belied by the undisputed evidence introduced at the hearing that Parcel A (front lot) has direct access to 22nd Avenue West and Parcel B (rear lot) has direct access to the improved alley. Neither of these parcels rely on an easement for their vehicle access. To the extent that Mr. Moehring will argue that the pedestrian access easement does not provide Parcel B with exclusive access to the street, which it does, that argument should be summarily dismissed by the Examiner because that issue was not raised in the Appeal. Regardless, the

[14] *Id.*, Conclusion #5.
[15] *Id.*, Decision.
[16] Ex. 17.

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evidence, which includes SDCI's long-standing and consistent interpretation of the word "exclusive," demonstrates that the pedestrian access easement provides Parcel B with exclusive access to 22nd Avenue West.

Mr. Mills testified during the hearing that SDCI uses Webster's Third International Dictionary second definition of exclusive, which defines exclusive as: "Limiting or limited to possession, control or use (as by a single individual or organization or by a special group or class)." This definition does not limit possession to a single individual, but allows possession "by a special group or class." In this case Parcels A and B, the properties benefited by the easement. Mr. Mills testified that an easement may be used by the owners of two or more parcels and SDCI considers that easement to be exclusive. To the extent Mr. Moehring will argue that an easement that benefits two parcels of land is not exclusive, has no logic and would not serve any legitimate purpose.

In a recent Hearing Examiner Decision in the *Matter of the Appeal filed by Gerard Bashein*, MUP 17-036, Examiner Pro Tem Gary N. McLean ruled "that the access Easement is limited to benefit the two lots created by the short plat, i.e. Parcels A and B."[17] He further held that the "finding is consistent with the Department's preferred definition of the term "exclusive," in that the use of the easement is limited to a special group (owners of Parcels A and B) of properties entitled by the terms of the proposed short subdivision to use the easement for driveway or access purposes."[18]

While there are no cases directly on point in Washington state, the Idaho Supreme Court held that: "The mere use of the word 'exclusive' in creating an easement is not, in and of itself, sufficient to preclude use by the owner of the servient estate." *Latham v. Garner*, 105 Idaho 854, 857–58, 673 P.2d 1048, 1051–52 (1983). The court in *Latham* relied on a

[17] Findings of Fact, Conclusions of Law, and Decision, MUP 17-036, Ex. B, ¶23.
[18] *Id.*

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Utah Supreme Court case: *Weggeland v. Ujifusa*, 14 Utah 2d 364, 384 P.2d 590 (1963). The easement in *Weggeland* provided the property owner with "an exclusive right of way for roadway purposes as a private driveway," along the edge of the neighbor's property. The Utah Supreme Court determined that to make the easement exclusive to the plaintiff's use would burden the defendant's property to a degree that was not necessary to satisfy the purpose of the easement. The same principles are true here.

The Oregon Supreme Court has a similar holding that interprets an exclusive easement to be exclusive to its use, and not exclusive to the persons using the easement. *George v. Coombes*, 278 Or. 3, 562 P.2d 200 (1977). The Court held that: "The aforesaid easement is exclusive in the sense that neither Plaintiff nor Defendants may grant any other easement rights on or to the easement area, and it inures solely (sic) to the benefit of Defendants' property." *Id.* at 6. The Oregon Supreme Court was "of the opinion that it was the probable intention of the parties to the agreement that plaintiff's use not be excluded." That is the intention of relevant parties here. SDCI, the agency that approved the easement, and Sound Equities, the applicant and property owner, both agree that the pedestrian access easement is exclusive to its use as an access easement, not that the use is exclusive to a particular parcel.

Mr. Mills also discussed draft minutes from two Land Use Forums that discussed easement and driveway standards.[19] The draft minutes from May 7, 2003 regarding 11754 Lakeside Avenue NE, concerned a short plat that would create two lots that would have frontage on an unimproved right-of-way. SDCI concluded that the lesser driveway standards would apply over the increased easement standards because the servient estate of easement would not count towards dwelling units when determining the width of easement

[19] Land Use Forum Draft Minutes, Ex. 15.

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requirement under SMC 23.54.030. SDCI's logic is that you do not need an easement over your own property.

The draft minutes from July 11, 2006, #3, acknowledged that "[u]nder Section 23.53.005, if a lot doesn't have at least 10 feet of street frontage, it must be served by an access easement meeting the standards of Section 23.53.025." This statement implicitly acknowledges that a pedestrian access easement is sufficient if a lot does not have vehicular access to a street.

As discussed above, if a lot does not abut a street or private permanent vehicle access easement, the lot must provide a pedestrian access easement that meets the requirements of 23.53.025.F. Because Parcel B does not abut a street or have a private permanent vehicle access easement, it must meet the requirements of SMC 23.53.025.F, which provides that:

> 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;

The Short Plat's pedestrian access easement complies with SMC 23.53.025.F. It is 5 feet wide and will provide a paved walkway of at least 3 feet. Furthermore, the pedestrian access easement is "exclusive" under SDCI's long-standing interpretation, Webster's Third International Dictionary and case law. Thus, the Short Plat complies with the Land Use Code's pedestrian access easement requirements.

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C. Mr. Moehring failed to allege, much less demonstrate, that there was an alternative lot configuration that would better maximize the retention of existing trees than the proposed Short Plat. Thus, there was no evidence presented to the Examiner that could lead to the conclusion that the Decision was clearly erroneous.

The question before the Examiner is this: Is the Short Plat designed to maximize the retention of existing trees? Mr. Moehring bears the burden of demonstrating that SDCI's Decision holding that the Short Plat is designed to maximize the retention of trees is clearly erroneous. To meet this burden, Mr. Moehring *must* demonstrate that there is an alternative Short Plat that would better maximize the retention of existing trees. Mr. Moehring failed to meet this burden. During the hearing, Mr. Moehring's sole witness, Michael Oxman, did not allege, much less introduce into evidence, an alternative short plat that was better designed to maximize the retention of existing trees. If Mr. Oxman was not able to identify a different division of land that was better maximize to retain existing trees, then there is basis for finding that the Director's Decision is clearly erroneous. For this reason alone, this appeal issue must be dismissed.

When City Council enacted SMC 23.24, which governs short plats, the only requirement concerning trees is that the "location and description of all trees at least 6 inches in diameter measured 4.5 feet above the ground" be identified in the short plat application. *See* SMC 23.24.020.F. It is undisputed that the Short Plat disclosed this information.

A short plat is the legal mechanism for dividing one parcel of land into two. It does not allow or authorize any particular development of the property. If City Council had wanted a more thorough investigation of whether a particular tree would be retained, they would have required the applicant to disclose much more extensive information, including (a) the location of tree root zones, (b) the location of tree driplines, (c) the health of the tree, (d) geotechnical reports, (e) arborist reports, (f) proposed development, (g) tree protection measures under Chapter 25.11 SMC, (h) whether any trees would be retained during

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development, and (i) whether the development will request encroachment into front or rear setbacks to allow for the retention of an exceptional tree. Instead, City Council requires this information as part of the building permit process. Those issues are not part of this land use appeal because they are not part of the short plat approval criteria.

Joseph Hurley, the SDCI Land Use Planner who drafted the Decision and an architect with over 25 years of experience, testified that he reviewed the Short Plat specifically to determine if it maximized the retention of existing trees. Mr. Hurley further testified that he was not able to identify an alternative short plat that would result in more trees being retained. Mr. Moehring essentially conceded this point by failing to identify a better division of the land to maximize retention of trees.

The property is located in an LR1 zone, which allows for much denser development than single family zones. Chapter 23.45 SMC governs multi-family developments, including rowhouses. Under SMC 23.45, rowhouses may be developed with only 5 foot front setbacks, 0 foot rear setbacks with alley (or average of 5 foot with no alley), and zero side setbacks. Moving the lot line on a parcel of this size will not have a material effect on the developable area or the future developments impact on existing trees.

During the hearing, both arborists testified about the five foot utility easement on the north part of the Site and the five foot Seattle City Light easement to the south. Mr. Oxman admitted that it could be possible to retain the trees located in or near the easement area. Mr. Ringe also testified that he had personally supervised numerous developments where utilities were installed in and around tree root zones without causing the trees to be damaged or removed. But this is all speculative because Mr. Moehring did not introduce any evidence on the location or installation of any utilities because that is part of the building permit process. The evidence introduced at the hearing can only lead to one conclusion: The Short Plat is designed to maximize the retention of existing trees.

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V. CONCLUSION

The evidence introduced at the hearing demonstrates that the Short Plat complies plain language of the Code. This is bolstered by the fact that SDCI has a long-standing and consistent interpretation of the Code and its vehicular and access requirements. Furthermore, there was no testimony or other evidence that there was an alternative short plat that was better designed to maximize the retention of existing trees. For these reasons, the Hearing Examiner should affirm the Director's Decision and dismiss the Appeal with prejudice.

Respectfully submitted this 20th day of April, 2018.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on April 20, 2018, the foregoing document was sent for delivery on the following party in the manner indicated:

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EXHIBIT A

City of Seattle Hearing Examiner Decision

Information retrieved April 17, 2018 10:26 AM

Findings of Decision of the Hearing Examiner for the City of Seattle

In the Matter of the Appeal of 29th AVENUE COMMUNITY COUNCIL from a decision of the Director of the Department of Construction and Land Use on a master use permit application

Hearing Examiner File: MUP-94-001
Associated File Numbers:
Department Reference Numbers: 9305075
Date: April 11, 1994
Type: SEPA, Short plat
Examiner: Ruperta M. Alexis

Introduction

The applicant applied to the Department of Construction and Land Use (DCLU) for a Master Use Permit (M to subdivide two existing parcels of land into three parcels of land. One parcel is in an environmentally critical area. The subject site is zoned Single Family 5,000. The proposed parcels A and B would each measure 4,637 sq. ft. in size, and proposed parcel C would be 5,137 sq.ft. DCLU also issued a Determination of Non-Significance (DNS).

The appellants appeal the DCLU decision to conditionally grant the short subdivision and the DNS.

The appellants exercised the right to appeal pursuant to the Master Use Permit Ordinance, Chapter 23.7 Seattle Municipal Code (SMC).

This matter was heard before the undersigned Deputy Hearing Examiner (Examiner) on March 30, 1994. record was left open for the Examiner to conduct a visit to the site and the surrounding area.

Parties present at the proceeding were: appellants, represented by Judith Flemings, *pro se;* applicant Jim Craft, and Onum Esonu, Land Use Planner, for the Director, DCLU.

After due consideration of the evidence elicited during the public hearing, and after having visited the si and the surrounding area, the following shall constitute the findings of fact, conclusions, and decision o Hearing Examiner on this appeal.

Findings of Fact

Short Plat

1. The subject property, addressed as 1723 29th Ave., is located in the Madrona neighborhood. The property is in a Single Family 5000 (SF5000) zone which requires minimum lot sizes of 5000 sq. ft. Two the parcels, A and B have been developed withsingle family residences. Only Parcel C would meet the minimum lot size for the zone. Parcels A and B would meet the "75/80" rule exception to minimum lot s in SMC 23.44.010 (B).

2. The subject property is designated as environmentally critical due to the potential for slides. DCLU co not exempt the proposal from critical areas requirements because the site is designated as a class m

geologic hazard area. The proposed short plat must comply with the Environmentally Critical Areas Ordinance.

3. Proposed Parcel A and B would be accessed from 29th Ave. S. Proposed Parcel C would be accessed fr E. Howell St. by a 16 ft. unimproved alley along the north property line. Although the applicant has submitted plans for the proposed developmenton parcel C, review of the building plans is not required i order to gain approval for the short plat application.

4. A brief history of the zoning designation for the subject site would help to clarify some confusion regarding development on the site. The site was previously zoned to allow townhouse development. In 1 DCLU approved a permit to build an eight-unit townhouse on the site. The townhouses was never built. zoning of the site changed to single family. New permits were issued for single family development. The permits for the single family dwellings were approved because the applicant met the requirements for si family development on the lots.

5 The proposed short platting of the parcel would create new conditions not generally found throughout neighborhood. It would alter the streetscape in that future development on parcel C the site would be in area previously designated as the rear yard of the existing two sites. Additionally, as allowed by Code ur specified conditions, the vehicular access to proposed parcel C would be via an improved alley. SMC 23.53.050E1 and SMC 23.44.016A. allow alley access for single family residences. The applicant would b required to improve the alley.

6. In analyzing the short plat application, DCLU referred the matter to the Seattle Engineering Departmer Water and Fire Departments, and Seattle City Light. DCLU conditioned the project based on the recommendations from the City departments. The departmental responses are as follows:

Seattle Engineering Department (SED): Reviewed the proposed alley and pedestrian access requirements recommended that the applicant grade the alley and pave it 6 inches of crushed rook. SED also required standard drainage control plan andindicated that the method of stormwater discharge would be determi at the time of the application for the building permit for development on Parcel C.

Water Department: The department required Parcel A and B to have new taps. Water service is available t the site.

Fire Department: No objections; a fire hydrant is currently located 185 ft. from the south property line o parcel B.

City Light: Requires a 10 ft. access easement for electrical utilities.

8. DCLU received a petition signed by neighbors who were opposed to the short plat during the commer period. A petition attached to the appeal was signed by 53 neighbors who opposed the short plat. The applicant submitted a petition signed by several individuals who did not reside in the Madrona neighborhood or the immediate vicinity.

9. The criteria for approval of a short plat in SMC 23.24.040 is:

"1. Conformance to the applicable Land Use Policies and Zoning Code or Land Use provisions;

2. Adequacy of access for vehicles, utilities and fire protection as provided in Section 23.54.010;

3. Adequate drainage, water supply and sanitary sewage disposal;

4. Whether the public use and interest are served by permitting the proposed division of land and.

5. Conformance to the applicable provisions of SMC 25.09.100, Short subdivisions and subdivisions in *environmentally critical areas.*

"SEPA

10. The appellants take exception to the DNS because they contend DCLU failed to take the cumulative impacts of the proposed project and other recent short plats in the neighborhood into consideration. In the appellants contend that other shortplats in the neighborhood have given rise to more short platting would continue this pattern into the future. The impacts of short plats would accumulate to affect the

environment in their neighborhood. The appellant"s contend, without identifying any probable environmental impacts, that there would be environmental impacts on the neighborhood. Appellants als contest DCLU"s failure to impose conditions upon proposed development related to the soil conditions a failure to require the applicant to provide detailed drainage plans.

11. The Seattle Environmentally Critical Areas Ordinance requires a geotechnical engineer to evaluate th conditions on the site and prepare recommendations as to the type of structure that could be developed the site. The geotechnical engineer retained by the applicant viewed the lot and offered comments regar the conditions. The geotechnical engineer measured the slope angles and found that generally slopes ar less that 10 percent. The geotechnical engineer analyzed the soil conditions from two test pits and the c utility trench between Parcel A and B. He found that the soil condition and slope angles should not pose development related difficulties. He identified usual construction practices such as 2,000 psf footings fo structure, but did not recommend the need for structural walls.

12. Although some of the neighbors have experienced stormwater runoff and earth slides on neighbors properties across the street from the site there was no evidence that the same soil conditions either exis the site, or that the mitigation proposed by DCLU would not adequately protect the surrounding neighbc from adverse impacts due to developments on the site.

13. DCLU reviewed the geotechnical report and concluded that there were no soil conditions which coulc be adequately mitigated by recommendations from the geotechnical engineer and by the requirements c existing City Codes and ordinances.

Conclusions

1. The Hearing Examiner has jurisdiction of this appeal pursuant to Chapter 23.76, Seattle Municipal Co The Director"s decision on short plats and environmental determinations must be given substantial weig SMC 23.24.050B. The burden is on the appellant to prove that the Director"s decision is clearly erroneou *Brown v. Tacoma*, 30 Wn. App. 762, 637 P.2d 1005 (1981).

2. The first criterion is whether the short plat approval would conform to the land use policies and code provisions. The proposal would comply with applicable Land Use Code requirements with regard to minimum lot size, under the provisions allowing for exceptions to the required 5,000 sq. ft. lot size. The adequate buildable area for development within required yard setbacks. The plat would allow adequate pedestrian and vehicular access to the site. The easements shown on the plat would have to be recorded

3. The subject proposal has been reviewed by the City agencies that are required to review such proposa The Fire Department, City Light and the Seattle Engineering Department have all reviewed the proposal a offered recommendations where necessary. The recommendations have been adopted in DCLU"s decisio and would be incorporated into the plat prior to recording of the applicable documents.

4. There is adequate sanitary sewer available to the site. The storm water detention system would be determined when the plan for development of the site are analyzed. An on-site water detention system w a drainage plan would also be required when the final plans for development are determined.

5. The fourth issue is whether the public use and interest are served by permitting the proposed divisior land. The public use and interest criterion is generally analyzed on a broader basis than the effect of the proposal on a particular residence. Moreover, land use decisions cannot be based on the number of individuals who either favor or oppose a particular proposal. Single Family Policies favor increasing avail housing opportunities throughout the city. The proposed short plat with the required conditions and recommendations, would increase housing stock. Although the location of the proposed Parcel C with al access is unusual in this neighborhood, it is not unusual throughout the City. When the proposed locatic with the alley access is compared against other housing policies, the unique conditions of this site are n enough to weigh against the proposed short plat.

6. Any future development on the site would have to comply with the Critical Areas Ordinance and other requirements designed to provide for safe construction and protect surrounding properties from negativ consequences from the development.

SEPA

7. The appellants are primarily concerned with two primary environmental impacts from the proposed sh platting; the cumulative impacts from other short plats in the neighborhood and the drainage conditions the soil. The City"s environmental policies regarding cumulative effects is found in SMC 25.05.670. The policies require an assessment of identified environmental factors to determine if a prior or simultaneou developments either induces further developments which would adversely effect the environment. The C requires an analysis of specified factors such as the capacity for storm sewers and drainage, impact on natural systems and demands on public facilities. The appellants have not cited any such environmental impacts. An increase in short platting without some identification of probable environmental impacts, is sufficient to establish the cumulative effects from the proposed short plat.

8. The appellants other concerns are about the soil conditions and drainage. The geotechnician"s report indicates that although the site is located in a slide area, the existing code and the recommendations of geotechnical engineer would mitigate against any adverse impacts.

Decision

The Director"s decision is AFFIRMED.

EXHIBIT B

Before Hearing Examiner Pro-Tem
Gary N. McLean

BEFORE THE HEARING EXAMINER
CITY OF SEATTLE

In the Matter of the Appeal filed by **GERARD BASHEIN,** Appellant, of a Short Plat approval issued by the **DIRECTOR OF THE DEPARTMENT OF CONSTRUCTION AND INSPECTIONS,** Respondent, **CARMEN MCCAFFERTY (OWNER), IZABELLA PHILLIPS, CHADWICK & WINTERS LAND SURVEY,** Applicant/Respondents *(Address of proposal: 924 NW 51st Street)*	**HE File No. MUP-17-036(SD)** **Ref. No. MUP 3028370** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION**

I. SUMMARY.

The appellant failed to meet his burden of proof to produce evidence or legal authority to demonstrate how the challenged short plat decision was issued in error. Accordingly, the appeal must fail, and the challenged short plat approval is confirmed.

II. APPLICABLE LAW.

Jurisdiction.

The Hearing Examiner has jurisdiction over this appeal pursuant to Chapter 23.76 SMC.

Substantial Weight.

Appeals shall be considered de novo, but the Examiner must give substantial weight to the Director's challenged decision. SMC 23.76.022.C.6, and .7. Accordingly, the Appellant bears the burden of proving that the Director's decision was "clearly erroneous." *Brown v. Tacoma*, 30 Wn. App. 762, 637 P.2d 1005 (1981). Under this standard the Director's decision may be reversed only when, upon consideration of the entire record and although there is evidence to support the challenged decision, the Examiner is left with the definite and firm conviction that a mistake has been committed. *Cougar Mt. Assoc. v. King Cy*, 111 Wn. 2d 742, 765 P.2d 264 (1988); *Norway Hill Preservation & Protection Ass'n v. King County Council,* 87 Wn.2d 267, 274, 552 P.2d 674 (1976), quoting *Ancheta v. Daly,* 77 Wn.2d 255, 259-60, 461 P.2d 531 (1969).

III. RECORD.

The Record for the matter includes all application materials, written appeal materials, pre-hearing and post-hearing briefs from the parties, and exhibits marked and numbered during the course of the public hearing. All witnesses who appeared at the appeal hearing offered testimony under oath. The City maintains copies of all materials in the record, including digital audio recordings of the pre-hearing conference and the open-record appeal hearing.

Through the appeal process, the appellant, Dr. Bashein, was represented by counsel, Jeffrey M. Eustis; the applicant/respondents were represented by counsel, Glenn Amster; and the respondent Department of Construction and Inspections was represented by Jerry Sudor, a Land Use Team Supervisor in the Department.

Upon consideration of all the evidence, testimony, codes, policies, regulations and other information contained in the file, legal authority and arguments presented in the post-hearing briefs, and additional legal research undertaken based on such arguments, the undersigned Examiner issues the following Findings, Conclusions, and Decision.

IV. FINDINGS OF FACT.

1. Any statements found in any other section of this Decision that are deemed to be findings of fact are hereby incorporated by this reference and adopted as Findings of Fact supporting this Decision. The use of captions is for convenience of the reader, and should not be construed to limit or modify the application of a particular fact to some other topic or

issue addressed elsewhere in this or any other portion of this Decision.

Procedural Background.

2. This matter concerns an appeal of Seattle Department of Construction and Inspections ("SDCI" or "Department") Director's Decision (the "Decision") approving a proposed short subdivision under permit No. 3028370 ("Permit") for property located at 924 NW 51st Street in the City of Seattle ("Property"). The permit authorizes the subdivision of the Property into two lots.

3. On or about June 26, 2017, Izabella Phillips, with Chadwick & Winters Land Survey, submitted the underlying short-subdivision (aka 'short plat') application on behalf of the property owner, Ms. McCafferty. SDCI approved the short subdivision on September 14, 2017.

4. Gerard Bashein ("Appellant") filed an appeal of the Decision on September 27, 2017. Due to an error in its original notice, SDCI issued a revised Notice of Decision on October 30, 2017, at which time the Hearing Examiner dismissed the appeal. Dr. Bashein filed the current appeal on November 9, 2017 ("Appeal").

5. There is no dispute that the appellant, Dr. Bashein, has standing, and that his appeal was filed in a timely manner.

6. In late November of 2017, Mr. Amster, as counsel for the Applicant/Owner, filed a Motion to Dismiss this appeal. In December, Appellant's counsel, Mr. Eustis, submitted a Response in opposition to Applicant's motion to dismiss, to which the applicant submitted a Reply. The Examiner received oral arguments regarding the motion during a Pre-Hearing Conference, held in January of this year. During the Pre-Hearing Conference, the parties agreed to set March 2nd as the appeal hearing date, if the motion to dismiss was not granted. On January 29th, the Examiner issued a written ruling denying the motion, followed by more detailed findings issued on February 16th. The appeal hearing took place on March 2nd. The parties were given additional time to supplement the record with legal authority to support their respective positions. Those items were submitted and received by the Hearing Examiner's Office staff during March; however, due to an email server error experienced by the Pro Tem Examiner, the undersigned did not receive notice of access to the parties' post-hearing materials for over a month. Copies of all pleadings and papers submitted by the parties are included in the file for this matter.

Description of requested short plat.

7. There is no genuine dispute regarding most facts. Instead, the appeal focuses on city codes and approval criteria, alleging that the challenged short-plat approval does not comply with relevant requirements.

8. The address of the challenged short plat is 924 NW 51st Street, a 4,994 sq.ft. mid-block parcel of land located between 9th Ave NW and 11th Ave NW in the Ballard area. *(Ex. 1; Ex. 2, Short Subdivision survey documents).* The parcel is zoned LR1 (Lowrise 1). *(Ex. 1).*

9. At the time of the application, the parcel included a single-family house, with a small garage structure in the rear/northeast corner of the property. The Department's approval document explains that "existing structures are to be demolished." The existing driveway runs along the east side of the property. The appellant, Dr. Bashein, lives immediately east of the property at issue, in a multi-unit residential structure. To the west, construction is underway for a new development, with a driveway/access easement located immediately west of the applicant's property. *(See Ex. 6, photos of existing parcel and neighboring properties to the east and west; Testimony of Dr. Bashein).*

10. The short plat would subdivide the existing parcel into two rectangular parcels of land: parcel "A" with 3,394 sq.ft, the southern portion of the existing parcel, retaining frontage along NW 51st Street; and parcel "B" with 1,600 sq.ft, on the northern portion of the existing parcel. *(Exs. 1, 2).* Parcel "B" would be the "back-lot" served by a 10-foot wide Access Easement running along the west side of Parcel A from its northern boundary with Parcel B down to NW 51st Street.

11. The challenged short plat approval was issued by the Department in the form of a 4-page summary document partially captioned as an "Analysis and Decision". *(Ex. 1).*

12. As noted by the appellant, the 'analysis' part of the challenged approval is minimal, at best. The entire 'Analysis' merely cuts and pastes some of the Seattle Municipal Code criteria for approval of short subdivisions, limited to items 1 through 8, found in SMC 23.24.040, followed by a short paragraph described by Mr. Suder as a summary statement, which includes the following conclusion: *"the above criteria have been met." (Ex. 1, pages 2 and 3).*

Issues raised in appeal.

13. Appellant's Notice of Appeal alleges that the Department's Analysis and Decision is based upon an erroneous application of the short subdivision approval criteria at SMC 23.24.040.A, generally summarized as follows[1]:

> A. Failure to provide adequate access for vehicles (.040.A.2):
>
> 1. Because each of the lots must meet the requirements found in SMC 23.84A.024, and the easement on the approved plat is proposed to serve both Parcels A and B and is

[1] The appeal statement included in the Notice of Appeal speaks for itself. This summary of issues should not be read or construed to limit

therefore not "exclusive" to Parcel B; and

2. The access easement does not meet minimum width requirements found in SMC 23.53.025.B, because future use of the easement for rowhouse or townhouse development on Parcel A and other residential development on Parcel B would require access of at least 20 feet, instead of the 10-foot easement in the approved short plat.

B. Failure to serve the public use and interests (.040.A.4[2]):

1. The proposed location of the easement on the west side of the site would allow for a building separation of as little as eight feet on the east side of the site [where the appellant resides] while making a building separation of at least 20 feet on the west side, arguing that "relocation of the easement to the east side of the site would improve access to light and air and increase privacy for the adjacent residence to the east and provide a more balance separation of structures on the three contiguous lots."

"Exclusive easement"

14. Much of the hearing testimony involved questions and records offered to demonstrate whether the Department has ever considered the effect of SMC 23.84A.024-"L", which includes the Land Use Code definition of the term "Lot", which reads in relevant part 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. [...]"

15. City witnesses confirmed that they were unable to locate any legal opinion, code interpretation, or other guiding document that lays out the Department's meaning of the term 'exclusive' easement. They also confirmed that, to their knowledge, prior short plat approvals have never required that access easements be limited to use by a benefited-parcel, prohibiting use by the burdened-parcel owner. In fact, the Access Easement created as part of the short plat approval granted in 2016 for the property located immediately west of the applicant's property, at 928 NW 51st Street, uses language identical to that at issue in this appeal: "An easement for ingress, egress, pedestrian access, utilities, Seattle City Light and address sign placement beneficial to all lots within this unit lot subdivision." *(See Ex. 12, Example 1, Short Plat approval dividing one parcel into two parcels of land, at 928 NW 51st Street, sheet 5 of 5).* The Record also includes other unrebutted examples of short plat approvals that create Access Easements allowing use of the easement area by both the benefitted and the burdened-parcel owners, including without limitation Ex. 12, Example 3, on Sheet 5 of 5.

[2] Appellant's Notice of Appeal included a manifest error, inadvertently citing to the wrong provision of the SMC addressing "public use and interests", citing SMC 23.24.040.A.3 instead of .040.A.4.

16. Throughout the appeal hearing, the appellant asserted that the term "exclusive" should be strictly construed so as to limit use of any access easement created to serve a new parcel to the benefited-parcel[3] only. In this matter, that would mean that the access easement could only be used by the back-lot, Parcel B, and that Parcel A could not make use of the easement area. The appellant argues that any use of the access easement by the burdened-parcel[4], Parcel A, would result in a shared-use situation that is not "exclusive". This issue is critical to addressing this appeal, because the appellant alleges that the short plat should have never been approved because Parcel B would not receive access by an "exclusive easement".

17. The appellant concedes that the term "exclusive easement" is not separately defined by the Land Use Code, or anywhere else in the Seattle Municipal Code, so he relies upon several other sources to support his position, including: a definition found in the dictionary at findlaw.com, which reads: "an easement that the holder has the right to enjoy to the exclusion of all others." *(Appellant's Response to Motion to Dismiss, at page 6, fn. 14);* an Idaho court decision that referenced other decisions and authorities for the proposition that "The grant of an exclusive easement conveys unfettered rights to the owner of the easement to use that easement for purposes specified in the grant to the exclusion of all others [,]" including the servient estate owner *(Appellant's post-hearing Statement of Authorities, at page 1,* citing part of Latham v. Garner, 105 Idaho 854, 856, 673 P.2d 1048 (Idaho 1983) [cited below for other key points that weigh against the appellant]; cases from Tennessee and California with similar rulings *(Appellant's post-hearing Statement of Authorities, at pages 1and 2);* and the discussion about exclusive easements provided in the legal treatise Thompson on Real Property, Volume 7, at § 60.04(b)(2). *(Id., at page 2).*

18. Appellant's post-hearing Statement of Authorities accurately notes that the Thompson Real Property treatise provides: "An exclusive easement grants unfettered rights to the owner of the easement to use the easement for purposes specified in the grant 'to the exclusion of all others'..." *(Id., at page 2).* But, it omits the last half of the same sentence, which reads:

> "; because the exclusive easement, in effect, strips the servient owner of the right to use the land for certain purposes, thus limiting the fee, and itself has been called almost a conveyance of the fee, this type of easement is generally not favored by the courts." [Emphasis added] *(Thompson on Real Property, Volume 7, at § 60.04(b)(2), first sentence).*

19. At the hearing, Applicant's counsel directed attention to an Oregon Supreme Court case, also referenced in his post-hearing pleading, George v. Coombes, 278 Or. 3, 562 P.2d 200 (1977), where the Oregon court interpreted a "perpetual and exclusive easement for

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[3] Also known as the "dominant" parcel or property.
[4] Also known as the "servient" parcel or property.

roadway purposes" as not precluding continued use by the servient property. In doing so, the Court accepted the argument of counsel that "exclusive" described the use of the easement and not the users of the easement, to wit: the easement could not be used for other than access, but did not prohibit use for access by owner of property over which the easement ran. *(Applicant's Post-Hearing Supplemental Authority, at page 1).*

20. The applicant's post-hearing Supplemental Authority pleading also includes reference to cases from other states that stand for the general proposition that the term "exclusive easement," standing alone, is ambiguous and requires a review of the purpose or intent of the easement in question in order to determine just what the word 'exclusive' really means;[5] and directs attention to a Utah case, where the court determined that to make an easement exclusive would burden the servient estate to a greater degree than was intended or necessary to satisfy the purpose of the easement, which was to create a private driveway. *(Id.,* citing Weggeland v. Ujifusa, 14 Utah 2d 364, 384 P.2d 590 (1963)).

21. The Department's post-hearing Supplemental Authorities cite to Webster's Dictionary for a definition of the word "exclusive" to mean "limiting or limited to possession, control, or use (as by a single individual or organization or by a special group or class)." [Emphasis added in Department's pleading]. The Department argues that "'exclusive' is not a term that limits possession, control or use to one individual only, but instead 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." *(SDCI Statement of Supplemental Authorities, page 1).*

22. The easement at issue in this appeal is captioned as an "Access Easement" on the face of the Short Subdivision survey documents prepared for recording, included in the Record as part of Exhibit 2. *(Ex. 2, sheet 5 of 5).* The Access Easement reads in relevant part: "An easement for ingress, egress, pedestrian access, utilities, Seattle City Light and address sign placement beneficial to all lots within this unit lot subdivision." *(Ex. 2, sheet 5 of 5).* The Examiner finds that the clear language of the easement is for access purposes, and that it is written to benefit both Parcel A and Parcel B, which are the two lots created by the challenged short plat.

23. The Examiner finds and concludes that the Access Easement is limited to benefit the two lots created by the short plat, i.e. Parcels A and B. This finding is consistent with the

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[5] From Applicant's post-hearing Supplemental Authority pleading, at page 2: An instrument which is reasonably subject to conflicting interpretation is ambiguous. *See Rutter v. McLaughlin,* 101 Idaho 292, 293, 612 P.2d 135, 136 (1980). The phrase "exclusively for their use" lends itself, without contortion, to a number of interpretations. The instrument could be interpreted as (1) the grant of an easement right of way to the grantee, the defendants herein, to the exclusion of all others, except the grantor; or (2) the grant of an easement right of way excluding all others, including the grantor; or, (3) as the grant of a fee simple estate to the grantee. Thus, the instrument is reasonably subject to conflicting interpretations and as such is ambiguous."

Department's preferred definition of the term "exclusive", in that the use of the easement is limited to a special group (owners of Parcels A and B) of properties entitled by the terms of the proposed short subdivision to use the easement for driveway or access purposes. *(See SDCI Statement of Supplemental Authorities, page 1).* The easement is also consistent with many examples of similar short plats placed into the record, and Appellant's witness, Mr. Moehring, had to concede that, to his regret, the city has not required a strictly-exclusive easement (meaning one that prohibits use of an access easement by a burdened parcel-owner) in any of his roughly 12 examples of other projects discussed during his testimony, many of which are included in the Record as part of Exhibits 11 and 12.

24. The Examiner takes notice of other legal authorities on the topic, including a 2009 Wisconsin Court of Appeals case holding that an easement must contain an affirmative statement of exclusivity in order to grant the right to exclude the fee owner of the real estate over which the easement has been granted. *Garrett v. O'Dowd,* 2009 WL 2871178 (Wis. Ct. App. 2009). The Wisconsin case relied, in part, on reasoning provided in the previously-referenced passage from the Thompson Real Property Treatise, explaining that a strictly "exclusive" easement would grant unfettered rights to the owner of the easement to use the easement for purposes specified in the grant "to the exclusion of all others"; and because the exclusive easement would, in effect, strip the servient owner of the right to use the land for certain purposes, thus limiting the fee, and itself has been called almost a conveyance of the fee, this type of easement is generally not favored by the courts. *Garrett,* citing Thompson on Real Property, § 60.04(b)(2).

25. A frequent question in cases involving the term "exclusive easement" is whether the landowner may use the easement, i.e., whether the landowner may use his or her own land for the same purposes as the easement holder. Jon W. Bruce and James W. Ely, Jr., LAW OF EASEMENTS AND LICENSES IN LAND ¶1.06[3] (Revised ed. 1996). Again, use of the term "Exclusive Easement" can be read to create three possible interests: an easement giving the easement holder the right to prevent anyone from using the easement area for the easement's purposes; an easement giving the easement holder the right to prevent anyone but the landowner from using the easement area for the easement's purposes; or, if the easement creates a substantial burden on the land, such as a right of way, a fee simple estate in the easement holder. *Latham v. Garner*, 673 P.2d 1048, 1052 (Idaho 1983). Again, strictly-exclusive easements are generally not favored by the courts, Thompson on Real Property, § 60.04(b)(2), and a clear intent to exclude the landowner must be apparent from the creating document, *Latham*, 673 P.2d at 1050-51.

26. Because courts and legal scholars are hesitant to find a grant that is essentially a conveyance of the fee interest in some or all of the servient estate owner's property in the absence of clear evidence of such intent or need, the Examiner finds and concludes that the language in the definition of the term "Lot" need not be construed to produce an absurd-result, i.e. one that would essentially require all access easements to convey virtual fee-interest in an easement area to a benefitted property owner. There is no evidence in the

record to support an argument that the Seattle City Council intended all access easements created to serve lots to effectively grant a fee-interest in such easement area to a benefitted property owner. Instead, the language in the code demonstrates that the true purpose of the easement mandated for a "Lot" is access, and not transfer of fee-interest in real property. Access can be exclusive to a limited group of parcels, like here, just Parcels A and B. The appellant failed to provide sufficient evidence or legal authority to establish that 'exclusive' has been or should be read to mean use by one, and only one, property owner.

27. Granting deference due to the Department's challenged determinations at issue in this appeal, the Examiner finds and concludes that the challenged Access Easement satisfies all applicable code requirements, including without limitation the definition of the term "Lot" found in SMC 23.84A.024 "L". The owners of Parcel A will own the underlying fee for the access easement area. As owners in fee simple, they may use their property in any way not inconsistent with the access easement. The Director did not err in failing to prohibit the owner of Parcel A from using any portion of Parcel A that is burdened by the access easement to Parcel B.

10-foot vs. 20-foot easement.

28. The appellant alleges that the applicant will soon be seeking other development approvals that could allow more than two residential units to make use of the 10-foot access easement created in the challenged short plat. While the Record is full of examples where other properties were short-platted, and later townhouses or rowhouses were constructed on the parcels, the applicant and the Department correctly noted that the approval criteria for a short plat does not include what other applications might come on a future date. Whether a 10-foot access easement is sufficient to serve some other, higher-density, development project will require review by responsible City officials to ensure compliance with then-applicable development regulations, including those addressing emergency access. If 10-feet is not sufficient, then subsequent approvals can be withheld or conditioned to address the issue.

29. This issue has come up before, and it was also paired with arguments directly asserting that a 10-foot wide access easement should be read so as to prohibit use by the burdened-property owner.

30. Puzzlingly, none of the parties directed attention to a previous case before the Seattle Hearing Examiner in 2008 where a short plat was challenged, in part, based on some of the same issues raised by Dr. Bashein in the instant appeal, including the argument that the size of the access easement must be wider because it will someday serve more than two lots, citing SMC 23.53.025. That Decision, known as *Friends of Cedar Park*, rejected an appeal of a short plat, and included the following Conclusion, which is instructive in this

matter:

> "The Appellant notes that under SMC 23.53.025, an access easement that serves three or four lots must be 20 feet wide and provide a vehicle turnaround. From this, the Appellant argues that Parcels A and B must be specifically prohibited from using the 10-foot wide easement across those parcels that provides required access to Parcels C and D. This is not correct. Parcels A and B front on 42nd Avenue NE and thus, require no easement for access. Parcels A and B are burdened by the access easement that benefits Parcels C and D, but the owners of Parcels A and B will own the underlying fee. As owners in fee simple, they may use their property in any way not inconsistent with the access easement. The Director did not err in failing to prohibit Parcels A and B from using that part of Parcels A and B burdened by the access easement to Parcels C and D."
> (*Friends of Cedar Park*, Appeal of Short Plat, Decision of the Seattle Hearing Examiner, File No. MUP-08-005, Conclusion No. 5, Aug. 12, 2008).

31. The 2008 Hearing Examiner decision was appealed, ending with a decision issued by the Washington Court of Appeals, which included the following passage that is controlling in this matter:

> Cedar Park also contends that because the SMC requires a 20 foot wide easement, the 10 foot wide access easement is too narrow. Under SMC 23.53.025(A) and (B) an access easement serving three or four lots must be 20 feet wide, but an easement serving one or two lots can be 10 feet wide. The testimony at the hearing supports the conclusion that because the 10 foot wide easement serves only the two interior lots and lots A and B abut the roadway, the lots do not require a 20 foot access easement. *Friends of Cedar Park Neighborhood v. City of Seattle*, 156 Wn. App. 633, 234 P.3d 214 (Div. I, 2010).

32. In this appeal, there is no dispute that the challenged access easement does not serve more than two lots. Parcel A abuts the public roadway, specifically NW 51st Street, so it does not even require an access easement. Because the 10-foot wide access easement serves only the interior lot, known as Parcel B, and the underlying fee-owner, Parcel A, the code does not require a 20-foot wide easement.

33. The Department did not err in approving the short plat with a 10-foot wide access easement.

Public use and interests.

34. The appellant argued that the short plat approval should be vacated because it fails to serve the public use and interests "on account of failure to conform to land use code provisions and to advance interests of the public in the surrounding neighborhood". *(Notice of Appeal, citing SMC 23.24.040.A.3, which should read .040.A.4).* The appellant asserts that the proposed location of the easement on the west side of the site would allow for a building separation of as little as eight feet on the east side of the site [where the appellant resides] while making a building separation of at least 20 feet on the west side, arguing that "relocation of the easement to the east side of the site would improve access to

light and air and increase privacy for the adjacent residence to the east and provide a more balance separation of structures on the three contiguous lots." *(Notice of Appeal, pages 2 and 3).*

35. At the hearing, Appellant offered evidence and testimony strongly contesting what he perceives as a "loophole" in city codes, where developers undertake a multi-step process that starts with a short plat, and is often followed by townhouse or rowhouse development on a "front-lot", via a unit-lot subdivision or something else, and another house or townhouse project on a new "back-lot", as a means to get around otherwise applicable standards in the City's LR1 Zone. *(Testimony of David Moehring; comments and examples in Exhibits 10, 11, and 12).* In the end, the appellant offered no evidence or legal authority that would serve as a basis for the Examiner to rescind the challenged short plat. Examiners are not empowered to correct perceived loopholes or alleged errors in public policies regarding development in residential zones. Those grievances should be directed to those with authority to write, adopt, and amend the code as they see fit.

36. The Appellant's arguments about potential development on the site is built on speculation regarding what the applicant might choose to do with the two lots created by the short plat. At the short subdivision stage, the location of residential units (whether they are houses, townhouses or some other option), garages and other features *on the lots* is often unknown, as it is here. The concern in reviewing a short subdivision is access *to the lots* being created, and the Applicant demonstrated that access to Parcel B meets all Code requirements.

37. Appellant's assertion that the access easement should be relocated to his side of the property, on the east side, appears to be more motivated by self-interest than a legitimate environmental, air, or open space argument. While understandable and argued in good faith, such argument is not a sufficient basis to reverse the challenged short plat decision. The argument was not supported by credible or substantial evidence that would rebut the Department's conclusion that the requested short plat has been designed to comply with all applicable approval criteria.

38. In the previously-referenced *Friends of Cedar Park Neighborhood* opinion, the Court of Appeals fully addressed and rejected similar "public use and interest" arguments raised by Dr. Bashein in this appeal. See *Friends of Cedar Park Neighborhood v. City of Seattle*, 156 Wn. App. 633, 234 P.3d 214 (Div. I, 2010).

39. In this matter as well as the *Cedar Park* case, SMC 23.24.040.A.4 requires the Department to consider whether "the public use and interests are served by permitting the proposed division of land." The *Cedar Park* appellants argued that the determination that the proposed short subdivision serves the public use and interests constituted an erroneous interpretation of the law and a clearly erroneous application of the law to the facts.

40. In this matter, as well as the *Cedar Park* matter, the Department concluded that the requested short subdivisions met the requirements for short subdivision approval and that the proposals served the public interests, in part by creating "the potential for additional housing opportunities in the City." *(Ex. 1, Analysis and Decision approving short plat, at page 3, Conclusion, last sentence).*

41. Like Dr. Bashein's arguments that this challenged short plat is just the beginning of a multi-step process to achieve an end-run around what he believes should be controlling development policies, the Cedar Park Neighborhood appellants forcefully argued that because "bizarre" lot configurations contravened the intent and purpose of development codes, approval of the short subdivision did not serve the public interests requirement under the SMC. Although admittedly not prohibited by the SMC, the Cedar Park appellants argued that a challenged short plat "contravenes the intent of the Code and supplants the public's reasonable expectation for density." Dr. Bashein makes a very similar argument, that although not prohibited by the SMC, the challenged short plat facilitates use of a perceived loophole in the code, in contravention of his and some other commenters' expectations regarding future development on the property.

42. The Court of Appeals rejected such arguments, relying on Washington State Supreme Court precedent favoring the vested rights doctrine and holding that compliance with the land use regulations that are in effect when the developer submits a plat application limit a local jurisdiction's discretion in considering a preliminary plat proposal. The Court cited multiple cases disfavoring denial of a plat application based on the grounds of public use and interest where the applicant satisfied applicable short subdivision requirements.

43. No evidence in the record, or controlling legal authority in the SMC, the Growth Management Act, state subdivision statutes, or elsewhere, suggests that the determination of whether approval of a short subdivision serves the public interest overrides compliance with existing regulations and the vested rights doctrine. To the contrary, case law emphases the Washington Supreme Court's adherence to the vested rights doctrine. *See, e.g., Abbey Rd. Grp., LLC v. City of Bonney Lake*, 167 Wn.2d 242, 218 P.3d 180 (2009).

44. While Dr. Bashein contends that public interests are not served when the City allows applicants to exploit loopholes, the remedy is not to abandon the vested rights doctrine and deny the short plat application, but to seek a legislative change to the SMC. Because the applicants' proposed short subdivision meets the requirements of the SMC, the Department lacked the authority to deny the proposal based on the public and personal interests promoted by the appellant.

45. In sum, the Department did not erroneously interpret the law or erroneously apply the law to the facts in concluding that the proposed short subdivision served the "public use and interests" under the SMC.

46. Because the appellant has not met his burden of showing that the challenged plat approval was issued in error, the appeal must fail.

V. CONCLUSIONS OF LAW.

1. In this appeal, it is worth noting that the Washington Court of Appeals issued a detailed decision in 2010 involving a previous Seattle short plat, which addressed a number of issues that were raised again in the instant appeal, including assertions that: a) access-easements serving new lots created by short plats should be applied to prohibit use by burdened-parcel owners; b) the potential for future development actions justifies a requirement for a 20-foot instead of just a 10-foot wide access easement; and c) perceived exploitation of loopholes in the municipal code should be construed as against public interests, thereby serving as a substantive basis to deny a requested short plat. See *Friends of Cedar Park Neighborhood v. City of Seattle,* 156 Wn. App. 633, 234 P.3d 214 (Div. I, 2010).

2. The court rejected all of these arguments, and essentially encouraged the appellants to seek a legislative change to the SMC, instead of asking the hearing examiner or a court to re-write code language that they do not like. This Record is absent any evidence that any of the short-plat approval provisions were substantively modified in any way following the Court's decision in the *Cedar Park* case. The *Cedar Park* decision by the Court of Appeals is controlling, or highly persuasive, on most, if not all, of the legal arguments raised in this appeal.

3. The prior Hearing Examiner, herself, suggested that the *Cedar Park* appellants could pursue action by the Seattle City Council to define state and City policies that constitute the "public interest" for use as an independent substantive factor in review of subdivisions and short subdivisions, explaining that such a change is within the jurisdiction of the City Council, not the Hearing Examiner. (See *Friends of Cedar Park,* Appeal of Short Plat, Decision of the Seattle Hearing Examiner, File No. MUP-08-005, Conclusion No. 10, Aug. 12, 2008). To date, there is nothing in the Record or the SMC to show that any refinement of what constitutes "public interests" has occurred. The appellant failed to demonstrate how the challenged short plat failed to meet any of the substantive criteria for approval of a short plat, and provided insufficient evidence and legal authority that would support an argument to essentially allow "public interest" considerations to override the letter of the law as written in the applicable development regulations in effect at the time the underlying application vested for purposes of review by City staff.

4. A basic rule of statutory construction is that a long-standing interpretation given a statute or ordinance by officials charged with its administration is highly persuasive with regard to legislative intent in enacting the statute or ordinance and, consequently, the

meaning of the statute or ordinance."[6]

5. A legislative body, including a City Council, is presumed to be familiar with its prior enactments and official interpretations of same.[7] And, where a legislative body leaves an enactment unchanged in the face of a decision interpreting such enactment, courts can conclude that if the legislative body wanted to change terms of its enactment it would have expressly amended relevant language to do so rather than leave it unchanged.[8]

6. In this matter, testimony established that it has long been the City's policy to construe codes to allow short-plats to be approved using 10-foot private access easements that serve new back lot(s) that do not abut a public right of way, and that such access easements have not prohibited use by the burdened-parcel. *Testimony of Department Staff, Mr. Suder and Mr. Mills; Testimony of Appellant's witness, Mr. Moehring.* There was no evidence that city codes have been amended to overturn portions of the *Cedar Park* decision that upheld a short plat that relied on access easements that did prohibit use by the burdened-parcel owner. There was no evidence to show that the SMC has been revised to include "potential future development plans" or something similar as a basis to require a 20-foot wide instead of a 10-foot wide access easement. There was no evidence to show that the SMC has been amended to clarify or specify what sort of factors can or should be considered "public interests" that are sufficient to serve as a basis to deny a short-plat that meets all other approval criteria found in SMC 23.24.040.A.

7. The facts weigh heavily against all of the appellant's arguments. They support the challenged short plat approval. The challenged decision is fully consistent with prior city interpretations and applications involving similarly situated lots, easements and proposals, including the property located next door to the project site.

8. Any findings or statements in other sections of this Decision that are deemed to be Conclusions of Law are adopted as such and incorporated herein by reference.

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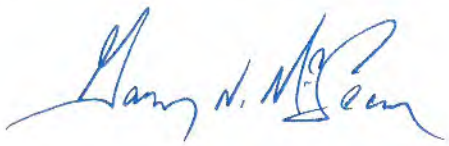
[6] 6 McQuillin Mun. Corp. § 20:45 (3d ed.)(citations omitted).
[7] *Leonard v. City of Bothell*, 87 Wash. 2d 847, 853 (1976); *State v. George*, 161 Wash. 2d 203, 211, 164 P.3d 506, 510 (2007); *State v. Ose*, 156 Wash. 2d 140, 148 (2005).
[8] *Friends of Snoqualmie Valley v. King Cnty. Boundary Review Bd.*, 118 Wash. 2d 488, 496-97 (1992).

VI. DECISION.

Upon consideration of the entire record, and granting substantial weight to the Director's challenged decision, the Examiner finds and concludes that the challenged short-plat approval was not in error. It was not a mistake. Instead, credible and sufficient evidence in the record establishes how the requested short-plat satisfied all applicable approval criteria. Accordingly, the appeal is denied, and the challenged short plat is confirmed.

ISSUED this 20th Day of April, 2018



Gary N. McLean, Hearing Examiner Pro Tem

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: PO Box 94729, Seattle, Washington 98124-4729. Office address: 700 Fifth Avenue, Suite 4000. Telephone: (206) 684-0521.

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 **Findings of Fact, Conclusions of Law, and Decision** to each person listed below, or on the attached mailing list, in the matter of **Gerard Bashein**. Hearing Examiner File: **MUP-17-036 (SD)** in the manner indicated.

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Dated: April 20, 2018

Alayna Johnson
Legal Assistant