BEFORE THE HEARING EXAMINER
CITY OF SEATTLE

In re: Appeal of Bruce Struthers, Appellant, vs. Seattle Public Utilities and Seattle Department of Planning and Development Respondents.	No. MUP-12-016 APPELLANT'S RESPONSE TO RESPONDENTS' MOTION TO QUASH CERTAIN DISCOVERY REQUEST

I. INTRODUCTION

On June 14, 2012, respondent Seattle Department of Planning and Development published a land use decision to permit respondent Seattle Public Utilities to proceed with the Meadowbrook Pond and Improvements Project. On June 28, 2012 appellant Bruce Struthers filed a timely appeal of the land use decision with the Seattle Hearing Examiner. On July 9, 2012 the parties filed a joint motion to bifurcate and affirm the decision in part. On July 10, 2012 appellant Bruce Struthers served upon respondents interrogatories and requests for

production, requesting a response within thirty days of the date of service of the discovery requests. On July 17, 2012, Assistant City Attorney Jeff Weber filed a notice of appearance. The pre-hearing meeting ordered by the Hearing Examiner was held on July 18, 2012. On July 19, 2012 the Hearing Examiner issued an order setting schedules for motion practice in this appeal, including several filing deadlines related to discovery. On August 1, 2012 respondents filed a motion to quash certain discovery requests, asking the Hearing Examiner to prohibit of the appellant's interrogatories and two requests for production.

II. ARGUMENT

With this motion to quash, the respondents ask the Hearing Examiner to overturn established Federal and State law governing discovery. Respondents do not offer substantive argument or case law that would support the Hearing Examiner in writing a decision that would overturn years of precedent. The core of the respondents' argument is that they do not wish to burden the Hearing Examiner with discovery matters. This is laudable, given that Public Guide to Appeals before the Hearing Examiner directs parties to hold informal discovery. The motion to quash refers to select sections of HE Rule 3.11:

> Appropriate prehearing discovery, including written interrogatories, and deposition upon oral and written examination, is permitted. In response to a motion, or on the Hearing Examiner's own initiative, the Examiner may compel discovery, or may prohibit or limit discovery where the Examiner determines it to be unduly burdensome, harassing, or unnecessary under the circumstances of the appeal. Unless provided otherwise by order, the Hearing Examiner should not be copied on discovery documents, or on correspondence and electronic mail about discovery matters.

The respondents ignored this rule's requirement to not burden the Hearing Examiner with the discovery documents, and in footnote 6 on page 3 of their motion, share an interpretation of some select portions of the electronic mail correspondence between the

parties. The appellant disagrees with the respondents' interpretation of the electronic mail correspondence, but in deference to the Hearing Examiner's rules, will decline to share the literal text of their exchange at this time.

Who Bears the Burden of Production?

Respondents SPU and DPD offer the appellant's Interrogatories and Requests for Production to support the Motion to Quash. The Hearing Examiner is asked to determine whether these requests are "burdensome, harassing, or unnecessary". Respondents ask the Hearing Examiner to read all 18 pages, put herself in the position of the respondents, and determine burden and necessity solely on the respondent's complaints of "burden". Respondents offer a draconian alternative, that the appellant to withdraw all his "highly specific and technical" interrogatories, and analyze all (unspecified) responsive documents that may be produced. In effect, respondents shift a burden they categorize as "an unreasonable use of limited staff time" to the Hearing Examiner and the appellant.

The appellant differs as to how reasonable, technical and burdensome his interrogatories are. These adjectives are subject to interpretation. The performance parameters of a storm water management facility may be considered highly technical by a legal professional and considered obvious and trivial by a professional engineer employed by Seattle Public Utilities, who is responsible for the design of improvements to a facility operating since 1998 (*Meadowbrook Pond: A Stormwater Detention and Flood-Control Facility*, p. 4)[1]. Conversely, a question on land use law may be considered trivial to answer by an experienced land use attorney, while the same question could be considered highly

[1] http://www.seattle.gov/util/groups/public/@spu/@drainsew/documents/webcontent/spu01_006163.pdf

complex and technical to a certified professional engineer. No one is better qualified than Seattle Public Utilities staff to navigate the business records, engineering documents, operational logs, data sources and control systems used by Seattle Public Utilities to design and control its storm water management facilities. The City simply has to identify these individuals and save all parties time by answering the questions posed in the interrogatories. The appellant has offered guidance to the City Attorney as to who those individuals might be, with the appellant's list of potential witnesses.

The appellant filed timely appeal of a land use decision by the Seattle Department of Planning and Development on June 28, 2012. Land use code is governed by Chapter 36.70 of the Revised Code of Washington. RCW 36.70C.030(2) holds:

> The superior court civil rules govern procedural matters under this chapter to the extent that the rules are consistent with this chapter.

The appellant served DPD and SPU with interrogatories in accordance with CR 33(a):

> (a) Availability; Procedures for Use. Any party may serve upon any other party written interrogatories to be answered by the party served or, if the party is a public or private corporation or a partnership or association or governmental agency, by any officer or agent, who shall furnish such information as is available to the party.

and CR 33(b):

> (b) Scope; Use at Trial. Interrogatories may relate to any matters which can be inquired into under rule 26(b), and the answers may be used to the extent permitted by the Rules of Evidence.

The appellant's first interrogatory complies with the general rule addressing the scope of discovery, Civil Rule 26(b)(1) which holds:

> (1) In General. Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending actions, whether it relates to the claim or defense of any other party, including the existence,

> description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter.

This rule is designed to permit a broad scope of discovery. *Bushman v. New Holland Div.,* 83 Wn.2d 429, 434, 518 P.2d 1078 (1974). *See Lurus v. Bristol Laboratories, Inc.,*89 Wn.2d 632, 574 P.2d 391 (1978); 4 L. Orland, Wash. Prac., *Rules Practice* § 5305 (3d ed. 1983). Respondents DPD and SPU have not made claims of privilege at this time. Instead, respondents complain of the burden of reviewing and producing responsive documents, and having to provide their analysis of "highly technical" documents in response to the appellant's interrogatories.

Relevance of Interrogatories

The next consideration before the Hearing Examiner is whether discovery will result in documents relevant to subject matter involved in the pending action. CR 26(b)(1) holds:

> (2) The only limitation is relevancy to the subject matter involved in the action, not to the precise issues framed by the pleadings; and inquiry as to any matter which is or may become relevant to the subject matter of the action should be allowed, subject only to the objection of privilege.

The standard of relevance for purposes of discovery is much broader than the standard required under the evidence rules for admissibility at trial.[2]. The fact that the evidence sought "would otherwise be inadmissible at trial is not an impediment to discovery"[3], so long as "the information sought appears reasonably calculated to lead to the discovery of admissible evidence." CR 26(b)(1).

[2] 4 J. Moore & J. Lucas,*Federal Practice* ¶ 26.56[4], at 26-170 (2d ed. 1983)
[3] 4 L. Orland, Wash. Prac., *Rules Practice* § 5305, at 22 (3d ed. 1983)

[A]lthough certain information may not be used as proof at the trial, still, information obtained by discovery may aid a party in preparing his case, in anticipating his opponents' position, and in gathering further evidence.

The appellant asserts that each interrogatory is directly relevant to the subject of the appeal and will lead to discoverable evidence. If the respondents had any question as to the relevance of the interrogatories, a perfunctory glance at the proposed list of exhibits will clearly demonstrate the relevance of every interrogatory.

The third interrogatory literally complies with the provisions of CR26 (b)(5)(A)(i):

> (A)(i) A party may through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter on facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion, and to state such other information about the expert as may be discoverable under these rules.

This interrogatory specifically asks for *detailed* information about the experts' qualifications and testimony, not the brief summary of expected testimony required by the Examiner's Prehearing Order of July 19, 2012. Specificity and detail, in response to an interrogatory, is essential to focusing and limiting any subsequent discovery requests. An interrogatory is an appropriate and economical vehicle for discovery. The respondents are posed direct questions and granted considerable time to produce their answers. A deposition of witnesses or testimony at the hearing may produce the same response, at a significantly higher cost in the time of the Hearing Examiner and all parties.

Respondent Seattle Public Utilities constructed the Meadowbrook Detention Pond in 1998 (*Meadowbrook Pond: A Stormwater Detention and Flood-Control Facility*, p. 4)[4]. SPU

[4] http://www.seattle.gov/util/groups/public/@spu/@drainsew/documents/webcontent/spu01_006163.pdf

applied to respondent DPD for a permit to perform maintenance of this facility, and to make changes described as improvements. According to regulatory filings and public relations material produced by SPU, the purpose of this facility is to reduce downstream flooding and improve water quality. Presumably, the facility was constructed to meet certain design goals, and proposed modifications were designed to improve these design goals. A standard measure of effectiveness of storm water detention ponds in improving water quality that is used by the Environmental Protection Agency is hydraulic residence time. This is the length of time water remains in a detention pond to allow sediments to settle (EPA832-F-99-048, *Storm Water Technology Fact Sheet: Wet Detention Ponds, p 3.*[5]*)*. To understand the effectiveness in reducing flooding, SPU must understand and measure the rate of flow of storm water into and out of the Pond. Water quality is commonly measured in several dimensions, including turbidity, temperature, and pH. According to the materials provided by SPU to regulatory agencies, salmon in particular are particularly sensitive to acidity, concentrations of dissolved oxygen, and turbidity levels that indicate sediment density. Salmon can thrive in a very limited temperature range. The temperature of storm water released from a detention pond is a significant measure of the success of such a facility[6].

The "highly specific, technical questions" posed in interrogatories 4 through 20 are simply requests for data that SPU must have readily available to effectively monitor and operate this critical facility. It is inconceivable to ask the public to pay millions of dollars for improvements having benefits that cannot be measured to a facility with unknown operational characteristics.

[5] http://water.epa.gov/scitech/wastetech/upload/2002_06_28_mtb_wetdtnpn.pdf

Seattle Public Utilities documents that provide the most insight into the relevance of the interrogatories are the first[7] and subsequent[8] SEPA Determination of Non-significance (DNS) signed by Judith Noble on September 6, 2011 and Betty Meyer on March 8, 2012, respectively. These documents describe in general terms the function of the existing Meadowbrook Pond, the proposed improvements and asserts these improvements will reduce flooding and improve water quality. The DNS, authored by applicant Seattle Public Utilities as a requirement for approval of a permit for an SPU-requested land use, do not explain how a conclusion of no probable significant adverse impact on the environment was reached.

These interrogatories specifically ask how the desired results will be accomplished. Interrogatories 4, 5, and 8 through 19 are not highly technical. They simply request observed and predicted measurements of water quality and flood control in the dimensions of retention time, temperature, pH, turbidity and flow rate. Seattle Public Utilities has been operating the Meadowbrook Pond since 1998. These interrogatories just ask for basic operational and design data for the existing and proposed facility. This project and the dependent Thornton Creek Confluence Project[9] have been in the design and approval stage at least for five years[10]. SPU has justified an expenditure of over $1.9M to its own Asset Management Committee to maintain and improve this critical facility. Certainly the questions posed by the interrogatories are at the finger tips of some engineers within SPU. Interrogatory 20 simply

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[6] Simulation of Temperature Mitigation By A Stormwater Detention Pond, Journal of The American Water Resources Association, October 2009. http://static.msi.umn.edu/rreports/2009/208.pdf

[7] https://sites.google.com/site/mbpsepadns/home/spu%20sepa%20checklist%20meadowbrook pond dredging.pdf?attredirects=0

[8] http://www.seattle.gov/util/groups/public/@spu/@drainsew/documents/webcontent/01_016311.pdf

[9] http://www.seattle.gov/util/groups/public/@spu/@drainsew/documents/webcontent/01_013516.pdf

poses a reasonable question: who collected this data, and extrapolated the performance of the proposed facility?

SPU has stated in their permit application to DPD that the project is within a liquefaction zone. A 48" sewer main bisects Meadowbrook Pond. The effect of an earthquake on sewer lines in liquefaction zones has been well documented[11]. The characteristics of soil within the project boundary are essential to understanding the potential of environmental damage resulting from a break of this sewer line in an earthquake. Interrogatory 6 simply requests the data that was collected by project staff before applying for a land use permit.

The Creeks, Drainage and Wastewater Advisory Committee allows members of the public to participate in review of Seattle Public Utilities' programs, policies and services. At the April 11, 2012 meeting of this committee, the Repair, Rehabilitation and Replacement (3R Tool) was presented[12] as a tool for asset management of facilities like the Meadowbrook Pond. Interrogatory 7 simply asks for the results of this structured analysis that led to the proposed project to dredge and improve Meadowbrook Pond.

Washington Court's Policy of Open Discovery

The Washington Supreme Court has long upheld[13] the provisions of CR 26. The Court recently reaffirmed its policy of open discovery, and asserted that discovery reduces

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[10] Thornton Creek Confluence Floodplain Restoration Project, April 11, 2009, p. 6. http://www.seattle.gov/util/groups/public/@spu/@DrainSew/documents/webcontent/SPU01_004646.pdf, p3, p12

[11] Sewers Float and Other Aspects of Sewer Performance in Earthquakes, http://www.sewersmart.org/summit08/ABAG%20Sewer%20Ballantyne%2010-09.pdf

[12] CMOM at SPU http://www.seattle.gov/util/groups/public/@spu/@diroff/documents/webcontent/01_017271.pdf

[13] *Barfield v. Seattle, 676 P. 2d 438 - Wash: Supreme Court 1984*

the burden on those presiding over a dispute *(Lowy (Leasa) v. PeaceHealth, et al., No. 85697-4. June 21, 2012):*

> Effective pretrial disclosure, so that each side knows what the other side knows, has narrowed and clarified the disputed issues and made early resolution possible. As importantly, early open discovery exposed meritless and unsupported claims so they could be dismissed. It is uncontroverted that early and broad disclosure promotes the efficient and prompt resolution of meritorious claims and the efficient elimination of meritless claims.

A Stipulation

The appellant agrees that he received an answer to his second interrogatory when respondents DPD and SPU complied with the Hearing Examiner's July 19, 2012 order. The appellant withdraws interrogatory 2 with this response.

III. RELIEF REQUESTED

Appellant Bruce Struthers respectfully requests that the Hearing Examiner deny the Respondents' Motion to Quash and uphold Washington Supreme Court's policy favoring open discovery.

DATED this 9th day of August, 2012.

By: _____

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