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6 **OFFICE OF THE HEARING EXAMINER**
7 **FOR THE CITY OF SEATTLE**

8 In the Matter of the Appeal of

Hearing Examiner File:
HC-18-001 through HC-18-007

9
10 FOUR SEASONS HOTEL, SEATTLE, et al.,
11

12 from a decision issued by the Director,

KONSTANTARAS' CLOSING BRIEF

13 DEPARTMENT OF CONSTRUCTION
14 AND INSPECTIONS

15 **I. INTRODUCTION**

16 On 9 October 2017, Washington State Department of Transportation ("WSDOT")
17 submitted its application ("Application") for a Major Public Project Construction Variance
18 ("MPPCV"), SMC 25.08.655, that would allow it to exceed the noise limits set forth in the SMC
19 25.08 for a period of one year for the demolition of the Alaskan Way Viaduct ("AWV"). The
20 Application requested that the demolition be allowed to exceed the noise limits 24x7, including
21 weekends and holidays. On 19 Mar 2018, the Director of the Seattle Department of Construction
22 and Inspections ("SDCI") issued a decision ("Decision") granting this variance, placing some
23 limitations, but allowing demolition work that exceeds the limits set forth in the Noise Code to
24 continue all day, every day for a year in the areas with multiple residential buildings. Six
25 appeals were filed objecting to the grant of the noise variance. WSDOT is the Applicant and the
26 City represents the SDCI, collectively hereinafter they are referred to as "Respondents."

1 Appellant Konstantaras' appeal argued that the Decision failed to meet the requirements
2 of Directors Rule 3-2009 and SMC 25.08.590, specifically that the application's Noise
3 Management and Mitigation Plan ("NMMP") lacked sufficient commitment to specific
4 mitigation measures and was merely a "framework" for a plan instead of an actual plan as
5 required by SMC 25.08.590.D. Furthermore, Appellant Konstantaras argued the standard of
6 review set forth in Director's Rule 3-2009 whereby the Noise Abatement Coordinator was
7 required to "compare the proposed construction processes, construction timeframes and
8 projected noise levels with and without noise mitigation measures." Finally, Appellant
9 Konstantaras argued that the analysis on the impact of public health and safety contained errors
10 and was insufficient.

11 Appellant Konstantaras' second argument was a SEPA argument that was dismissed in a
12 partial summary judgment motion filed by WSDOT.

13 Appellant Konstantaras' third argument, asserted that the MPPCV was improperly
14 granted because the Application failed to meet the criteria set forth in SMC 25.08.65.A.
15 Specifically, the Application failed to provide any information to substantiate that failing to get
16 the variance would result in safety issues (SMC 25.08.65.A.1) or that such failure would render
17 the project economically or functionally unreasonable. In fact, the section of the Application
18 dedicated to showing that criteria of SMC 25.08.65.A were met failed to use the term
19 "unreasonable" or any other word with a similar meaning. The entire argument of that section of
20 the Application merely states "Completion of all construction activities during only daytime
21 hours would extend the construction period and increase the economic cost to taxpayers."
22 Application, Section 4.3.1, p. 9.

23 Finally, Appellant Konstantaras argued that oversight set forth in the decision was
24 insufficient to meet the public's need and suggestions for addressing this included creating an
25 oversight committee that included community representatives and making data from all noise
26 detection equipment available to the public in real-time.

II. RENEWAL OF OBJECTIONS

At the hearing on 16 Jul 2018, the City objected to Appellant Konstantaras exhibits arguing that they were not received in a timely fashion, even though City and WSDOT received all of the Exhibits that were not provided in discovery by 6 Jul 2018, four days after the 2 Jul 2018 deadline. The remaining exhibits consisted of documents produced by the City and WSDOT during discovery. Parties should be expected to know which documents they produce pursuant to discovery requests since they had more time to review them than the recipients of such documents. Furthermore, the exhibit prepared by Smith-Blum was received by WSDOT and City on 6 Jul 2018, as Appellant Konstantaras sent it to all parties at 4:36pm on 6 Jul 2018. Appellant Konstantaras renews his objection to the exclusion of all of this evidence.

During cross-examination of several witnesses, Appellant Konstantaras requested to use evidence to impeach the testimony of those witnesses and the Hearing Examiner denied that request because the documents were part of the exhibits that were excluded because of timeliness. The Hearing Examiner should have at least looked at the documents before ruling as the basis of excluding them would not have been available if the documents were not in the excluded exhibits. However, if the documents in question were not in the excluded documents, Respondents would still not have had a chance to review them. Appellant Konstantaras renews his objection to the exclusion of documents for purposes of impeachment of witness testimony.

Finally, during testimony of acoustic expert Iona Parks, City asks “Without any additional mitigation measures would you expect to see 46 db(A) would result in the endangerment of [one’s] health?” HC-18-001-HC-18-006 Hearing Day 1, Part 3, at approximately time code 1:28:30 (recording was unclear at some points, but this was an accurate as possible, the word in brackets was especially unclear.). Appellant Konstantaras objected to an acoustic expert testifying to health impact as she was not admitted as an expert on medicine or health. This objection was overruled and Appellant Konstantaras renews his objection.

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III. BURDEN OF PROOF

Since noise variances appeals receive de novo review, the burden is upon Respondents to establish that the Application meets the requirements of SMC 25.08 and Director's Rule. The evidence in this case is limited to the testimony presented at the 16 Jul 2018 hearing and the 13 documents on the Exhibit List Before the Hearing Examiner, posted on the Hearing Examiner website at 4:05pm on 16 Jul 2018. No other documents, including documents submitted to oppose a motion for summary judgment may be considered as appellants have not had an opportunity to challenge those before the Hearing Examiner. While they may have been sufficient for summary judgment determination, they are not part of the hearing evidence, as was confirmed to me at the end of the hearing of 16 Jul 2018. If Respondents had wanted any of those documents to be considered, they could have easily included them as part of their hearing exhibits.

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IV. ARGUMENT

The Application speaks for itself. In the section clearly marked to demonstrate how the criteria of a MPPCV were met, it merely states:

Completion of all construction activities during only daytime hours
would extend the construction period and increase the economic cost
to taxpayers. Application, p. 9.

The statute requires that the applicant must show that failure to get the requested variance would be unreasonable because of public or worker safety or "render the project economically or functionally unreasonable." Since safety is not mentioned in the above sentence, which is the entire substantive portion of the Section 4.3 Criteria for a Major Public Project Construction Noise Variance, Applicant is clearly relying on the basis for a MPPCV. Even if Applicant had used the word "unreasonable" in the above sentence, it would still be insufficient as this sentence is merely a conclusion and is not obvious by any means. Also, assuming that this statement is true, which there is no evidence in the Application to support the conclusion, it still does not

1 meet the standard because there can be no way to determine whether the additional time or cost
2 is unreasonable.

3 During the hearing, Respondents provided some testimony that claimed to assert that
4 some analysis was done, and a rational determination was made that working through the night
5 would be substantially cheaper. However, when pressed for details, none of the witnesses could
6 provide sufficient information to substantiate this alleged analysis. More importantly, none of
7 the witnesses pointed to any text in the Application that would substantiate this assertion. If such
8 analysis occurred, it would clearly have resulted in some paper trail, a spreadsheet, a Word
9 document, something. Respondents failure to provide any such document to support this
10 testimony is telling. In discovery, approximately 5 GB of data was turned over. One would
11 assume that in the process of responding to the discovery request, any documentary evidence
12 would have been uncovered. If it existed, it would clearly have been presented as an exhibit.

13 Even if such documentary evidence existed, to be considered, it had to be part of the
14 Application. While the word “unreasonable” does appear later in the document, it is merely an
15 unsubstantiated conclusion. Appellants do not require that every detail be included in the
16 application but given that SMC 25.08.590.A states that “No variance shall be granted until the
17 Administrator has considered the relative interests of the applicant, other owners or possessors of
18 property likely to be affected by the noise and the general public,” Applicant’s failure to provide
19 a summary of its analysis is unacceptable.

20 SMC 25.08.590.C.1 requires a finding that the proposed noise would “not endanger
21 public health or safety.” It is telling that Respondents never consulted a medical professional.
22 None of their evidence speaks to the medical impact. They used sound experts and building
23 experts to assure us that the 24x7 sound is not going to pose any health concerns. When I have a
24 medical question, I don’t consult an accountant or a lawyer, I go to someone who has medical
25 training.

1 Respondents experts provided a lot of detail and at times it sounded compelling, but if you
2 step back from the detail, it becomes clear that their experts proved too much. According to Ms.
3 Parks, with ear plugs in the sound in a building adjacent to the demolition would be at the level
4 of “a quiet library, a soft whisper or a high-quality recording studio.” HC-18-001-HC-18-006
5 Hearing Day 1, Part 3, approx. time code 1:33:55. Even when factoring in the unreasonable
6 requirement that all the windows be shut, this assertion still strains credulity. If common
7 buildings only needed ear plugs to reduce the sound by such a great amount, then why does the
8 Noise Code require construction projects seek a variance for the noise levels sought by WSDOT?
9 Furthermore, anyone who has been in a building or hotel next to construction knows that closed
10 windows and ear plugs will not produce a sound level similar to a high-quality recording studio.

11 Finally, there is an important public policy issue that should be considered in resolving this
12 case. There can be no doubt that the Application is deficient. WSDOT has substantial resources
13 available to it and it could easily have done the analysis to honestly compare the cost of working
14 during daytime hours only and working through the night. The cost of this hearing is certainly
15 more than what it would have cost to perform that analysis. It did not have to be exact, but it had
16 to be something. Allowing Respondents to prevail when they so clearly did not meet their
17 statutory obligations in the Application would be sending the wrong message to future applicants
18 and the public. If the variance is going to be granted regardless of how bad a job is done on the
19 application, then what is the point of the whole process?

20 21 22 **V. CONCLUSION**

23 Respondents made valiant attempts to convince us that there will be no hardship suffered by
24 those who live near the AWW demolition. Unfortunately, they cannot and did not cure the
25 deficiencies of the Application. This application should be rescinded and if Respondents still
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1 seek a variance, they should submit another application and hold the appropriate public meetings
2 and then get a decision by the Director of SDCI.

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4 Dated this 30th day of July 2018

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28 KONSTANTARAS' CLOSING BRIEF

HC-18-001 through HC-18-007

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**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 **Konstantaras Closing Brief** to each person listed below, or on the attached mailing list, in the matter of **Four Seasons Hotel Seattle et al.**, Hearing Examiner Files: **HC-18-001 through HC-18-007** in the manner indicated.

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Dated this 30th day of July 2018



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