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CITY OF SEATTLE
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BEFORE THE CITY COUNCIL
FOR THE CITY OF SEATTLE

In the Matter of the Application of
BOB MCCULLOUGH
for a Multi-Family Tax Exemption

Clerk File No. 313457

**Applicant's Reply to Office of Housing's
Response re Denial of MFTE Application**

INTRODUCTION

This document is the Applicant/Appellant's response to the Office of Housing's response to the appeal. In sum, this case involves DPD and OH coordinating behind the scenes to deny MFTE to an eligible project that provides valuable affordable housing in the University District. The City Council must grant this appeal and allow the project to obtain the MFTE.

- i. The MFTE application was consistent with the number of "dwelling units" applied for at DPD.**

The Office of Housing's ("OH's") response includes a lengthy background of the policies and different standards applied by DPD to define "dwelling unit." The discussion states the various DPD and OH policies related to MFTE and dwelling units and states that OH "recognized that certain developers were describing the number of dwelling units differently for purposes of their application for a tax exemption than they were for their applications to DPD for

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1 development permits” mainly to avoid design review or SEPA review. OH Response, pp. 4-5.
2 Notably, OH’s brief does not state that Mr. McCullough’s project is not one of these projects. In
3 fact, Mr. McCullough’s application matches his DPD application for 20 dwelling units, which is
4 the correct number of dwelling units for SEPA purposes and for design review purposes. Mr.
5 McCullough was not attempting to “game the system” by reducing the number of dwelling units
6 at DPD to avoid certain levels of review and then obtaining MFTE on the full number of units.
7 Instead, Mr. McCullough applied for MFTE for the same number of units (20) as was applied for
8 SEPA and design review thresholds. Mr. McCullough’s project is completely consistent with the
9 number of units applied for for both MFTE and DPD permits. For this reason, the City Council
10 must grant this appeal as the project is eligible for MFTE.
11

12
13 **ii. Mr. McCullough’s MFTE status should not be penalized for DPD’s confusion over**
14 **the definition of “dwelling unit.”**

15 OH’s brief states that it relies on DPD’s determination of what a dwelling unit is, and that
16 it was simply responding to DPD’s determination of dwelling unit. However, throughout this
17 process, DPD has been unable to determine how many dwelling units are in this project. DPD
18 even “reissued” a building permit after the building was constructed in order to ensure that Mr.
19 McCullough’s project would not be eligible for MFTE. Mr. McCullough should not be
20 penalized for the failure of DPD to determine the number of dwelling units in this project.
21

22 First, DPD wrongfully reissued a building permit after the project was already
23 constructed to “clarify” how many units existed on the project. It is questionable legally whether
24 DPD can reissue a building permit under state law.¹ Nevertheless, the reissuance of the building
25 permit was the trigger for the denial of the MFTE application. At the time of application, Mr.
26

27 ¹ The timing of the reissuance of the building permit is also questionable—it was during the MFTE application
28 process and appears to have been communicated to OH prior to the applicant learning of the reissuance.

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1 McCullough's MFTE application was entirely consistent with the DPD building permit—DPD
2 issued a building permit for 20 units, which matches the MFTE application. It was only after
3 DPD wrongfully reissued the building permit and changed the dwelling unit count to 1 unit that
4 OH denied the application. Mr. McCullough's application complies with the MFTE
5 requirements, including the OH Director's Rule, and should therefore be granted.
6

7 DPD's reissuance of the building permit only underscores DPD's internal confusion
8 related to dwelling units. OH's response outlines no fewer than four different ways this project
9 could count dwelling units. It could be counted as the total number of bedrooms (40). It could
10 be counted under the definition of DR 12-2012, so that design review and SEPA thresholds are
11 consistent with MFTE (20). It could be counted as one, consistent with Ms. Mosteller's
12 reissuance of the building permit at the end of this project. Incredibly, DPD has found another
13 way of counting this project—as zero dwelling units, "because the rooms in this project do not
14 meet the Land Use Code's definition of dwelling unit." OH Response, p. 7.
15

16 Mr. McCullough should not be penalized for DPD's internal confusion. Mr. McCullough
17 applied for MFTE for 20 units, which is consistent with DR 12-2012 and the design review and
18 SEPA thresholds for this project. It is consistent with DPD's understanding at one time of the
19 number of units for this project. *See* Declaration of Ndifon. It is consistent with Mr.
20 McCullough's building permit application. The City Council should therefore grant this appeal
21 and allow the project to obtain the MFTE.
22

23 **iii. OH failed to follow proper procedure in review of this permit.**
24

25 OH disputes that improper procedure was followed in review of this permit, because Mr.
26 Kent's request for additional information did not constitute a "notification that the project was
27 incomplete" under SMC 5.73.050. OH attempts to make a distinction without a difference. Mr.
28

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1 Kent's email clearly asked for additional information because he felt he could not process the
2 application as presented, also known as an incomplete application.

3 It makes sense that the MFTE application should remain pending and incomplete: as
4 stated above, DPD was still trying to determine what a "dwelling unit" was, and was still
5 responding to the inquiry whether DPD could legally "reprint" a permit. Thus, a determination
6 of completeness would have been premature and unwarranted—OH simply did not have the
7 information required to make a final determination regarding this matter. The code requires that
8 OH issue a Determination of Completeness if the Office has asked for additional information.
9 OH did not do this, and therefore its denial of the MFTE application violates SMC 5.73.050.

10
11 **iv. The Office of Housing lacks the power to deny an MFTE application based on
12 Director's Rule 1-2013.**

13 OH fails to respond to this argument, other than by saying that if OH lacks the authority
14 to deny an application based on DR 1-2013, then it is up to the City Council to determine the
15 definition of dwelling unit. The argument remains--OH may not rely upon a Director's Rule to
16 deny an application.
17

18 Chapter 5.73 SMC very clearly outlines the requirements for MFTE eligibility and denial
19 or approval of application. Although Chapter 5.73 SMC does not cite to a Director's Rule as a
20 criterion for eligibility or approval, the Municipal Code does give the Office of Housing the
21 general ability to create a Director's Rule:
22

23 SMC 3.14.740 In order to carry out office functions, the Director of Housing shall have
24 the power to: G. Promulgate and amend, in accordance with the City Administrative
25 Code to the extent applicable, rules, regulations, and polices to carry out Office of
26 Housing activities, provided that no such rule, regulation or policy shall confer any rights
27 to entitlement upon any person, entity, class or group, nor undertake any legal duty to any
28 person, entity, class or group.

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1 Director's Rule 1-2013, and the Office of Housing's reliance upon this rule to deny the
2 application, clearly is in violation of SMC 3.14.740. The Director's Rule gives the Office of
3 Housing the authority to deny an MFTE application for the number of dwelling units listed on a
4 building permit not matching the number of dwelling units on an MFTE permit. See Exhibit E.
5 The rule adds additional application approval or disapproval criteria to a process and criteria not
6 mentioned in Chapter 5.73 SMC. Thus, the Director's Rule confers rights and duties, in
7 violation of SMC 3.14.740. The Office of Housing must base its approval or denial of the
8 application upon the criteria stated in Chapter 5.73 SMC alone; reliance on the Director's Rule
9 violates SMC 3.14.740 and is an illegal delegation of legislative authority, as the legislative body
10 has already spoken regarding the application approval criteria in SMC 5.73.060.
11
12

13 RELIEF REQUESTED

14 The Appellant respectfully asks the City Council to grant this appeal and to overturn the
15 Office of Housing's denial of the Project's MFTE permit. Substantial evidence in the record
16 before the Office of Housing, and before the City Council, shows that the MFTE application was
17 consistent with the building permit and included an application for 20 units, DPD wrongfully
18 reissued a building permit for 1 unit after the project was constructed (and incredibly has now
19 stated that the project actually does not contain *any* dwelling units), the Office of Housing did
20 not follow required procedures related to a complete application, and the denial was based upon
21 a Director's Rule that violates SMC 3.14.740 and is an illegal delegation of legislative powers.
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28 CITY COUNCIL APPEAL –MCCULLOUGH REPLY- Page 5 of 6

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1 Dated this 12th day of February, 2014.

2 Respectfully submitted,

3 McCULLOUGH HILL LEARY, P.S.

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6 _____
7 Jessica M. Clawson, WSBA No. 36901
8 Attorneys for Appellant

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28 **McCULLOUGH HILL LEARY, P.S.**

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CERTIFICATE OF SERVICE

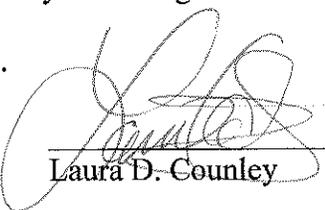
I, Laura D. Counley, declare as follows:

I am employed with McCullough Hill Leary, P.S., which represents Bob McCullough. I served a copy of the APPLICANT'S REPLY TO OFFICE OF HOUSINGS'S RESPONSE RE DENIAL OF MFTE APPLICATION via hand delivery on the following party:

Robert D. Tobin
Seattle City Attorney
600 Fourth Ave., 4th Floor
P.O. Box 94769
Seattle, WA 98124-4019

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct to the best of my knowledge and belief.

DATED this 27th day of February, 2014.



Laura D. Counley

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