

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

BEFORE THE HEARING EXAMINER
CITY OF SEATTLE

In the Matter of the Appeal of:) Hearing Examiner File:
)
) **W-18-002**
10 **DISCOVERY PARK COMMUNITY**)
11 **ALLIANCE, et al.,**)
) Motion to Exclude Exhibits and Witnesses
) and to Dismiss
12 from a decision of the City of Seattle, Final)
13 Environmental Impact Statement for the Fort)
14 Lawton Army Reserve Center Redevelopment)
Project.)

15
16
17
18
19
20
21
22
23

I. INTRODUCTION

Ms. Campbell failed to file her exhibit and witness list by the August 31, 2018 deadline set in the Examiner's Prehearing Order. Instead, days after the deadline to file the list passed, Ms. Campbell brought a motion to extend her filing deadline, which was denied. To date, Ms. Campbell has still not filed her witness and exhibit list.

Ms. Campbell's failure to file the list has prejudiced the City by impairing its ability to prepare for the hearing. The City's witness preparation sessions have concluded without knowing what documents or witnesses Ms. Campbell will attempt to rely on in her case.

1 As a result, the Examiner should exclude Ms. Campbell from filing any list, or offering
2 exhibits or calling witnesses in this appeal. And, if Ms. Campbell cannot offer exhibits or call
3 witnesses in the hearing, Ms. Campbell cannot meet her burden of proving the FEIS is
4 inadequate. As a result, the Examiner should dismiss this appeal.

5 **II. FACTS**

6 On May 23, 2018, the Examiner issued a prehearing order setting among other deadlines,
7 these deadlines:

- 8 • August 31, 2018: appellant's witness and exhibit list, and exhibit copies;
- 9 • September 7, 2018: City's witness and exhibit list, and exhibit copies; and
- 10 • September 25, 2018 through September 28, 2018: the hearing.

11 On September 4, 2018, Ms. Campbell filed a motion to extend discovery and her exhibit
12 and witness filing deadline and the hearing itself. On September 12, 2018 the Examiner denied
13 Ms. Campbell's motion.

14 To date, Ms. Campbell has not filed her witness and exhibit list. The hearing starts on
15 September 25, six working days after this motion was filed.

16 **III. ISSUES**

17 The May 23 Prehearing Order required Ms. Campbell to file her witness and exhibit list
18 by August 31, 2018. As of September 14, the date of this motion, her witness and exhibit list has
19 not been filed. This willful failure has prejudiced the City's ability to prepare for the hearing.
20 Should Ms. Campbell's witnesses and exhibits be excluded?

21 Ms. Campbell bears the burden of establishing the FEIS is inadequate. Ms. Campbell's
22 exhibits and witnesses should be excluded because of her willful failure to timely disclose
23

exhibits and witnesses as required by the Prehearing Order. Should Ms. Campbell's appeal be dismissed when she can present no exhibits or witnesses to demonstrate the FEIS is inadequate?

IV. ARGUMENT

A. *Ms. Campbell's exhibits and witnesses should be excluded*

The May 23, 2018 Examiner's prehearing order established clear dates for prehearing procedural events. HER 2.02 (y) defines " 'Timely' - within the time prescribed by applicable law or, in the absence of applicable law, the time prescribed by Hearing Examiner Rule or order." Ms. Campbell failed to timely file her witness and exhibit list. In fact, it has been two weeks since the filing deadline and a week since the City filed its exhibit and witness list. Because of Ms. Campbell's willful delay in filing her list, the City is requesting the Examiner exclude Ms. Campbell's exhibits and witnesses.

In *The Four Seasons Hotel Seattle et al.*, Hearing Examiner Files HC-18-001 through HC-18-007, the City moved to exclude the appellant's untimely-filed exhibit list. The minutes from the July 16, 2018 hearing, contained in the Examiner's records that are on-line, show between 9:10:07 and 9:21:35 the Deputy Examiner granting the City's motion and excluded the exhibits. All of the below-listed *Four Seasons* dates are in the Hearing Examiner's on-line records. What follows is timeline comparison between *Four Seasons* and this appeal:

<i>Four Seasons</i>	<i>Campbell</i>
June 18, 2018: witness and exhibit list due	August 31, 2018: witness and exhibit list due
July 6, 2018: witness and exhibit list filed	Not filed
July 16, 2018 hearing	September 25, 2018 hearing
Five working days between list filed and hearing date	Six working days left before hearing (as of 9/14/2018) and list not filed

1 In *Port of Seattle v. Equitable Capital Group, Inc.* 127 Wn.2d 202, 898 P.2d 275 (1995),
2 the Washington State Supreme Court upheld the trial court's motion to exclude the testimony of
3 an appraisal expert when the trial court issued an order "requiring all experts to clearly state their
4 opinion based upon the facts provided by January 11, 1993 [the pre-trial order date]." *Id.* at 209-
5 10. When no reasonable excuse for noncompliance with a pre-trial order exists, the
6 noncompliance is willful. *See Falk v. Keene Corp.*, 53 Wn. App. 238, 251, 767 P.2d 576, 584
7 (1989), *aff'd and remanded*, 113 Wn.2d 645, 782 P.2d 974 (1989) ("The absence of a reasonable
8 excuse for noncompliance with a discovery order is sufficient to support a finding that the
9 noncompliance was willful.").

10 The reason Ms. Campbell was required to file her exhibit and witness list before the City
11 files its list is, so the City could assess her exhibits and witnesses and respond when preparing
12 our list. That did not happen when Ms. Campbell willfully failed to file her list. And the reason
13 there is an exhibit and witness list disclosure date for both parties before the hearing is, so the
14 parties can prepare their witnesses to respond to the exhibits and witnesses listed by the other
15 party.

16 The City's window to prepare its witnesses for unidentified exhibits and witnesses has
17 closed with a hearing now a few days away. The City is prejudiced in preparing its case just as it
18 was in *The Four Seasons*. Further, Ms. Campbell's willful disregard for the Prehearing Order's
19 exhibit and witness deadline should also exclude her witnesses based on the above-cited
20 authority.

21 Ms. Campbell's willful failure to timely file her exhibit and witness list has prejudiced
22 the City's ability to prepare for this matter and her exhibits and witnesses should be excluded.

23 //

1 **B. *The appeal should be dismissed where Ms. Campbell cannot meet her burden that the***
2 ***FEIS is inadequate***

3 As cited by *In the Matter of the Appeals of Seattle Displacement Coalition, et al., and*
4 *University District Advocates*, Hearing Examiner File W-15-001 and W-15-004, the Examiner
5 must give “substantial weight to the agency’s determination of [FEIS] adequacy.” *See* SMC
6 25.05.680.3. Further, Ms. Campbell carries the burden of proof demonstrating the EIS is “to the
7 contrary” or inadequate. SMC 25.05.680.3.

8 Ms. Campbell cannot meet this burden. The Examiner should for the reasons stated
9 above, exclude Ms. Campbell’s exhibits and witnesses that Ms. Campbell has still not disclosed
10 to the City. Without exhibits and witnesses, Ms. Campbell cannot meet her burden of
11 demonstrating that the FEIS is inadequate. Accordingly, Ms. Campbell’s appeal should be
12 dismissed.

13 **V. CONCLUSION**

14 Ms. Campbell’s willful refusal to comply with the Examiner’s Prehearing Order and the
15 prejudicial effect on the City should not be excused. In any other forum, this delay would result
16 in excluding the exhibits and witnesses. The same result should occur here. Without exhibits or
17 witnesses, Ms. Campbell cannot meet her burden to show the FEIS is inadequate and as a result,
18 the appeal should be dismissed.

19 //

20 //

21 //

22 //

1 Dated this 14th day of September 2018.

2 PETER S. HOLMES
3 Seattle City Attorney

4 By: s/Patrick Downs, WSBA #25276
5 Assistant City Attorney
6 Seattle City Attorney's Office
7 701 Fifth Ave., Suite 2050
8 Seattle, WA 98104-7097
9 Ph: (206) 684-8200
10 Fax: (206) 684-8284
11 Email: patrick.downs@seattle.gov
12 *Attorneys for Respondent*
13 *Seattle Office of Housing*
14
15
16
17
18
19
20
21
22
23

1 **CERTIFICATE OF SERVICE**

2 I certify that on this date, I electronically filed a copy of Respondent's **Motion to**
3 **Exclude Exhibits and Witnesses and Dismiss** with the Seattle Hearing Examiner using its e-
4 filing system.

5 I also certify that on this date, a copy of the same document was sent by email to the
6 following party:

7 ***Appellants***

8 Discovery Park Community Alliance (DPCA)
9 c/o Elizabeth Campbell
4027 – 21st Avenue West, Suite 205
Seattle, WA 98199
10 dpcaccontact@gmail.com
11 neighborhoodwarrior@gmail.com

12 the foregoing being the last known address of the above-named parties.

13 Dated this 14th day of September 2018, at Seattle, Washington.

14 *s/Alicia Reise*
15 ALICIA REISE, Legal Assistant