INSTITUTE FOR JUSTICE

July 23, 2020

VIA FIRST-CLASS MAIL AND EMAIL TO NATHAN.TORGELSON@SEATTLE.GOV

City of Seattle
Seattle Department of Construction and Inspections
700 Fifth Avenue
Seattle, Washington 98104
Attn: Nathan Torgelson
Director

Re: *Building permit application No. 6728050-CN of Andre and Erika Cherry, 7755 Highland Park Way SW, Seattle, WA 98106*

Dear Mr. Torgelson:

We represent Andre and Erika Cherry (the "Cherrys"). In 2018, the Cherrys purchased a two-bedroom, single-family house located at 7755 Highland Park Way SW, Seattle, WA 98106 (the "Property"). The Property is an old home and needs significant renovations, but it was what the Cherrys could afford. They want to bring the Property up to modern conditions while keeping it a two-bedroom, single-family house for them to live in. Accordingly, in May 2019, the Cherrys submitted a building permit, Building Permit Application # 6728050-*CN* (the "Permit Application"), seeking a permit for renovations to the Property. As of the date of this letter, however, Seattle Department of Construction and Inspection (SDCI) has neither denied nor approved the Permit Application. SDCI maintains that the renovations are subject to the requirements of the City of Seattle's Mandatory Housing Affordability Ordinance, Ordinance No. 125791, Council Bill No. CB 119444 (the "MHA") because the renovations would create a "new structure." Based on this determination, SDCI will not approve the Permit Application unless the Cherrys comply with MHA conditions.

We write to urge SDCI to grant the Permit Application without application of MHA conditions within the next 60 days. As is discussed below, the MHA does not apply to the Property because the renovations proposed by the Permit Application are not the creation of a "new structure" under the MHA. Even if the renovations do fall under the MHA, SDCI should waive any performance required or amount due under the MHA because of the severe economic impact and undue burden either requirement would impose on the Cherrys. Finally, SDCI should issue the permit because application of the MHA to the Property would violate the Cherrys' constitutional rights.

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A. The Property and the Proposed Renovations.

The Cherrys purchased the Property in November 2018. The Property consists of a 3,480 square foot lot with a two-bedroom, single-family home built in 1916. The main floor is 685 square feet, containing the entire living area and two tiny bedrooms. The second (upper) floor consists of a 135 square foot attic. Approximately 175 square feet of the main floor at the back of the house (one of the bedrooms) is an old unpermitted addition with significant problems, and, given the roof pitch and low clearances, the upper floor is currently not suited for use as living space. The home needed work, but it was what the Cherrys could afford.

Because of the home's condition, the Cherrys purchased the Property with the intent to renovate it before they moved in. Consequently, the Cherrys submitted a pre-application in January 2019 and hired an architect to do the required drawings. The drawings were submitted with the Permit Application in May 2019. The Permit Application proposes the following renovations: First, the Cherrys propose to remove the back 18 inches of the unpermitted addition, thereby clearing the alley and bringing the house up to code. Second, they propose to eliminate the "front" bedroom on the first floor. This would require removing an internal wall and enclosing the front porch. Third, they propose to build the attic out into a second bedroom and bathroom, a real staircase, and an office.

Because of the condition of the home and extent of renovations, the Cherrys did not intend to live in the house while they waited for permit approval and renovations were completed. Until recently, they rented a small apartment around the corner, leaving them with both monthly rent and a mortgage. But the more-than-a-year delay in approving their permit, explained below, has caused significant economic hardship, forcing the Cherrys to move out of the apartment and into the Property in its unimproved condition.

B. The Course of Proceedings So Far.

In March 2019, the Seattle City Council adopted the MHA. The ordinance took effect on April 19, 2019. The Property is in an MHA area and is currently zoned "LR1 (M)." According to Seattle Municipal Code (SMC) § 23.58C.025(B), MHA requirements apply to development that includes units, whether such development occurs through (1) construction of a new structure; (2) construction of an addition to an existing structure that results in an increase in the total number of units; (3) alterations within an existing structure that result in an increase in the total number of units; or (4) change of use that results in an increase in the total number of units. Consequently, the MHA will apply to the Property only if the Property meets one or more of these standards.

In an email dated January 27, 2020, SDCI Zoning Team Supervisor Scott Ringgold informed the Cherrys that their planned renovation would result in a "new structure" subject to the MHA because the renovations would replace more than 50% of their existing house structure's "envelope." The MHA does not define "new structure" and does not contain any discussion of a building's "envelope."

The consequences of SDCI's interpretation are devastating for the Cherrys. Under SMC § 23.58C.025, if MHA applies to the Cherrys' renovation plans, the Cherrys must satisfy MHA requirements either through a "performance option" or a "payment option." If the Cherrys choose

the performance option, the Cherrys must provide at least one, if not more, "comparable" units for affordable housing. This means they must build an additional dwelling unit on their lot and rent it to eligible tenants. Their only other choice under MHA is to take the payment option, which means they must pay a significant fee before SDCI grants the Permit Application. According to Mr. Ringgold, the Cherrys would have to pay "roughly $11K, to the Office of Housing before permit issuance" based on the total square footage of the "new structure," most of which already exists in the existing structure.

Because the Cherrys have not complied with the MHA's requirements, SDCI has not taken final action regarding the Permit Application, despite having received it over a year ago.

C. SDCI Should Grant the Permit Application Immediately.

1. The Proposed Renovations Do Not Result in A "New Structure."

To state the obvious, the Cherrys are not building a "new structure." They bought a two-bedroom single-family home to live in. Following their renovations, they will still have a two-bedroom, single-family home to live in. The purpose of the MHA is not to prevent people from renovating their own residences, and SDCI should not apply it that way.

As noted above, the MHA does not define "new structure." Nor does it discuss how changes to a building's "envelope" may result in a "new structure." In this state, the meaning of legislation is determined by its "plain language" and "ordinary meaning." *State v. J.P.*, 149 Wn.2d 444, 450, 69 P.3d 318 (2003). The ordinary meaning of "new structure" is a structure that did not exist before. The Cherrys' renovations are changes to an existing structure; that is, they are restoring an existing building to a better state. While extensive, the planned renovations are not the creation of a "new structure," regardless of their effect on a building's "envelope." And because the Cherrys' renovations do not result in a new structure or increase the total number of "units," they are not subject to the MHA.

Moreover, if the legislation is to be guided by the intent of the legislative body that created it, *J.P.*, 149 Wn.2d at 444, the Permit Application is not the type of "development" the MHA was designed to affect. The undersigned has reviewed the MHA and its legislative history and there is no indication that the City Council intended to reach projects like the Cherrys' when it implemented "mandatory inclusionary housing requirement[s] for new residential development and commercial linkage fees for new commercial development." CB 119444.

In sum, the MHA does not reach the Cherrys' Permit Application and the City Council did not intend it to. SDCI's interpretation of the ordinance is inconsistent with its plain language and intent. As such, the MHA does not apply to the Permit Application and SDCI should grant the Cherrys' permit immediately.

2. SDCI Should Waive the MHA's Requirements.

Even if SDCI persists in its interpretation of "new structure" such that MHA requirements apply to the Cherrys' renovation, it should waive the MHA's payment and performance requirements. SMC § 23.58C.035(C)(3)(b) allows you to waive MHA requirements if the costs will result in severe

economic impact that would reach the level of an undue burden that should not be borne by the property owner. For the Cherrys, both the payment option (the $11,000 fee) and the performance option (the obligation to build an additional dwelling unit on the Property) will result in severe economic impact that would reach the level of an undue burden that should not be borne by the Cherrys. Therefore, the City should grant them a waiver.

Specifically, the City should waive the requirements of the MHA in the Cherrys' case for four reasons. First, the economic harm to the Cherrys will not be nominal. Quite the opposite. The Cherrys are veterans who continue to serve their community as mental health professionals. They bought their house because that is what they could afford. The Cherrys cannot afford to pay $11,000 in fees to the City or pay to build an additional unit on their small property. The cost of making it livable will be high enough without the additional and extraordinary expenses imposed by the City under the MHA. Additionally, because the house needs repairs, the Cherrys were living in an apartment until they could renovate the house—paying double the housing costs (rent and mortgage) while this burdensome permitting process dragged on for months. Those double payments made a significant dent in their reserves, and they still need to pay for the renovation itself. The staggering fee of $11,000 (the payment option) and the cost of building an additional unit (the performance option) are both untenable for the Cherrys and will lead to severe economic hardship. It would be unfortunate, to say the least, if a city program claiming to make housing affordable for those of modest means made this specific house unaffordable for these particular people of modest means.

Second, the Cherrys could not have known that they would be subject to MHA requirements when they purchased the Property. As noted above, the MHA, by its terms, does not cover renovations that do not add "units." The Cherrys bought the Property, submitted a pre-application, hired an architect for the required drawings, and began preparing to renovate the home—all prior to the passage of the MHA. It would, therefore, be inequitable to apply this ordinance to the Cherrys.

Third, the need for a waiver would not be alleviated by an alternative use or configuration of the Property because there are no reasonable alternative uses or configurations of the Property. The Cherrys bought this single-family home to live in it as a single-family home. It would be unreasonable to require them to alter its use to multi-family housing. It would also be unreasonable to configure their renovation differently. They bought a two-bedroom, single-family house featuring clearances and room dimensions appropriate for life in 1916; the permits they have requested from the City will allow them to make that house a two-bedroom, single-family house appropriate for life in 2020. Under such circumstances, requiring them to retain the original "envelope," or something close to it, just to avoid the reach of the MHA, is irrational and unfair.

Fourth, the economic hardship the Cherrys will suffer under the requirements of the MHA is not due to their own decisions. Their decisions were perfectly within the norm for middle-class new homeowners in a cramped real estate market. They decided to buy an old house that needed work because it was what they could afford, had plans drawn up, communicated with the City, and requested permits to bring the house up to modest, modern living standards. The Cherrys' decisions were reasonable and responsible, and they should not be penalized for those decisions with onerous fees or a City-imposed obligation to build an extra unit on their small parcel that they must rent.

D. Failure to Issue the Permit Will Deprive the Cherrys of their Constitutional Rights.

The choice the City is offering to the Cherrys—pay a fee of $11,000 or build an additional unit for rental—amounts to an unconstitutional condition or illegal exaction.[1] *Koontz v. St. Johns River Mgmt. Dist.*, 570 U.S. 595, 604-05 (2013); *Dolan v. City of Tigard*, 512 U.S. 374, 385 (1994); *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 831 (1987). In those cases, the U.S. Supreme Court held that the government may not condition the approval of a land-use permit on the owner's relinquishment of a portion of his or her property—including through fees—unless there is a nexus and rough proportionality between the government's demand and the effects of the proposed land use.

Application of the MHA to the Cherrys violates these principles. The Cherrys' home renovation will not change the use of the property—it is currently a single-family home and it will remain a single-family home. As such, the renovation will not affect Seattle housing supply or Seattle housing costs at all. That means there is no nexus between the Cherrys' home renovation and Seattle's affordable housing shortage. Even if there were, the City's condition is not proportional (roughly or otherwise) to the impact of the Cherrys' home renovation on Seattle's housing market. Furthermore, the condition was not determined by an individualized assessment of the Cherrys' case; instead, it was based formulaically on the total square footage of the Cherrys' planned renovated home. The City's demands under the MHA thus amount to an unconstitutional condition that SDCI may not legally extract.

* * *

SDCI should not and cannot condition the Cherrys' Permit Application on their compliance with the MHA. On its own terms, the MHA does not apply to the Cherry's home renovation. Application of the MHA to the Cherrys will also cause them severe economic impact that would reach the level of an undue burden. Moreover, applying the MHA to their Permit Application results in unconstitutional conditions on the Cherrys' property rights because the Cherrys' home renovations do not affect any government interest in "affordable housing." To the contrary, were SDCI to deny the Permit Application or keep it in limbo, this will do nothing but make housing far more expensive—in fact, prohibitive—for the Cherrys. We therefore urge you to immediately grant the Permit Application without applying MHA conditions to the Permit Application.

[1] The Cherrys' noting that SDCI's application of the MHA to the Cherrys would result in an unconstitutional condition should not be read to suggest that this is the only reason such an application would violate federal or state law. The Cherrys specifically reserve the right to present all arguments against SDCI's application of the MHA to them in any forum.

If SDCI continues to hold to its view that the MHA applies to the Cherrys, please note that the Cherrys cannot and will not comply with the MHA's burdensome and unconstitutional requirements. In that event, we urge you to expeditiously deny the Permit Application so that the Cherrys may take any further actions to which they are legally entitled. In any event, we ask that you take final action on the Permit Application in the next 60 days.

Sincerely,

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By: s/William R. Maurer
William R. Maurer
Attorneys for the Cherrys