

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

BEFORE THE HEARING EXAMINER
CITY OF SEATTLE

In the Matter of the Appeals of
**WALLINGFORD COMMUNITY
COUNCIL, ET AL.**

of adequacy of the FEIS issued by the
Director,
Office of Planning and Community
Development.

Hearing Examiner File:
W-17-006 through W-17-014

**WALLINGFORD COMMUNITY
COUNCIL'S MOTION IN LIMINE**

The Wallingford Community Council respectfully submits the following Motion in
Limine for the hearing beginning on June 25, 2018. This motion is filed on behalf of WCC
and not on behalf of other appellants whose appeals are consolidated with this matter.

A. Relief Requested.

WCC respectfully requests that any testimony, exhibits or other evidence offered by
OPCD and the City of Seattle relating to alternatives to the MHA proposal beyond the
alternatives defined and advocated by OPCD in its motion to dismiss WCC's appeal, be
excluded for the purpose of this appeal and respondent's compliance with SEPA.

B. Statement of Facts.

The City of Seattle through OPCD issued a Final Environmental Impact Statement
which is the subject of the pending appeal to be heard beginning June 25, 2018. SEPA

WALLINGFORD COMMUNITY COUNCIL'S
MOTION IN LIMINE - 1

G. LEE RAAEN
LAWYER
3301 Burke Ave. N., #340
Seattle, WA 98103
(206 682-9580 Lee@LRaaen.com

1 requires the consideration of alternatives as part of the environmental review process. The
2 FEIS under consideration in this appeal only considered alternative ways to implement
3 MHA, not alternatives to MHA. OPCD and WCC filed cross motions regarding whether
4 OPCD's limiting consideration of alternatives to those for the implementation of MHA
5 complied with SEPA. OPCD contends that it is not required to consider alternatives to the
6 "proposal" (MHA). WCC contends that SEPA requires considerations of alternatives
7 beyond the MHA proposal. (See pleadings filed in this matter by OPCD and WCC in
8 support of their respective motions to dismiss and/or for summary judgment, and the
9 pleadings filed in response and reply to the respective motions.) The Hearing Examiner
10 denied the summary judgment motions of both OPCD and WCC on this issue.

11 On Thursday, June 21, 2018, the undersigned received "OPCD's Final Witness and
12 Exhibit List." At least two witnesses are listed to testify regarding alternatives: Richard
13 Weinman "alternatives analysis in the EIS" ¶ 7, and Rich Jacobus "EIS alternatives" ¶ 21. It
14 is not clear if the offered testimony will go beyond consideration of the alternatives in the
15 FEIS relied on by OPCD in its summary judgment motions, or if it will be inconsistent with
16 its prior legal positions taken before the Hearing Examiner.

17
18
19 **C. Statement of Issues.**

20 Should OPD be allowed to present testimony, exhibits and argument which are
21 irrelevant, prejudicial, unauthorized by law, and inconsistent with its prior legal positions in
22 this matter?
23
24

1 **D. Evidence Relied Upon.**

2 The records and files in this matter, specifically pleadings filed by OPCD and WCC
3 relating to OPCD’s motion to dismiss WCC’s appeal and WCC’s Cross Motion for
4 Summary Judgment, and the FEIS which is the subject of this appeal.

5
6 **E. Authorities and Argument.**

7 The Hearing Examiner may look to Superior Court rules for guidance when
8 questions of practice or procedure are not addressed by Hearing Examiner Rules. HE 1.04.

9 ER 104 allows the court to make a preliminary determination regarding the
10 admissibility of evidence. In *Osborne v. Lake Washington School Dist.*, 1 Wn. App. 534,
11 538, 462 P.2d 966 (1969), the court recognized that a motion in *limine* is a proper method to
12 exclude such evidence. In addition, it has long been held that a pretrial motion to exclude
13 evidence is proper. *State v. Smith*, 189 Wash. 422, 65 P.2d 1075 (1937); *See also Fenimore*
14 *v. Drake Construction Co.*, 87 Wn.2d 85, 549 P.2d 483 (1976). Such motions are designed
15 to simplify the trial and avoid prejudice. *Fenimore, supra*.

16
17 When a trial court is able to determine the admissibility of the questioned testimony
18 prior to its introduction at trial, it is appropriate to grant a motion *in limine* and thereby
19 avoid prejudice. *State v. Kelly*, 103 Wn.2d 188, 192-193, 685 P.2d 564 (1984). The
20 standards for granting a motion *in limine* are as follows:

21 [T]he trial court should grant such a motion if it describes the evidence
22 which is sought to be excluded with sufficient specificity to enable the
23 trial court to determine that it is clearly inadmissible under the issues as
24 drawn which may develop during the trial and if the evidence is so
prejudicial in its nature that the moving party should be spared the

necessity of calling attention to it by objecting when it is offered during the trial.

Fenimore, supra, 87 Wn.2d at 91.

“Evidence which is not relevant is not admissible.” ER 402. Evidence presented by OPCD at the hearing considering alternatives to MHA to support the adequacy of the FEIS would not only be irrelevant given the legal position taken by OPCD earlier, but would be highly prejudicial to not only WCC, but the citizens of Seattle. If OPCD is allowed to present evidence of alternatives to MHA in support of the EIS and the MHA proposal, WCC would be prejudiced in being denied an opportunity to address evidence and arguments inconsistent with prior legal positions taken by OPCD. This would be particularly true in this matter. The Hearing Examiner has consolidated nine appeals to be heard over a period of several weeks in three different months. Since most of the hearings will not concern issues raised by WCC’s appeal, counsel for WCC will not be present to object to evidence as it may be presented. Without a motion in limine, WCC would be required to have counsel “sit in” on weeks of hearings not related to its appeal.

The presentation of evidence which might go beyond the alternatives considered in the FEIS would also be highly prejudicial to the citizens of Seattle since those alternatives would not have been part of the EIS process and notice of the consideration of those alternatives would not have been disclosed to the public as required by SEPA.

It should be noted that WCC is not seeking to exclude evidence offered by other appellants or WCC regarding possible alternatives which should have been considered as part of SEPA review but were not. Nor is WCC seeking to prevent OPCD from responding to any evidence along those lines which might be submitted. This motion is intended to

1 prohibit OPCD from presenting evidence considering other alternatives to MHA beyond
2 those in the FEIS to remedy inadequacies in the City's environmental review of MHA.

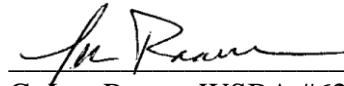
3 OPCD should not be allowed to write (or right) provisions of the FEIS at a hearing without
4 full compliance with SEPA.

5 If OPCD intends to present evidence covered by this motion, it should be required to
6 give at least 24 hours' notice to WCC's counsel to afford an opportunity to appear at the
7 hearing and object.

8 **F. Conclusion and Proposed Order.**

9 WCC's Motion in *Limine* should be granted as set forth in the attached proposed
10 order.

11 Respectfully submitted this 22nd day of June, 2018.

12
13 

14 G. Lee Raaen, WSBA #6258
15 Attorney for Wallingford Community Council
16
17
18
19
20
21
22
23
24

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

BEFORE THE HEARING EXAMINER
CITY OF SEATTLE

In the Matter of the Appeals of

**WALLINGFORD COMMUNITY
COUNCIL, ET AL.**

of adequacy of the FEIS issued by the
Director, Office of Planning and Community
Development.

Hearing Examiner File:
W-17-006 through W-17-014

**ORDER GRANTING
WALLINGFORD COMMUNITY
COUNCIL'S MOTION IN LIMINE**

This matter coming before the Hearing Examiner on Wallingford Community
Council's Motion in Limine, and having considered the motion and response of OPCD (if
any), and the records and files in this action, it is hereby

Ordered that WCC's Motion in Limine is granted.

OPCD without at least 24 hours' notice to the Hearing Examiner and counsel for
WCC may not offer testimony, exhibits, other evidence or argument concerning alternatives
beyond those contained in the FEIS for the purpose of supporting the adequacy of OPCD's
consideration of alternatives as required by SEPA.

Entered on this _____ day of _____, 2018.

Ryan Vancil, Hearing Examiner

ORDER GRANTING WCC'S MOTON IN LIMINE