BEFORE THE HEARING EXAMINER
CITY OF SEATTLE

In the Matter of the Appeal of: DOUG WAUN Denial for a Marijuana Business License issued by the Director, Regulatory Compliance & Consumer Protection Division, Department of Finance and Administrative Services,	Civil Case No. L-18-007 APPELLANT'S OPPOSITION TO WA OG, LLC'S MOTION TO INTERVENE AND MOTION TO SUBMIT EVIDENCE

I. INTRODUCTION AND RELIEF REQUESTED

The City of Seattle and Marigold Products Inc. d/b/a Seattle Cannabis Company ("Seattle Cannabis") agree as to the relevant underlying facts, law, and Hearing Examiner Rules applicable here. The parties have narrowed the scope of this case down to a single legal question of interpretation of the Seattle Municipal Code, which the Hearing Examiner may decide as a matter of law. Indeed, Seattle Cannabis believes this late motion may have been motivated by a desire to discourage the Hearing Examiner from ruling on a summary judgment matter which both parties agree is ripe for decision. Whatever the motivation, this motion should not be permitted to delay the decision on the pending summary judgment motions.

Now, Washington OG, LLC ("WA OG") submits an untimely and flawed motion to intervene that threatens to throw this appeal into chaos. But despite its attempts to expand the scope of SMC § 6.202.110, the code does not entitle WA OG to notice of Seattle Cannabis's

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appeal nor does it provide WA OG the right to intervene in this proceeding, particularly at this last minute when the City already is opposing Seattle Cannabis's appeal. The code is not a weapon to be wielded by competing retailers for their own financial gain. Neither the code nor the Hearing Examiner Rules of Practice and Procedure provide WA OG the remedies it requests. Intervention would unnecessarily confuse and complicate the pending hearing, and further delay Seattle Cannabis's right to have its appeal decided. Accordingly, Seattle Cannabis respectfully asks the Hearing Examiner to deny WA OG's motion to intervene and motion to submit evidence.

II. STATEMENT OF FACTS

The facts relevant to this dispute are contained in the parties' summary judgment briefings, already before the Hearing Examiner. They are undisputed and incorporated herein by reference. The new alleged "facts" contained in WA OG's motion to intervene are irrelevant. Therefore, without conceding the veracity of anything alleged by WA OG, Seattle Cannabis will not address them here.

III. ARGUMENT

WA OG's motion to intervene and to submit evidence should be denied because the motion is untimely, lacks authority, and frustrates Seattle Cannabis's right to expeditious adjudication of its appeal.

A. WA OG's motion should be denied because it is untimely.

As a preliminary matter, WA OG's motion is not timely. Rule 3.09(b) of the Hearing Examiner Rules of Practice and Procedure ("HER") is clear that, except as provided in HER 3.09(d), "a written request for intervention must be filed with the Hearing Examiner and served on all parties no later than 10 business days prior to the scheduled hearing." WA OG failed to submit its motion in compliance with HER 3.09(b): Seattle Cannabis's hearing is scheduled for

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October 1, 2018, and WA OG submitted its motion for intervention on September 19, 2018, less than 10 business days before the hearing.

There is no basis in this case for the Hearing Examiner to find exception to the 10 day rule under HER 1.03(c). The time limit for filing a motion to intervene is not a question of practice or procedure "not addressed by these Rules." It is addressed in an unequivocal way. Intervention motions must be timely filed and this one was not. HER 1.03 does not give WA OG a pass on its failure to file its motion 10 business days before the hearing. The late filing is fatal to its effort to intervene.

WA OG's failure to file on time is not a mere procedural defect. As discussed more fully below, allowing intervention at this late date, substantially broadening and complicating the factual issues the parties to the appeal are prepared to address, would cause prejudice to Seattle Cannabis. Already, having to respond to this motion is prejudicing Seattle Cannabis's ability to prepare for the October 1st hearing. Injecting new parties and new issues less than a week before the hearing would exacerbate that prejudice, requiring another continuance. This hearing has already been delayed once; it should not be delayed again. The appropriate remedy for WA OG's late motion is denial of the motion.

B. WA OG should not be permitted to intervene because it has no right to participate in Seattle Cannabis' Appeal.

1. <u>WA OG was not entitled to notice of the October 1, 2018 hearing.</u>

The bulk of WA OG's motion is grounded in the false assertion that SMC 6.202.11 entitles it to notice of and intervention in Seattle Cannabis's appeal. WA OG asserts that because it submitted an objection to Seattle Cannabis's license to operate in Ballard, WA OG should have received notice and now be allowed to intervene in this proceeding. But that is not at all what the code says.

SMC 6.202.11 provides:

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> Whenever a written objection or protest to the issuance of a new or renewal license has been received from any person and the license has been issued after consideration of the objection or protest, the Director shall notify any known complainant within ten (10) days *after the license is issued*, of the reasons for issuance over his/her objection.

(Emphasis added). WA OG should not be "baffled" by the fact that it was not notified of Seattle Cannabis's appeal because it was not entitled to notice. SMC 6.202.11 is not hard to understand: a known complainant will be notified only if the license for which they objected is *granted*, not before. At this juncture, Seattle Cannabis has not been issued a license. Therefore, WA OG was not entitled to any notice under SMC 6.202.11.[1]

WA OG is permitted to object to Seattle Cannabis's license application and entitled to notice *if Seattle Cannabis is granted a license* over WA OG's objection, but SMC 6.202.11 does not support WA OG intervening in Seattle Cannabis's appeal at this time. Seattle Cannabis's license is yet to be granted; WA OG's motion is at best premature and should be denied.

2. WA OG fails to demonstrate a significant interest not adequately represented in the appeal.

WA OG has failed to demonstrate a substantial interest in the proceeding. HER 3.09(b) requires an intervening party to demonstrate a substantial interest that is not otherwise adequately represented. An "interested party" is a party that is significantly affected by or interested in the proceeding before the Hearing Examiner. HER 2.02(o). WA OG asserts that they are directly affected by the outcome because a ruling in Seattle Cannabis's favor would put WA OG in the "unique position of being the only Seattle marijuana license operating within 1,000 feet of two other stores" and would have a negative effect on WA OG's business.

[1] WA OG's argument would not justify its untimely motion in any event. This appeal is a matter of public record, HER 1.05. WA OG was on constructive (and, Seattle Cannabis suspects, actual) notice of the appeal even if it had been entitled to some other notice under SMC 6.202.11, which it was not.

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WA OG does not have a legitimate substantial interest in intervening in this appeal because the dispersion rule does not exist to protect commercial operations from competition. WA OG isn't interested in limiting or reducing marijuana sales in Ballard, it just wants all of those sales for itself. But as discussed in both Seattle Cannabis's and the City's motions for summary judgment, the purpose of the dispersion rule is responsible city planning and public concern, it is not to provide competitive advantage to any participant in the recreational marijuana industry. See Department's Motion for Summary Judgment, pg. 9-10; Appellant's Response to Department's Motion, pg. 7.

Even if its commercial interest was legitimate, WA OG must demonstrate that its interest is "not otherwise adequately represented" in the appeal. Here, WA OG does not argue for any legal position that Seattle Cannabis and the City of Seattle are not already litigating. HER 3.09(b). WA OG's motion is about the dispersion rule, which limits the number of businesses conducting "major marijuana activity including retail sales" within 1000 feet in Seattle and is already within the scope of this proceeding. SMC 23.42.058. The City of Seattle is already adequately opposing this appeal on the basis that issuing a license to Seattle Cannabis would contravene the dispersion rule. Furthermore, the City of Seattle is in the best position to represent the City's interests in accurately interpreting and applying the Seattle Municipal Code.[2] WA OG is therefore not an interested party entitled to intervene.

C. WA OG's intervention in Seattle Cannabis's appeal would cause undue delay, expand the issues beyond those stated, and prejudice the rights of the parties.

Appeal hearings are to be conducted expeditiously. HER 2.06. In determining the merits of a motion to intervene, the Hearing Examiner shall consider "whether intervention will unduly

[2] "The City Attorney shall have full supervisory control of all the litigation of the City, or in which the City or any of its departments are interested, and shall perform such other duties as are or shall be prescribed by ordinance." Charter of the City of Seattle art. XIII, § 3.

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delay the hearing process, expand the issues beyond those stated in the appeal, or prejudice the rights of the parties." HER 3.09(b). Here, WA OG's motion to intervene implicates each of those three issues and should therefore be denied.

First, WA OG's intervention would further delay the proceeding. Seattle Cannabis' hearing was previously delayed by FAS' motion for summary judgment and motion to continue. WA OG has now indicated an intention to present witnesses and evidence not previously known to the parties to the appeal. Seattle Cannabis could not possibly be prepared to address the proposed new factual issues by October 1st, so intervention would necessitate another continuance and further postpone the Hearing Examiner's decision. This proceeding should be handled as expeditiously as possible and without any further delay.

Second, WA OG's intervention would expand the issues of this appeal. WA OG wants to present evidence on its history, call additional witnesses, and present additional exhibits on matters either not directly relevant to Seattle Cannabis's appeal, or litigate fact issues the City and Seattle Cannabis agree are undisputed. This cannot be done without expanding the present appeal beyond those issues the parties agree are dispositive.[3] WA OG's motion should be denied because it would undermine all that the parties have done to narrow the issues to be heard.

Last, WA OG's intervention is prejudicial to Seattle Cannabis. The inevitable delay discussed above is prejudice enough. But having to also defend a collateral attack from a potential competitor further prejudices Seattle Cannabis's ability to focus on the true issues in the appeal. The issues are between FAS, Seattle Cannabis, and the City of Seattle. The late addition of an unnecessary and hostile witness/party would muddy what are currently clearly defined

[3] As just one example, both the City and Seattle Cannabis agree that WA OG was not engaged in retail sales of marijuana on March 2, 2018 because, among other things, it had no City license to conduct business at that time. WA OG apparently wants to argue that it made an illegal retail sale in February and therefore was engaged in retail sales in March. Litigating the details and significance of an allege sale at a location that was not open for business would be a time-consuming and ultimately irrelevant sideshow.

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issues and require Seattle Cannabis to defend an attack on its flank, weakening its ability to fully litigate its issues with the City. This is the type of prejudice contemplated by HER 309(b), and provides yet another basis to deny the motion to intervene.

As demonstrated above, the Hearing Examiner's HER 3.09(b) considerations in determining the merits of WA OG's motion to intervene favor denying the motion. For the same reasons, WA OG's motion to submit written statement and evidence should also be denied.

IV. CONCLUSION

Allowing WA OG to intervene is not only prejudicial to Seattle Cannabis, but procedurally unsound and substantively unnecessary. As a threshold matter, WA OG's motion to intervene is untimely and unsupported. Additionally, WA OG uses a flawed application of the law in an attempt to circumvent established procedure. The Hearing Examiner should adjudicate this proceeding without the intervention of WA OG, which would cause further delay. The Hearing Examiner has all of the evidence necessary to make a determination; there is no need to allow WA OG to intervene and expand the scope of the appeal beyond the issues presented by FAS, the City of Seattle, and Seattle Cannabis.

Accordingly, Seattle Cannabis respectfully requests the Hearing Examiner deny WA OG's motion to intervene.

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DATED this 25th day of September, 2018.

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CERTIFICATE OF SERVICE

I hereby certify that on the date set forth below I served the foregoing APPELLANT'S OPPOSITION TO WA OG, LLC'S MOTION TO INTERVENE AND MOTION TO SUBMIT EVIDENCE on:

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Under the laws of the state of Washington, the undersigned hereby declares, under the penalty of perjury, that the foregoing statements are true and correct to the best of my knowledge.

Executed at Seattle, Washington, this 25th day of September, 2018.

s/ Gillian Fadaie
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