BEFORE THE HEARING EXAMINER
FOR THE CITY OF SEATTLE

In the Matter of the Appeals of DAVID MOEHRING, NEIGHBOR TO 3641 22ND AVE W Of the SHORT PLAT SUBDIVISION to Create Two Parcels of Land from the Lot at 3641 22nd Ave West	Hearing Examiner File: **MUP-18-001** SDCI #3028431 APPELLANT'S RESPONSE TO APPLICANT'S POST-HEARING BRIEF & the SDCI CLOSING STATEMENT

In response to the Applicant's Post-Hearing Brief dated the April 20, 2018 and the SDCI Closing Statement dated April 19th, the Appellant offers the responses herein relative to the Appeal Hearing conducted by Hearing Examiner Ryan Vancil on April 12, 2018.

I. RESPONSE TO POST-HEARING BRIEF 'INTRODUCTION':

a. As outlined herein relative to the 'Statements of Fact', the Appellant has clearly demonstrated that the Department has failed to consider the retention of existing trees, even in part, as required by the Seattle Municipal Code as a condition to grant Short Plat subdivisions. In fact, the testimony of the Expert Witnesses and the Department had revealed that alternatives were indeed available as demonstrated considering one of numerous similar current examples within low-rise multifamily, LR1, zoning as applicable with this Short Plat application.

b. In correction to the statement that Mr. Moehring, the Appellant, 'did not introduce any evidence that the Short Plat did not provide adequate access, the Appellant will reiterate the evidence as outlined within the section below 'Statements of Facts'. Regarding introducing testimony is another matter that should have no bearing on the facts presented in the case. We already know that Mr. Moehring was excluded from offering testimony at the request of the Applicant given that the Appellant neglected to identify himself as a witness in the pre-hearing list of witnesses. However, evidence for the Department's erroneous decision to grant a

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short-plat based on an unidentified means of vehicular access was clearly demonstrated within exhibits and by cross-examination of the Applicant's and Department's witnesses.

II. RESPONSE TO POST-HEARING BRIEF 'STATEMENT OF FACTS':

a. Evidence was introduced by the Appellant relative to adequate **access easement**:

i. Exhibit 1 which erroneously indicated that the Short Plat would include vehicular access, whereas no such access has been indicated in the application materials.

ii. Exhibit 3 which records that Subject Property is within a low-rise multifamily zone rather than Single Family zone, as the testimony of case studies from Mr. Mills erroneously referred to.

iii. Exhibit 4 which records that Subject Property was submitted explicitly excluding vehicular access to Parcel A as required for new lots fronting a street.[1] Exhibit 4 makes it clear that Parcel A will not have vehicular access from the street. The Sheet 1 of 5 Notes #4 clearly states "No curb cuts or vehicular access from 22nd Avenue W. will be granted for any future development permits associated with Parcel A."

iv. This Exhibit 4 was also submitted without a designation for vehicular access to the alley as required for new lots (Parcel A) when an alley is present.[2]

v. Exhibit 5 which records the Department's admittance in not enforcing the access easement standards prior to October 2017.[3]

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[1] SMC 23.24.035 - Access. D. states: "Vehicular access to new lots shall be from a dedicated street, unless the Director determines that the following conditions exist, and permits access by a permanent private easement."

[2] SMC23.24.040.A.8.d- If the property being proposed to be subdivide is adjacent to an alley, then all new proposed lots must provide alley access.

[3] This October 17, 2017 document states "Seattle's Code (SMC 23.53.025) requires vehicle access widths to be based on the number of units being served, not the number of parking spaces required." "We require projects to meet these standards even for if the developments to not require or provide parking. Even if the development does not have parking, projects need to provide adequate access for emergency vehicles."

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vi. Exhibit 6 which records that the Short Plat submission must indicate any easements that affect development.[4] This includes legal descriptions of parking easements that have not been shown although required.[5]

vii. Given the above, the Applicant's Post-Hearing Brief and the statement about the lack of introduced evidence is unsubstantiated.

b. Similarly, evidence was indeed introduced by the Appellant relative to addressing the **retention of existing trees**:

i. Exhibit 1 which erroneously indicated that the Short Plat considered the retention of existing trees, which the testimony indicated to the contrary.[6]

ii. Exhibit 2 which records the Department had provided no comments or required any re-submissions of the Applicant to consider alternatives in their subdivision location and easement locations toward the retention of existing trees.

iii. Exhibit 3 which records that Subject Property is within a low-rise multifamily zone rather than a Single Family zone, which the tree-protection comments provided in Decision (Exhibit 1) referenced.

iv. Exhibit 4 records the required location, size and species of all trees at least 6" in diameter measured 4-1/2 feet above ground per SMC 23.24.020.F.

v. Exhibit 9 of Director's Rule 16-2008 which confirms the existence of at least one Exceptional Tree near the property's proposed southeast Seattle City Light easement.

vi. Exhibit 10 which records an inventory of all trees within the proposed subdivision as well as those trees along the Subject Property border. Multiple discrepancies were cited between this submission and Exhibit 4.

vii. Exhibits 11 and 12 which record the existence, appearance, and general condition of the trees that are to be evaluated within the proposed subdivision and corresponding easements.

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[4] Tips #213A, page 2, column 2, Item 9,1.g.

[5] Tips #213A, page 6, Item 7.

[6] Recorded Part 4 multiple testimony, beginning at 7:50, 8:10, 10:05, 12:04, 15:34, and 17:10 to 18:45.

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viii. Exhibit 15 which included "Example 2" of multiple short plat examples indicating that alternatives were available to this application in order to retain trees.[7]

ix. Again, as with the access easement criteria, the Applicant's Post-Hearing Brief statement suggesting a lack of introduced evidence relative to retention of trees is unsubstantiated.

c. Mr. Gribben, the attorney for and representing the Applicant, took issue that the Appellant's expert witness, Mr. Oxman, 'never measured the tree diameters, located the root feeder zones, identify drip lines, or conduct a physical inspection of the trees.' These points have little bearing given the exhibits recorded on the tree inventory, survey, and photographs already provide sufficient evidence for peer review. For the purposes of verifying tree locations, species, approximate size, and general health, visual observations of the trees from outside the property is not difficult as testified by Mr. Oxman, especially given the existing trees for retention are within forty feet of the site property line. To the contrary of the Applicant's brief[8], Mr. Oxman clearly stated in his testimony that at least five trees were at risk given the location of the proposed easements.[9] He extensively testified to the diameter and dripline discrepancies between the survey drawing Exhibit 4 and the Applicant's Arborist report Exhibit 10.[10] He also noted that feeder root zones have not been identified making the plans incomplete[11]. Regarding alternatives, Mr.Oxman indicated that the Department was in error by accepting a small lot size (just over 3,000 square foot) with existing trees to be retained. Mr. Oxman further testified that a larger "Parcel A" would potentially avoid the removal of the existing Tree #1 at the southeast corner of the lot. He

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[7] Example 2 was from the January 12, 2017 Short Subdivision of LR1 lot at 2432 NW 60th Street, SDCI application number 3026112. It shows dividing the site into two unequal parcels of 3043.5 and 1604 square feet. It also shows a combined pedestrian, utility and City Light Easement of 10 feet in width on the side of the lot opposite an existing 24-inch DBH Decoder Cedar tree.

[8] Page 3, line 3.

[9] Recorded testimony Part 2, from 31:42 to 34:00; and from 35:30 to 48.00.

[10] Recorded testimony Part 2, from 20:35 to 29:35.

[11] Recorded testimony Part 2, from 1:01:20 to 1:03:15.

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testified that in his opinion the Department failed to examine available alternatives to retain existing trees.[12]

d. Mr. Gribben also indicates in the Post-Hearing Brief that the Applicant's arborist, Mr. Ringe testified that he had overseen numerous development projects where trees were retained even though excavations and installation of utilities took place in the root zone.[13] Yet, in cross-examination, Mr. Ringe indicated that he was not aware of any development plans, that he has not been provided any short plat documents other than the existing conditions survey, that an arborist would be required for special excavations around trees, that he has only been involved in such procedures about a dozen times, that he has not been asked to provide such services for this project, and that there is no guarantee that special excavation efforts within easements would not harm the trees.[14] Such speculation by the Appellant and Department requiring special excavation procedures is outside the scope of tree retention relative to Short Plats.

e. Mr. Gribben also indicates in the Post-Hearing Brief that the Appellant 'failed to allege, much less identify, an alternative short plat that better maximized the retention of existing trees.'[15] As indicated earlier, the Appellant successfully referenced Exhibit 15 in comparison with Exhibit 4 of the Subject Property to identify with the Department's witness at least three (3) measures that the Director could have easily enforced with this Short Plat application in order to retain as many existing trees as possible. Three (3) include the following:

    i. Firstly, combining the two five-foot Seattle City Light and Utilities Easement into one ten-foot wide easement – likely along the southern property line - in order to retain Exhibit 10's marked Tree '1'.

    ii. Additionally, locating the proposed division line between Parcels A and Parcels B to the west at approximately 35 to 37 feet[16] from the alley right-

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[12] Recorded testimony Part 2, from 1:19:15 to 1:23:44

[13] Post-Hearing Brief Page 3, line 20

[14] Recorded testimonies Part 3, 23:45 to 27:12; and Part 3, 32:33 to 37:15.

[15] Post Hearing Brief, Page 4, lines 20-22.

[16] Distance as subsequently identified from the Exhibit 4 graphic scale.

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of-way would result in the short plat division being near centered on the marked Tree '3'. The resulting parcels of 1,850 and 4,150 square feet could be easily developed as done in numerous instances within LR1 zones. LR1 lot sizes as small 1,600 square feet on 50-foot wide lots is quite common in Seattle.[17]

iii. Optionally, it was offered to split the lot longitudinally into two 25-foot by 120-foot lots – as was recommended by Mr. Oxman – in order to provide the ability to retain at least two existing trees. In this scenario, both lots would have street frontage and thereby eliminate the need for Seattle City Light and Utility Easements to a rear lot that risk tree removal. [Each lot of 3,000 square feet is allowed up to two dwellings per LR1 zoning code, thereby a reasonable Short Plat alternative.]

These alternative subdivision examples are commonplace within Seattle's LR1 zoned developments. In no way, at any point of the hearing as suggested by the Applicant, has the Appellant conceded by failing to identify better divisions of land that would retain existing trees. In fact, the Department conceded that options to consolidate the easements, shift the north-south property line, or to split the site longitudinally were not examined. As such, this Short Plat application is woefully deficient in terms of achieving the Director's criteria required for granting approval. The decision was clearly erroneous, and the lack of due diligence has been proven and evident.

f. The Department's failure to act on this criteria for the approval of the Short Plat denies the requirements of Short Plat approvals. Since SMC 23.24.050.C makes the Short Plat decision binding, any lots created thereunder shall be deemed to meet lot requirements imposed by the Land Use Code for a period of no less than five years. Thus, given that a short plat shall be governed by the terms of approval of the Director's decision, the consideration for the retention of existing trees and access easements to each lot must be made at this critical juncture, and not later in the development process.

[17] As identified from the SDCI permit information on-line public record.

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III. FUNDAMENTAL FLAW of the APPLICANT and DEPARTMENT'S ARGUMENT

In terms of the Department's failure to examine the retention of existing trees with the Short Plat, the case evidence clearly indicates a neglect of the Department to enforce the code. Policy and practice are not considered substitutes to code requirements. Beyond the issue of the tree retention criteria, there also exists a fundamental flaw in this case that the Applicant and the Department must recognize. The Applicant's Hearing Brief (as well as the SDCI's Closing Statement) devotes pages of code analysis that is not applicable to the errors made by the Applicant and the Department as challenged in the appeal.

This case *is not* about challenging the city's general interpretation of the lot access requirements in Short Plat subdivisions. Rather, this case *is* about a project-specific errors and disconnect between what has been submitted and what was been approved relative to vehicular access. Specifically, the project's subdivision submission Exhibit 4 makes it clear that Parcel A will not have vehicular access from the street. Exhibit 4 Sheet 1 of 5 Notes #4 states "No curb cuts or vehicular access from 22nd Avenue W. will be granted for any future development permits associated with Parcel A" (reference figure 1 on the following page.) In essence, Parcel A is being proposed without any vehicular access. There is no access provided from the street, as this Note 4 clearly states that vehicular access will not be granted for any future development. Contrary to the Department's testimony, there is no vehicular access to "Parcel A" through "Parcel B" from the alley, as the submission does not show a vehicular access easement from the alley to the west side of proposed parcel "A"; nor would it be applicable to consider pedestrian access to "Parcel A" in-lieu of vehicular access. In fact, the proposed Parcel "A" fails to meet the requirements of a legal lot given its Legal Description has excluded Vehicular Access from the street (Exhibit 4.) Exhibit 4 was also submitted without a designation for vehicular access to the alley as required for new lots (Parcel A) when an alley is present. Contrary to the legal description of the Short Subdivision provided, Exhibit 1, the Director's Analysis and Decision indicates that the decision has been made based on this short subdivision providing pedestrian *and* vehicular access to all lots within the short subdivision. Which is it? No vehicular access from the street to Parcel A, or vehicular access to

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both "Parcels A" and "B". The Applicant's and Department's conflicting declarations within this Short Plat decision are, therefore, fundamentally flawed are erroneous.

EXISTING LEGAL DESCRIPTION (5,999 SQ.FT.)

LOT 21, BLOCK 12, GILMAN'S ADDITION TO THE CITY OF SEATTLE, ACCORDING TO THE PLAT THEREOF RECORDED IN VOLUME 5 OF PLATS, PAGE 93, RECORDS OF KING COUNTY, WA.

NOTES:

1. THIS SURVEY WAS PERFORMED BY FIELD TRAVERSE USING A 10 SECOND "TOTAL STATION" THEODOLITE SUPPLEMENTED WITH A 100 FT. STEEL TAPE. THIS SURVEY MEETS OR EXCEEDS THE STANDARDS FOR LAND BOUNDARY SURVEYS AS SET FORTH IN WAC CHAPTER 332-130-090.

2. BASIS OF BEARINGS = N 00°59'41" E BETWEEN THE TWO FOUND MONUMENTS IN THE CENTERLINE OF 23RD AVE. W. AS SHOWN HEREON.

3. ALL EXISTING STRUCTURES AS SHOWN ON SHEET 3 ARE TO BE LEGALLY REMOVED UNDER SEPARATE PERMIT.

4. NO CURBCUTS OR VEHICULAR ACCESS FROM 22ND AVENUE W. WILL BE GRANTED FOR ANY FUTURE DEVELOPMENT PERMITS ASSOCIATED WITH PROPOSED PARCEL A.

Figure 1- [above] Excerpt from Exhibit 4, sheet 1 of 5- Note 4 on the Legal Description which indicate that there will be no vehicular access from 22nd Avenue W granted for any future development. As such, Parcel A does not have the required vehicle access as indicated in the record and as suggested in the Applicant's Post-Hearing brief.

Conclusion:

Based on information provided by the applicant, referral comments from SDCI and other City Departments, and review and analysis by the Land Use Planner, the above criteria have been met.

The short subdivision meets all minimum standards or applicable exceptions set forth in the Land Use Code. This short subdivision will provide pedestrian and vehicular access (including emergency vehicles), and public and private utilities.

Adequate provisions for drainage control, water supply and sanitary sewage disposal will be provided for each lot and service is assured, subject to standard conditions governing utility extensions.

The short plat application has been reviewed by Seattle Public Utilities and a Water Availability Certificate (WAC) was issued on August 7, 2017. The site is not subject to the provisions of Section 25.09.240 since it is not located in a riparian corridor, wetland, wetland buffer, or steep slope area. There does not appear to be any reasonable alternative configuration of this plat that would better maximize the retention of trees than the proposed plat.

Future construction will be subject to the provisions of SMC 23.44.008, 25.11.050 and 25.11.060 which sets forth tree planting and exceptional tree protection requirements.

Figure 2- [above] Excerpt from case Exhibit 1- Director's Analysis and Decision which, in contrast to Figure 1, indicates that the decision has been made based on this short subdivision providing pedestrian and vehicular access. Related to the retention of trees, this figure also highlights the erroneous Single Family (SF) zone code sections that are not applicable to Subject Property's LR1 zoning.

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IV. OBJECTION TO APPLICANT'S ADDITIONAL EXHIBITS

The Appellant objects to the Applicant's attempt to supplement their case with items that were missing from the exhibits. The Post-Hearing Brief Page 11 lines 13 to 18 and Exhibit B refer to MUP-17-036 that was posted just hours before the Applicant's Post-Hearing Brief was due. The results from that Examiner Pro Tem are subject to reconsideration and have no precedent to this appeal. Moreover, that particular LR1 subdivision is not equivalent to this case in that (a) the front parcel does have access from the street, (b) the rear parcel does not have access to an alley and relies on an access easement through the front parcel, and (c) no existing trees are on the site or adjacent property. Addition to its lack of merit, post-hearing exhibits must be dismissed.

V. CONCLUSION

1. The decision on the Short Subdivision by the Department's Land Planner, Joseph Hurley, dated December 18, 2017 (case Exhibit 1) was granted with no conditions, it made no consideration relative to the retention of existing trees, it erroneously concluded that vehicular access would be provided to all lots with the subdivision despite the application legal description indicating that no vehicle access would ever be permitted to "Parcel A".
2. The published analysis issued by the Department's Land Planner on December 18, 2017 (case Exhibit 1) is in error and must be vacated by the Hearing Examiner resulting from the review of the evidence. Mr. Hurley's testimony that access to "Parcel A" is from the street contradicts the Short Plat application.[18] With multiple errors and the Department's failure to apply all of the criteria in their decision to grant a short plat to the subject property, the Appellant requests relief that the Hearing Examiner execute their authority for a vacation of the analysis and the decision.

Dated this Twentieth-fourth day of April, 2018

By: 

DAVID MOEHRING AIA
Appellant (MUP-18-001)

[18] Recorded Part 4, Hurley, 37:30

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Certificate of Service

I certify under penalty of perjury under the laws of the State of Washington that on this date I, David Moehring, the Neighbor to 3641 22nd Ave West, sent true and correct copies via e-mail, of the attached **Appellant Response to the Applicant's Post-Hearing Brief** to every person listed below, in the matter of the **LAND USE DECISION APPEAL** to the Short Subdivision to create two parcels of land from 3641 22nd Avenue West lot, Hearing Examiner File No. MUP-18-001.

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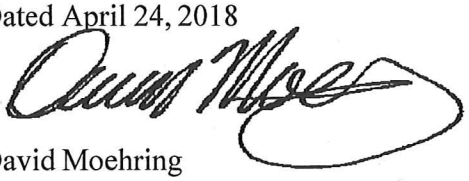
Dated April 24, 2018



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