BEFORE THE HEARING EXAMINER
CITY OF SEATTLE

In the Matter of the Appeal of:	Hearing Examiner File WA-18-002
ELIZABETH CAMPBELL, ET AL, Of the adequacy of an FEIS issued by the Director, Seattle Office of Housing	APPELLANTS' MOTION FOR RECONSIDERATION OF EXAMINER'S DECISION DENYING APPELLANTS' MOTION FOR CONTINUANCE

I. RELIEF REQUESTED

Pursuant to HER 3.20(a)(4) and CR 59(a)(7)(9) the Appellant, Elizabeth Campbell, respectfully requests that the Hearing Examiner ("Examiner") 1) reconsider his September 12, 2018 *Order on Motion For Continuance* ("Order") denying the Appellant's motion for continuance ("Motion"), 2) that the Examiner extend its standard of reconsideration to include the grounds and guidance offered by CR 59(a)(7)(9), and 3) grant the continuance.

II. STATEMENT OF ISSUES

There are a number of factual errors in the Order, there are related issues - that the City misrepresented, made false statements in its response, that it failed to provide an affidavit to support its claims of prejudice, and the fact that the Order did not result in substantial justice in this matter.

III. AUTHORITY

The *Hearing Examiner Rules of Procedure* ("HER") 3.20, which is loosely based on Superior Court Civil Rule ("CR") 59(a),[1] in pertinent part states:

(a) The Hearing Examiner may grant a party's motion for reconsideration of a Hearing Examiner decision if the following is shown:

(4) Clear mistake as to a material fact.

CR 59(a) upon which the Examiner may rely for guidance further provides that a motion for reconsideration may also be granted for any one of the following causes materially affecting the substantial rights of such parties:

(7) That there is no evidence or reasonable inference from the evidence to justify the verdict or the decision, or that it is contrary to law;

(9) That substantial justice has not been done.

IV. STATEMENT OF FACTS/EVIDENCE RELIED UPON/ARGUMENT

The following errors were made by the Examiner in his Order (attached and included herein as Exhibit A):

1. HER 3.02(a)/CR 59(a)(7)(9) Examiner's Error: Misplaced Reliance Upon City's Response to Motion to Extend Time:

[1] HER 1.03(c) provides that the Examiner may look to the Superior Court Civil Rules for guidance: *"When questions of practice or procedure arise that are not addressed by these Rules, the Hearing Examiner shall determine the practice or procedure most appropriate and consistent with providing fair treatment and due process. The Hearing Examiner may look to the Superior Court Civil Rules for guidance."*

The City claimed that the continuance should not be permitted on the basis that a) the new information discovered by the Appellant was irrelevant, b) that the City would be prejudiced if it could not go to hearing on September 25th, and c) claims of bad faith on the part of the Appellant.

The City however presented no evidence, by affidavit or otherwise, to support its claims and in the bargain made false statements to support its objection to the continuance. In fact, the City's response is entirely self-serving and has a certain obstruction of justice air to it.

For example the City stated in its Response that "No relevant reason to 'extend' past [sic] deadlines or continue the hearing have been presented in her motion.", and "…Ms. Campbell offers no appropriate or relevant reason[s]..." in support of the Motion - a similar incorrect conclusion that the Examiner expressed in the Order.

The City's and the Examiner's above and other incorrect claims/conclusions about the relevancy, appropriateness, materiality of the newly discovered information are clearly refuted by the record and are detailed in the treatment of Examiner's Error's #4 and #5 below.

The City offered up other false claims about Appellant acting in bad faith, including but not limited to the following, "Finally, Ms. Campbell understands the importance of following the mandates in prehearing orders.", "As an experienced appellant, Ms. Campbell knows the dates set by the examiner have meaning.", and likewise falsely claimed that Appellant was a party to two land use appeals, MUP 90-05 and MUP-90-050, when in fact she was not.

The City provided no evidence to sustain its claims of bad faith on the part of the Appellant, neither is there any evidence of the same in the record for this matter. This was purely specious conjecture on the part of the City and an attempt to put the Appellant in a false light.

In regards to the City's claim of prejudice, the failure of the non-moving party, the City, to file an affidavit setting forth the details of any prejudice that it would suffer if the continuance was granted should be deemed a waiver of its claim of prejudice.

In the alternative, the City provides no evidence that granting the continuance would have a prejudicial effect. Its witnesses are still prepared whether they show up on September 25th or whether they show up at a hearing date shortly after the 25th.

The City has provided no evidence that witnesses likewise have made scheduling concessions to appear as the City would have the Examiner believe. All participants in and parties to this manner, Examiner, opposing counsel, witnesses, and Appellant all show up on the same hearing date. We set aside all other non-hearing related matters, personal and private to attend. We are not making "scheduling concession", this is what parties to an administrative or quasi-judicial proceeding do – barring any other considerations within the hearing process - they show up at the hearing whenever it is scheduled.

The City's witnesses have not been compelled to attend either. In fact they all have incentive to attend, they are all being paid to show up at the City's behest. That is not to diminish their contribution, it is to reorient the narrative – the witnesses will make the same effort attend and will be paid to and will appear at hearing whenever the City needs them to appear. Therefore there is no prejudice to the

City's case should a continuance be granted – its witness preparation work is still intact, its witnesses prepared and available even if the continuance is granted.

Conversely, the Appellant clearly stated in its September 12th Reply the nature of the prejudice it would suffer were the continuance not granted, "Therefore, taking the time to conclusively verify the fact that the Talaris site has been sold, and in contradiction to what the City is arguing that such a sale is of no importance to the process of determining the adequacy of its EIS, *it is in fact the reverse*. It is in fact of great importance to the case before the OHE; without the availability of the Talaris site the adequacy of the City's EIS fails."

Therefore in accordance with HER 3.02(a)(4) and CR 59(a)(7)(9), the City's claims at a), b), and c) above and the Examiner's reliance upon them as fact represents a material mistake in the Examiner's decision, that the City presented no evidence or basis for a reasonable inference by the Examiner that the claims the City made were facts and thus informed or justified the decision; as well as the Examiner's apparent reliance upon the City's faulty claims and representations while ignoring or excluding the Appellant's statement that it would be prejudiced without the continuance, is evidence that substantial justice has not been done in this matter.

2. HER 3.02(a)(4)/CR 59(a)(7)(9) Examiner's Error: The Hearing Examiner did not include in his deliberations all of the filings for the Motion. In the Order the Examiner acknowledges only two of the four documents supporting the motion for continuance, "On September 4, 2018, Elizabeth Campbell et. Al. ("Appellants") filed a Motion for Continuance…The City of Seattle ("City") filed a response opposing the motion."[2]

The Examiner did not consider the the third and fourth documents filed herein, the Appellant's letter/declaration that accompanied the motion,[3] and Appellant's strict reply to the City's response.[4] All of those were filed prior to the Examiner issuing its Order.

This exclusion or is is an oversight is an omission of fact. Substantial justice would require an acknowledgement and consideration of all of the primary documents that inform or support the Motion.

The following statements and conclusions of fact by the Examiner are also in error:

3. HER 3.02(a)(4)/CR 59(a)(7) Statement/Error: "On September 4, 2018, Elizabeth Campbell et al ("Appellants") filed a Motion for Continuance for the date of the hearing, the discovery cutoff, and other deadlines set in this matter."

Fact: Motion and supporting letter/declaration were filed with the Office of Hearing Examiner on August 24, 2018.

Fact Source: Campbell and Alayna Johnson email communications 8/24/18 to 9/4/18:[5]
The Appellant's Motion was filed on August 24, 2018 with the Office of Hearing Examiner ("OHE"), albeit in an alternative manner, via email to the examiner's legal assistant Alayna Johnson. This was necessary

[2] Hearing Examiner. "Order on Motion for Continuance". Office of Hearing Examiner. September 12, 2018.
[3] "Appeal of Elizabeth Campbell, et al, W-18-002/W-18-003 – Declaration of Elizabeth Campbell." August 24, 2018.
[4] "Appellant Campbell's Reply To City of Seattle's 9/10/18 Response". September 12, 2018.
[5] Email Attachments 1, 2, and 3 filed on September 12, 2018.

because OHE had not granted Appellant access to OHE's e-filing system. Appellant did not know that direct OHE permission was required to use the e-filing system. This was an oversight on the part of the OHE.[6]

The Motion was also sent on August 24th to the City of Seattle, Patrick Downs and Alicia Reise via email and via first class mail. Ms. Johnson has acknowledged receiving the same on August 24th, and that she likewise received copies of the transmission from Appellant to the City. This information is sworn to and was included in the Appellant's Reply, and is also in the case file for this matter.

The September 4th filing date reflects OHE's final processing date of the documents submitted to it on August 24th, not when the documents were actually on file with it.

4. HER 3.02(a)(4)/CR 59(a)(7)(9) Examiner's Statement/Error: "Appellants have identified no specific reasons to continue the hearing or dates set forth in the prehearing order issued on May 23, 2018."

Fact: Appellant stated multiple reasons for continuing the hearing and dates:

Fact Source: Motion to Extend Deadlines and Hearing Schedule:[7]
"Since the phone call Appellant has endeavored to confirm the information received through regular channels and without benefit of a legally compelling authority that would induce more prompt, transparent, and complete responses to her inquiries. *Appellant requires the authority of discovery in this matter, including the Hearing Examiner's power to compel discovery*." (Emphasis Added.)

"[T]hese items[8] if true changes many aspects of how or whether this matter would or should proceed to hearing."

Fact Source: Letter/Declaration of Appellant Elizabeth A. Campbell: [9]
"If the balance of the information regarding the negotiations is also accurate then that would realistically affect the advisability of taking up the Office of Hearing Examiner's resources, the hearing examiner's time with the proceedings herein, time and resources which could be better spent on other pending cases. Administrative/judicial economy is an important factor to keep in mind."

"[I]t has implications for this matter on a number of fronts, including if there has been such a City-led material change to the direction or nature of the City's project alternatives it may very well moot, rearrange, or otherwise negate the proceedings herein."

Fact Source: Reply of Appellant Elizabeth A. Campbell/City of Seattle Response to Motion: [10]

[6] Despite the City's claims that Appellant is in fact a seasoned participant in OHE cases or procedure, Appellant is not and thus did not know about OHE needing to grant the Appellant access to its e-filing system. In fact, the only documents that had been filed by the Appellant prior to the motion did not require explicit permission from OHE to be filed, thus the Appellant had no reason to believe that it needed to seek e-filing access when it went to file its motion for continuance.

[7] *Appellant Campbell's Motion to Extend Deadlines and for Hearing Schedule Continuance,* dated August 24, 2018.
[8] The sale of Talaris property and City's identification of alternative site for housing.
[9] *Appeal of Elizabeth Campbell, et al, W-18-002/W-18-003 Declaration of Elizabeth Campbell*, dated August 24, 2018.
[10] Filed 9-12-18.

"The extension of time…is necessary in order that the Appellant can prepare for the hearing…in the best interests of all parties…to have this time to either prepare for hearing or to consider if there realistically are other avenues of redress, negotiation, or settlement..the efficient use of the parties' and the Office of Hearing Examiner's time and resources may be lost."

5. HER 3.02(a)/CR 59(a)(9) Examiner's Error: "Appellants have already had an extensive period to address discovery."

The Examiner's above statement disregards the statements in the Motion that the goal of the continuance was to 1) pursue discovery activity that would be limited in nature and confined to the newly discovered information, 2) that verification of the information would be in the interest of judicial/administrative economy, in the interest of all of the parties' time (witnesses included), and 3) ensure that substantial justice is done in this matter.

Evidence/sources supporting the fact that Appellant sought limited/narrowly defined discovery opportunity and was promoting judicial economy in this matter:

Appellant sought in its Motion, "An extension of time to conduct discovery into the matters which were only very recently discovered by the Appellant…"

Appellant noted the limited nature of the discovery opportunity sought in its August 24th letter/declaration, as well as that the continuance would result in judicial economy:

"All the more reason that narrowly defined discovery should continue so that this activity can be brought to light for two reasons, one, if nothing else as an exercise in administrative/judicial economy – why take up all of the parties' time in this matter, the City's, the OHE's, the Appellants', over a moot situation; and two, it is in the interest of equity and justice to reach a reasonable, nay a responsible outcome."

"[I]f in fact the EIS is not adequate on the basis of what should now can be easily shown, or if in fact the City has changed its approach or direction in this matter, why would the City want to put is people through a show-hearing process, particularly at great expense to "the City", in reality at great expense to the taxpayers?"

6. HER 3.02(a)(4)/CR 59(a)(7)(9) Examiner's Statement/Error: "Nothing in the motion identifies the availability of new information related specifically to the EIS appeal."

Part 1 Fact: Multiple identifications of the availability of new information were made by Appellant Campbell.
Fact Source: Motion to Extend Deadlines and Hearing Schedule:
"On Thursday of last week, August 16, 2018 Elizabeth Campbell, Appellant herein received a phone call from an informed source with comprehensive knowledge of the matter herein. The phone call was to alert her of two things…that is an integral and critical part of the City's Alternatives #2 and #3 in the FEIS is now under a binding real estate contract…An extension of time to conduct discovery into *the matters which were only very recently discovered by the Appellant* is necessary in order that the Appellant can prepare for the hearing, or if certain of the information in question proves true, it might be in the best interests of all parties in the matter to be able to have this time…" (Emphasis added.)

Fact Source: Letter/Declaration of Appellant Elizabeth A. Campbell:
"On Thursday of last week, August 16th I received a phone call from an informed source with comprehensive knowledge of the matter herein…to alert me of two things…that the Talaris property...is now under a binding real estate contract...that there have been meetings between the City of Seattle, the Mayor's office, Office of Housing, Parks Department and a group of local individuals working to negotiate the identification and designation of an alternative location to the Talaris site in Seattle for the homeless and affordable housing project…".

"I have only been able to verbally ascertain three aspects of the information I have received, that the City has been involved in communications with the FoDP leadership and others about alternative, off-site affordable and homeless housing options, the engagement of the landscape architect, and that there have been actual submittals to the City of alternative housing development locations for their consideration."

Fact Source: Reply of Appellant Elizabeth A. Campbell to City of Seattle's Response to Motion:
"Given that the City Attorney's Office has unqualified access to dispatch 'an unfounded claim' with any number of authoritative affidavits from department heads and highly placed officials, elected and unelected, all of whom have every reason to resoundingly quash such an unfounded claim in order to protect and ensure the realization of a housing project that they have put their reputations and substantial City resources behind, it is highly telling that this was not done.

"The City's response all but screams, 'Yes, the City has been engaged in talks to locate the proposed housing project at another location within the City, *not* at Fort Lawton.'"

Part 2 Fact: Appellant's filings clearly indicated that the new information is related specifically to the EIS appeal.

Fact Source: Motion to Extend Deadlines and Hearing Schedule:[11]
"[T]he Talaris property that is an integral and critical part of the City's Alternatives #2 and #3 in the FEIS is now under a binding real estate contract…that materially affects the viability of the FEIS's Alternatives #2 and #3."

"[T]hese items[12] if true changes many aspects of how or whether this matter would or should proceed to hearing."

Fact Source: Letter/Declaration of Appellant Elizabeth A. Campbell:[13]
"[T]he Talaris property that is an integral and critical part of the City's Alternatives #2 and #3 in the FEIS is now under a binding real estate contract…there have been meetings between the City of Seattle, the Mayor's office, Office of Housing, Parks Department and a group of local individuals working to negotiate the identification and designation of an alternative location to the Talaris site in Seattle for the homeless and affordable housing projects; that was proposed to be built at the Fort Lawton Army Reserve Center property ("FLARC") (Alternative #2), or at the Talaris site (Alternative #3)."

[11] *Appellant Campbell's Motion to Extend Deadlines and for Hearing Schedule Continuance,* sated August 24, 2018.
[12] The sale of Talaris property and City's identification of alternative site for housing.
[13] *Appeal of Elizabeth Campbell, et al, W-18-002/W-18-003 Declaration of Elizabeth Campbell*, dated August 24, 2018.

"The goal of these heretofore unknown efforts is to facilitate the City's adoption of Alternative #3, the use of the FLARC property for purely park and recreational purposes and the offsite location of the homeless and affordable housing."

"[A] real estate contract to purchase the Talaris site has been signed, that materially affects the viability of Alternatives #2 and #3. There are multiple alternative sites now being considered by the City for the proposed homeless and affordable housing development under Alternative #3…"

"[I]t has implications for this matter on a number of fronts, including if there has been such a City-led material change to the direction or nature of the City's project alternatives it may very well moot, rearrange, or otherwise negate the proceedings herein."

"The absolute elimination of the Talaris site as an alternative is a material development in this matter, and discovery to establish that fact is necessary to ensure a full review and adjudication of the proceedings herein. If the balance of the information regarding the negotiations is also accurate then that would realistically affect the advisability of taking up the Office of Hearing Examiner's resources, the hearing examiner's time with the proceedings herein, time and resources which could be better spent on other pending cases. Administrative/judicial economy is an important factor to keep in mind."

Fact Source: Appellant Campbell's Reply to City of Seattle's 9/10/18 Response:
"And far from being speculative information, of no consequence to the question of the adequacy of the City's EIS…the Talaris site…[if] it has in fact been sold is an important event in this matter before the OHE due to the fact that if this is true, and since the City/Housing has not identified or evaluated in the EIS any other off-site opportunities in addition to or in lieu of the Talaris site, then the EIS Alternatives 2 and 3 cannot meet the definition of "reasonable alternatives.", and by extension, without Alternative 3 the only alternative that would provide park space, the EIS utterly fails to address the adverse environmental impacts that development of hundreds of units of housing will have on some of the last remaining open space in the City…'Without Alternatives 2 and 3, only preferred Alternative 1 and Alternative 4 of "no-action" remain'."

"Therefore, taking the time to conclusively verify the fact that the Talaris site has been sold, and in contradiction to what the City is arguing that such a sale is of no importance to the process of determining the adequacy of its EIS, *it is in fact the reverse*. It is in fact of great importance to the case before the OHE; without the availability of the Talaris site the adequacy of the City's EIS fails."

7. HER 3.02(a)(4)/CR 59(a)(7)(9) Examiner's Error: "Appellants appear to need additional time to understand the new information they have received, and to potentially discuss settlement with the City."

Facts: There is nothing in the Appellant's Motion, letter/declaration, Reply that indicates that the Appellant sought the continuance in order to understand the new information. As noted in the Facts for item #6 above, an opportunity to discuss a settlement of the matter with the City was only one of a number of considerations that informed the Motion.

8. HER(a)/CR 59(a)(9) Examiner's Error: "Only if the parties submit a motion mutually stipulating to the continuance for settlement purposes, would the Hearing Examiner consider extending the hearing date at this late stage in the established deadlines."

The Examiner's position that it would only grant a stipulated motion for settlement purposes extinguishes the Appellant's due process rights, is an abandonment of the purpose and goals of Office of Hearing Examiner, to render substantial justice in the matters before it, not to mention the Examiner's stance conflicts with the OHE's *Rules of Practice and Procedure* and OHE's *Guide to Appeals:*

"*What is "discovery"?*
"Discovery" takes place prior to the hearing and is the process whereby a party seeks disclosure by the other party of documents and information that are relevant to the appeal, or that are likely to lead to documents and information that are relevant to the appeal. The process is normally conducted by the parties without intervention by the Hearing Examiner, and often involves an informal exchange of documents and information. *Each party has the right to learn as much as it can about the other party's case, so disclosure of requested information and documents is required. If you fail to disclose information that should have been disclosed, the Hearing Examiner may prohibit you from using it in the hearing or impose other sanctions.*"[14] (Emphasis added.)

"2.16 Motions (d) For motions made at hearing, and motions made for the extension of time or to expedite the hearing, the Hearing Examiner may waive the requirements of this section and may also rule upon such motions orally."[15]

"*Can the date established for a hearing be changed?*
After receiving the notice of hearing, if a participant or someone else important to the presentation is unable to attend on the date specified, the participant should write a letter to the Hearing Examiner, explain the conflict and request that a different hearing date be scheduled. (This is referred to as a "continuance".) The person making the request must also send a copy of it to the other participants, who may respond to the request. (These names and addresses can be obtained from the Office of Hearing Examiner or through viewing the appeal file online through the e-File portal on the Hearing Examiner's website.) The Hearing Examiner will determine whether a continuance is warranted."[16]

9. <u>HER 3.02(a)/CR 59(a)(9) Examiner's Error</u>: "The Appellants' Motion is DENIED."

Facts: The Examiner's decision, denial of the Motion, deprives the Appellant of substantial justice, it deprives her of the ability to use the Examiner's power to compel the production of written/documented form of the newly discovered evidence detailed in the Appellant's Motion and letter/declaration. Without the written/documented evidence Appellant is left with inadmissible hearsay evidence unlikely to be admitted into the record. Given how integral the information is to the matter, substantial justice cannot be done unless that information is admitted as evidence into this matter.

[14] Vancil, Ryan P.. "Public Guide to Appeals and Hearings Before the Hearing Examiner". Page 13. City of Seattle. Office of the Hearing Examiner. March 2018. http://www.seattle.gov/examiner/docs/Public-Guide-Revised-2018.pdf
[15] 2.16 Motions P. 13
[16] Vancil, Ryan P.. "Public Guide to Appeals and Hearings Before the Hearing Examiner". Page 14. City of Seattle. Office of the Hearing Examiner. March 2018. http://www.seattle.gov/examiner/docs/Public-Guide-Revised-2018.pdf

Fact Sources:

Appellant's letter/declaration stated:

"Since the phone call I have endeavored to confirm the information received through regular channels and without benefit of a legally compelling authority that would induce more prompt, transparent, and complete responses to my inquiries. I have only been able to verbally ascertain three aspects of the information I have received, that the City has been involved in communications with the FoDP leadership and others about alternative, off-site affordable and homeless housing options, the engagement of the landscape architect, and that there have been actual submittals to the City of alternative housing development locations for their consideration."

"I am requesting the extension of discovery time in order to obtain certifiable evidence that the information I have been given is accurate…"

CONCLUSION

Based on the facts, argument, and authorities presented above, I respectfully request the Examiner reconsider his Order and grant the Motion for Continuance to allow *limited* discovery, to adjust the deadlines for the submittal of the exhibit and witness lists, and to reschedule the hearing date.

DATED this 18Th day of September, 2018.

ELIZABETH A. CAMPBELL

Appellant
4027 21st Avenue West Suite 205
Seattle, WA. 98199

BEFORE THE HEARING EXAMINER
CITY OF SEATTLE

DECLARATION AND STATEMENT OF FACTS

I, Elizabeth Campbell, declare as follows:

That I am over the age of 18 years and competent to be a witness herein:

I have read the entire contents of the foregoing *Motion for Reconsideration* dated September 18, 2018, I agree with the conclusions therein and I declare that the statements made by me in it are accurate and true.

I certify under penalty of perjury under the laws of the State of Washington that my statements above are true and correct.

EXECUTED at Seattle, Washington on this 18th day of September, 2018.

Elizabeth A. Campbell,
Declarant

BEFORE THE HEARING EXAMINER
CITY OF SEATTLE

CERTIFICATE OF SERVICE

I, Elizabeth Campbell, declare as follows

That on September 18, 2018 I filed the Appellant's Motion for Reconsideration above and this Certificate of Service with the Seattle Office of Hearing Examiner using its e-filing system, and that on September 18, 2018 I also addressed said documents and sent them for delivery as follows:

To the Hearing Examiner Ryan Vancil c/o
Alayna Johnson
700 Fifth Avenue, Suite 4000
Seattle, WA. 98104
Alayna.Johnson@seattle.gov

To the City of Seattle by E-Mail
Patrick Downs
Assistant City Attorney
Patrick.Downs@seattle.gov

Alicia Reise
Alicia.Reise@seattle.gov

I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

EXECUTED at Seattle, Washington on this 18th day of September, 2018.

Elizabeth A. Campbell,
Declarant