

**BEFORE THE HEARING EXAMINER
FOR THE CITY OF SEATTLE**

In the matter of the appeal of

Hearing Examiner File:

MacDonald, Douglas B.

W-19-007

from a SEPA Determination of Non-Significance
(DNS) issued by the Director, Seattle Department
Of Transportation

**OPPOSITION TO CITY'S MOTION TO
EXCLUDE EXHIBITS AND WITNESSES**

Introduction

On the basis of grounds stated below, the Appellant respectfully requests that the Hearing Examiner deny the City's Motion to Exclude Exhibits and Witnesses.

The City is correct that the Appellant failed by inadvertence to file the Witness and Exhibit and Lists on the date provided in the prehearing order.

Immediately upon himself recognizing that failure, the Appellant moved the Hearing Examiner for a short extension that the City now opposes.

Circumstances the Appellant Asks the Hearing Examiner to Weigh

The Appellant would bring these circumstances to the attention of the Hearing Officer as grounds not to obviate the fact of inadvertent missing of the filing deadline, for which he apologizes to the Hearing Examiner and the City, but to weigh in favor of the relief requested in the Appellant's motion that the City now opposes, and against the City's exclusion motion.

1. The Appellant at the prehearing conference indicated his appreciation that the matter be expeditiously brought to hearing without delay because of the significance the City attached to its schedule for moving ahead with its Shared Scooter Proposal. In the discussion of the discovery schedule, it was noted (by the Hearing Examiner) the available time period for the Appellant to respond to any City discovery production would be very tight if the hearing schedule were to be set to take advantage of the Hearing Examiner's earliest hearing date availability. The Appellant accepted that very tight schedule in order to avoid any imputation that a purpose of this appeal lay in a desire to unnecessarily extend the City's schedule beyond the shortest practicable time for a ruling to be reached on the merits of the appeal.

2. The Appellant does not accept the City's contention that his discovery requests have been unduly burdensome or overbroad. The City offered no objection to the requests as they were made and undertook no effort at consultation in an effort to narrow discovery if that should have been an issue.
3. The City's production of documents was voluminous. The Appellant has been grateful and expressed appreciation for the courtesy and diligence of staff of the City Attorney in attempting to organize the response. But the fact is that enormous amounts of duplicative material produced had to be item-by-item examined by the Appellant.
4. Although the deadline for the City's first discovery response was February 5th, the largest volume of the discovery (approximately 8,000 pages), was not ready to be produced on February 5th and its production was delayed until February 6th. See **Attachment A**, emphasis supplied. The Appellant is not the only party in this case that may have inconvenienced the other by missing a deadline set in the prehearing order.
5. The Appellant promptly on February 11th, three business days after receiving the City's tardy production, delivered narrow and particularized interrogatories tied directly to specific issues that came to light in the City's document production. That email also asked for suggestions about how best to resolve the newly-revealed issue of attorney-client privilege claims. The City responded without interest to the request for discussion of resolution of possible privilege claims. See **Attachment B**.
6. The City responded to the interrogatory requests (to which it made no objection) on February 19. But upon review of the responses, the Appellant observed that perhaps quite a important mistake had been made with reference to a material fact. Immediately the Appellant as a matter of courtesy called the question to the attention of the City. Se **Attachment C**. The City corrected the mistake in the interrogatory response on February 20 (the second business day before Appellant's deadline for filing his Witness and Exhibit List), thereby avoiding by virtue of the attention and diligence of the Appellant what might have been unnecessary confusion and distraction at the hearing yet had already unnecessarily distracted the Appellant in his preparation of evidence. Meanwhile, the City's February 19 providing the Privilege Log requested on February 11th was the first specification to the Appellant of claims of privileged documents, two weeks after the City's initial deadline in the pre-hearing order for responding to the Appellant's discovery request.
7. The City's production of the Discovery Log on February 19 triggered the need on February 24 for the Appellant to file a motion seeking intervention by the Hearing Examiner, consuming further time and attention and diverting the Appellant's attention from the matter of the Witness and Exhibit List that that day was due under the pre-hearing order. On the afternoon of February 26, the City finally hand-delivered a thumb drive to the Appellant providing redacted copies of the Draft Checklist documents in

question to resolve the discovery issue on attorney-client privilege claims. That was **fifteen days** after the Appellant had first queried the City (February y 11 request to the City as to how to handle any potential issues of attorney-client privilege), and two days after the Appellant's missed deadline for the filing of an Exhibit List. The Appellant at the City's request agreed to strike the pending motion, which the Appellant agreed to do (and has done) in the spirit of the Hearing Officer's request at the pre-hearing conference that the parties seek to resolve discovery disputes between themselves. In this matter and all others thrust into a difficult discovery process, the Appellant has done his utmost to respect Rule 2.06: "At every stage in the proceedings, all parties shall make every effort to avoid delay." The Appellant would have much appreciated a prompt resolution by the City of the attorney-client privilege matter which would have much simplified and expedited his evidentiary preparation regarding the preparation of the Draft Checklist.

9. The Appellant avers that the redacted documents produced on February 26 contain evidence that goes to the very core of the issues in this Appeal as to the sufficiency of the City's compliance with the SEPA Ordinance. They, with other exhibits to which they relate, specifically the SEPA Checklist itself, are essential to the Hearing Examiner's ability to rule in this appeal on the basis of a full and adequate record.

10. The prejudice to the City in receiving the Appellant's Witness and Exhibit List as now sought to be filed in accordance with his motion, is minimal because:

(a) On February 25th at 8:57 a.m. the Appellant inquired of the City's counsel whether matters could be simplified and convenience served by the City's agreement to produce witnesses for the hearing without necessity of subpoena. The Appellant listed all witnesses in that communication (with one exception) who will appear on the Appellant's Witness List. The City therefore has had nearly full constructive knowledge of whom the Appellant would likely call to testify at the hearing since the opening of business on the day after the Appellant's missed filing. **Attachment D.**

(b) With exception of a handful of evidentiary exhibits that will be offered by the Appellant that are being finalized this weekend and made available to the City as soon as possible, the crucial evidentiary record on this appeal will be built on documents produced by the City and other City documents with which it and the Appellant's proposed witnesses are well familiar from gathering and certainly reviewing discovery response as well as their daily job responsibilities. With knowledge of the identify of witnesses, its own document index of its voluminous response, and a clear appreciation of what the issues will be from the Notice of Appeal, it is, frankly, unfair to the Hearing Examiner to represent that the City is in a position of having to "guess" what preparation of witnesses will be called for. Any short delay or adjustment necessary to be made to the City's Witness and Exhibit List filing deadline will be accommodated by the Appellant. If the Appellant's Witness and Exhibit List is provided, as requested in the Appellant's Motion, on Tuesday, March 3, the City will have several days to prepare

witnesses for a hearing the next week of only a day and a half's length. The handful of the expected Appellant's exhibits that are not City documents can be provided to the City on Monday, March 2, if that will assist the City. In light of the City's finally providing on February 26 the documents (modestly redacted) for which attorney-client privilege had earlier been asserted, Mr. Downs will not appear on the Witness List.

Meanwhile, the effort to simplify matters for all concerned by the request to counsel concerning the dispensing of subpoenas was never answered, thereby having further causing to divert the Appellant into preparing motions for the issuance of subpoenas that would have been avoided by an extension of courtesy.

Conclusion

This appeal presents significant issues that on compelling evidence the Hearing Examiner will find it necessary to engage on the grounds recently presented by Findings and Decision *In the Matter of the Appeal of Seattle Mobility Coalition*, Hearing examiner File W-18-013 (Sept. 20, 2019)..

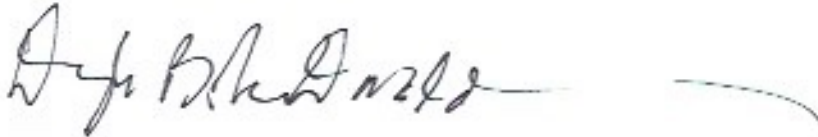
Evidence will be offered at the hearing, one way or another. However, presentation of evidence and the orderly presentation of matters to assist the Hearing Examiner in adjudicating the appeal will be made significantly more cumbersome and inefficient without the benefit of Appellant-designated witnesses and exhibits that the City now would exclude. Allowance of the City's motion will likely *not* conduce to an expeditious conduct of the proceedings (Rule 2.06). Nor, despite the Appellant's responsibility for his inadvertently failure to meet the date set in the Prehearing Order, will it advance the cause of the parties being provided a fair opportunity for hearing (Rule 3.15).

Finally, as a wholly personal concern, the preparation for this appeal so that the Hearing Examiner will have solid evidentiary record has consumed not only personal financial costs far in excess of the nominal filing fee, but two months of the Appellant's unceasing evidentiary research efforts, during a difficult time when he has simultaneously been under medical care for a serious infection requiring for some of that period, daily outpatient antibiotic infusions at Northwest Hospital and further additional follow-up outpatient appointments from mid-December to the present. This has not made easy the Appellant's management of his responsibilities to keep up with the procedural imperatives of the case. It is the Appellant's hope that this will be given consideration, if not weight, and while not excusing the Appellant's inadvertent missing of the filing deadline, as an extenuating circumstance in relieving the Appellant of the impediment to the presentation of the evidence by the exclusion of witnesses or exhibits.

The Appellant respectfully requests that the City's motion to exclude be denied and the Appellant's motion for extension of the filing deadline be granted.

Dated: February 28, 2020

Respectfully submitted:

A handwritten signature in black ink, appearing to read "Douglas B. MacDonald", followed by a horizontal flourish line.

Douglas B. MacDonald
Appellant, *pro se*

902 North 79th Street Seattle WA 98103
360 701 1786
dbmacdonal@earthlink.net 360 701 1786

ATTACHMENT A

From: Menzel, Laurie
Sent: Wednesday, February 05, 2020 2:03 PM
To: dbmacdonal@earthlink.net
Cc: Downs, Patrick <Patrick.Downs@seattle.gov>
Subject: MacDonald v. City, HE Case No. W-19-007, Discovery Response

Mr. MacDonald:

Please see the link below for documents responsive to your discovery request to the City. If you have any problems downloading the documents, please let me know.

We are still reviewing email and plan to provide those documents to you tomorrow.

[Click here](#) to download the files. Be sure to "Save As" to save with a unique file name.

To access the documents, you will need to create an account on ShareFile with your email address and a password. To establish a password if you have never logged into ShareFile, click "Forgot Password." Enter your email address and you will then be sent an email to establish a password. If you have any trouble accessing the file, please let me know.

Note that the file will only be accessible to people whom I have directly sent the link to. If there is someone else in your office who normally downloads this type of data, please send me their email address and I will send the link directly to them.

Laurie Menzel
Paralegal
Land Use Section
Seattle City Attorney's Office
Civil Division
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Seattle, WA 98104-7095
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Laurie.Menzel@seattle.gov

ATTACHMENT B.

From: Douglas MacDonald <dbmacdonal@earthlink.net>
Subject: HE. W-19-007 SSP SEPA Appeal - Appellant's Interrogatories
Date: February 11, 2020 at 12:17:05 PM PST
To: "Downs, Patrick" <patrick.downs@seattle.gov>

Attached are the Appellant's Interrogatories.

Two points:

First, in view of the shortness of time for preparing witness and exhibit lists, every effort you and SDOT can make to get specific interrogatories answered and back to me as promptly as possible would be much appreciated.

Second, working through to the end of the emails yesterday, I was a bit surprised to find you being thanked by Mr. Miller as part of the team that had prepared the SEPA filing. (COS0007231). It is likely that critical issues at the hearing will revolve around discussions and decisions made about the SSP and how it was evaluated in the preparation of the Checklist well into the month of November. **This presents a bit of a problem in my thinking through the witness list. Without presupposing the correct answer from within the City Attorney's Office, I do ask whether a role you played in preparing the documents that are now the subject of the appeal should be noted in some way soon for the Hearing Examiner. Your thoughts on this would be appreciated.**

Please acknowledge that you received this transmittal today. Thanks.

From: "Downs, Patrick" <Patrick.Downs@seattle.gov>
Subject: RE: HE. W-19-007 SSP SEPA Appeal - Appellant's Interrogatories
Date: February 11, 2020 at 12:49:12 PM PST
To: Douglas MacDonald <dbmacdonal@earthlink.net>
Cc: "Downs, Patrick" <Patrick.Downs@seattle.gov>

First, we will respond as quickly as possible.

Second, I represent clients when preparing a variety of documents. My advice is attorney-client privileged and will remain privileged in the Examiner setting.

ATTACHMENT 6

From: Douglas MacDonald <dbmacdonal@earthlink.net>
Subject: Re: MacDonald v. City, HE Case No. W-19-007, Discovery Response 2
Date: February 20, 2020 at 1:45:50 AM PST
To: "Menzel, Laurie" <Laurie.Menzel@seattle.gov>
Cc: "Downs, Patrick" <patrick.downs@seattle.gov>

Ms. Menzel. Your promptness, diligence and courtesy on all of this is duly noted and hugely appreciated.

I'll raise separately with Mr. Downs one matter. Leaving for you just two, that I hope we can attend to even though the discovery has closed.

First, in your narrative document at 11.B(b) I was startled by something that I had not appreciated. Ms. Dawes answer "was provided verbally: one (1) fatality and one (1) serious injury." This matter of a fatality is a crucial fact, if true, especially if testimony confirms that Mr. Miller represented in a meeting with King County Department of Health that bike share injury experience did not present matters of concern (or something to that substance). I think to keep everybody, including me, cautious and accurate on a question of some importance, can you, or someone, confirm for me that there has been (or not, if the interrogatory answer needs to be clarified) a bike share fatality in Seattle, as this interrogatory answer seems to suggest. If so, can any specifics be supplied? If not, what does the interrogatory answer mean? I would also like to know (same reasons) the details of any "serious injury" in 2019 before I were to pursue these matters at the hearing.

Second, with respect to the study performed at Harborview by Dr. Rivera, you sent me to the 2017 Evaluation Report, 20. There I find a characterization of a conclusion, and the information that Dr. Rivera and Harborview did not intend to "publish" the study. I think my interrogatory request should have yielded *whatever* form by which these results were communicated to SDOT, even if only an email or an informal written report. If you would, could you

please check to see whether any form of documentation of the study result exists at SDOT. If so, I request it be provided.

Thanks.

On Feb 19, 2020, at 11:40 AM, Menzel, Laurie <Laurie.Menzel@seattle.gov> wrote:

Mr. MacDonald:

Attached to this and the following emails is the City's response to your second set of discovery requests. This email is the first of four.

<image003.png> Laurie Menzel
Paralegal
Land Use Section

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Civil Division
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<Scooter Share Pilot SEPA Appeal Interrogatory Response.pdf><Folders 1-8.zip>

ATTACHMENT D

From: Douglas MacDonald <dbmacdonal@earthlink.net>

Subject: H.E. W-19-007: Yesterday's motion turns into today's motion. And a question about witnesses and subpoenas.

Date: February 25, 2020 at 8:57:42 AM PST

To: "Downs, Patrick" <patrick.downs@seattle.gov>

I tardily recognized that the motion I attempted to file yesterday afternoon was over-length for e-filing. I'll get a hard copy filed today. I'll assume service on you yesterday will suffice. Thanks.

I have a question about another problem of process and protocol. When we last "met" at the Hearing Examiner, I had subpoenas served on City witnesses (I had learned that from a bad prior experience).

I would like the City employees listed below to be available for examination at the hearing March 9 and 10. Could I rely on you to make them available, or will it be necessary again for me to obtain and have you accept service on behalf of City employees, as I think we arranged last time, the subpoenas.

My witness list filed next Monday will include these iCity employee individuals (plus myself):

Margo Dawes
Stefan Winkler
Dongho Chang
Joel Miller
Joel Hancock
Elliot Helmbrecht
Alex Pazuchanics
Adiam Emory
Bradley Torpal

Also Kelly Rula. I believe Ms. Rula is on leave and I believe the examination I need to make may be limited to authenticating a single document or two. I should expect we will work that out without having to bring her in to testify, but for purposes of preserving the opportunity, I expect to list her.

Also Patrick Downs. I believe avenues are open to us (as suggested in my

motion) perhaps to make your personal testimony unnecessary, but unless and until any issues about attorney-client privilege claims concerning the draft checklists are put to rest, I think I have no choice but to include you on the list.

I'd be pleased to hear from you soon on the subpoena question, Thanks.

CERTIFICATE OF SERVICE

I certify that on this date I electronically filed a copy of **OPPOSITION TO CITY'S MOTION TO EXCLUDE EXHIBITS AND WITNESSES** with the Seattle Hearing Examiner using its e-filing system.

I also certify that on this date a copy of the same document was sent via e-mail to the following party:

Patrick Downs
Assistant City Attorney
Seattle City Attorney's Office
Patrick.downs@Seattle.gov

With copies to alicia.reise@seattle.gov

Dated this 28th of February, 2020.

A handwritten signature in black ink, appearing to read "Douglas B. MacDonald", with a long horizontal flourish extending to the right.

Douglas B. MacDonald