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BEFORE THE HEARING EXAMINER
CITY OF SEATTLE

In the Matter of the Appeal of:)	Hearing Examiner File:
)	
)	W-19-007
DOUGLAS B. MACDONALD,)	
)	Department Reference 002180-19N
)	
from a Determination of Non-Significance)	Motion to Exclude Exhibits and Witnesses
issued by the Director, Seattle Department)	
of Transportation.)	
_____)	

I. INTRODUCTION

Mr. MacDonald failed to file his final witness and exhibit list by the February 24, 2020 deadline set in the Examiner’s Prehearing Order. Mr. MacDonald’s failure to file the list has prejudiced the City by impairing its ability to prepare for the hearing. As a result, the Examiner should exclude Mr. MacDonald from calling witnesses or offering exhibits in this appeal.

II. FACTS

On January 14, 2020, the Examiner issued a prehearing order setting these deadlines:

- February 24, 2020: appellant’s final witness and exhibit list, and exhibit copies;
- March 2, 2020: City’s final witness and exhibit list, and exhibit copies; and
- March 9 and 10, 2020: the hearing.

1 **III. ISSUE**

2 The Prehearing Order required Mr. MacDonald to file his witness and exhibit list by
3 February 24, 2020. As of the date of this motion, his witness and exhibit list has not been filed.
4 This failure has prejudiced the City’s ability to prepare for the hearing. Should Mr. MacDonald’s
5 witnesses and exhibits be excluded at hearing?

6 **IV. ARGUMENT**

7 The January 14, 2020 Examiner’s prehearing order established clear dates for prehearing
8 procedural events. HER 2.02 (y) defines “ ‘Timely’ - within the time prescribed by applicable
9 law or, in the absence of applicable law, the time prescribed by Hearing Examiner Rule or
10 order.” Mr. MacDonald has failed to timely file his witness and exhibit list.

11 Mr. MacDonald is familiar with the City of Seattle Hearing Examiner processes and
12 timely filing requirements of a Prehearing Order. He recently was the appellant *In the Matter of*
13 *the Appeal of Douglas MacDonald from a Determination of Non-Significance* [by] *the Director,*
14 *Seattle Department of Transportation W-19-003* where he appealed the DNS issued by the
15 Transportation Department for its sidewalk café legislation. He was also the appellant *In the*
16 *Matter of the Appeal of Douglas B. MacDonald and Michael McAdams from a decision issued*
17 *by the Director, Department of Planning and Development MUP-18-003.*

18 The Examiner has consistently ruled that failing to timely file the witness and exhibit list
19 precludes the appellant from calling witnesses or using exhibits. The Examiner ruled *In the*
20 *Matter of the Appeal of Elizabeth Campbell, et al., from the adequacy of an FEIS issued by the*
21 *Director, Office of Housing,* Hearing Examiner File W-18-002 that the appellant’s failure to
22 timely file the witness and exhibit list precluded the appellant’s witnesses and exhibits from
23 being presented in the hearing:

1 The Office of Hearing Examiner consistently does not allow exhibits or witnesses
2 to be introduced at hearing that have not been disclosed in an exhibit or witness
list when such lists are required in advance of a hearing.

3 In *The Four Seasons Hotel Seattle et al.*, Hearing Examiner Files HC-18-001 through
4 HC-18-007, the City moved at the beginning of the hearing to exclude the appellant's untimely-
5 filed exhibit list. The on-line minutes from the July 16, 2018 hearing, between 9:10:07 and
6 9:21:35, show the Deputy Examiner granting the City's motion and excluded the exhibits.

7 In *Port of Seattle v. Equitable Capital Group, Inc.* 127 Wn.2d 202, 898 P.2d 275 (1995),
8 the State Supreme Court upheld the trial court's motion to exclude the testimony of an appraisal
9 expert when the trial court issued an order "requiring all experts to clearly state their opinion
10 based upon the facts provided by January 11, 1993 [the pre-trial order date]." *Id.* at 209-10.

11 The City acknowledges that on February 25, 2020, Mr. MacDonald sent an email
12 identifying 11 potential City witnesses, including myself who represents the Transportation
13 Department as its attorney. Sending an email with potential witnesses is not compliance with the
14 Prehearing Order. Mr. MacDonald has also told the Examiner in his Motion for a Discovery
15 Hearing filed February 24, 2020 that the City sent him over 8,000 pages of documents
16 responsive to his discovery request.

17 Of the 8.000 plus documents sent to Mr. MacDonald, the City cannot reasonably be
18 expected to guess what documents Mr. MacDonald will seek to introduce as evidence and will
19 ask City witnesses about. Nor can the City on this accelerated schedule prepare ten witnesses
20 with unknown exhibits. Nor can the City identify responsive exhibit documents that should be
21 included in the record in response to Mr. MacDonald's exhibits before our own witness and
22 exhibit list is due on March 2, 2020.

1 Mr. MacDonald's failure to timely file his witness and exhibit list has effectively closed
2 the City's window to adequately prepare its witnesses given the accelerated schedule this hearing
3 is on. The City is prejudiced in preparing its case just as it was in the *Appeal of Elizabeth*
4 *Campbell et al.*, and in *The Four Seasons*. For the same reason the Examiner's Office ruled that
5 witness and exhibits not timely filed in those cases should not be allowed in the hearing, the
6 Examiner should rule the same in this case.

7 **V. CONCLUSION**

8 Mr. MacDonald's failure to comply with the Examiner's Prehearing Order and the
9 prejudicial effect on the City should not be excused. In any other forum this delay would result in
10 excluding the exhibits and witnesses. The same should occur here.

11 Dated this 27th day of February 2020.

12 PETER S. HOLMES
13 Seattle City Attorney

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23 *Seattle Office of Housing*

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 **Douglas B. MacDonald**
8 **dbmacdonal@earthlink.net**
9 *Appellant*

10 the foregoing being the last known address of the above-named party.

11 Dated this 27th day of February 2020, at Seattle, Washington.

12 *s/Alicia Reise*
13 ALICIA REISE, Legal Assistant