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8 BEFORE THE HEARING EXAMINER  
9 FOR THE CITY OF SEATTLE

10 In the Matter of the Appeal of

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12 MAGNOLIA COMMUNITY COUNCIL AND  
13 OTHERS; and FRIENDS OF THE LAST 6,000

14 From a decision issued by the Director, Seattle  
15 Department of Construction and Inspections  
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Hearing Examiner File: MUP 21-016 (CU)  
and MUP 21-017 (ECA)

Department Reference: 3028072-LU

APPLICANT’S RESPONSE TO EX  
PARTE MOTION FOR ISSUANCE OF  
SUBPOENAS DUCES TECUM

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18 **I. INTRODUCTION AND RELIEF REQUESTED**

19 The Hearing Examiner should deny Appellant Magnolia Community Council  
20 (“MCC”)’s Ex Parte Motion (“Motion”) for Issuance of Subpoenas Duces Tecum  
21 (“Subpoenas”). The Subpoenas are hugely overbroad, requesting documents that have no  
22 relevance to the issues remaining in this appeal. They are also incredibly burdensome,  
23 requiring the Applicant Oceanstar, LLC (“Applicant”) to review eight years of written and  
24 electronic documents, although the application for the project at issue here (“Project”) was  
25 submitted only two years ago, including correspondence between all of its employees and  
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1 anyone else, relating to several broad topics. Applicant anticipates responding to the  
2 Subpoenas will require the assistance of an outside consultant, occupy easily a hundred hours  
3 of consultant and employee time, and generate thousands of documents. Imposing enormous  
4 and unnecessary costs on other parties through discovery such as this may be par for the  
5 course in civil litigation, but thankfully it is not typical or permissible in practice before the  
6 Examiner. Instead, Hearing Examiner Rule of Practice and Procedure (“HER”) 312(b)  
7 requires a party seeking a subpoena of documents to “indicate the relevance of the materials  
8 subpoenaed to the issues on appeal, and demonstrate the reasonableness of the scope of the  
9 subpoena sought.” MCC failed to make this showing in its Motion, nor could it do so, since  
10 the documents requested are not relevant and the scope of the request is not reasonable. The  
11 Applicant would not oppose a request for documents relating to the issues remaining in this  
12 case that was reasonable in scope. However, MCC has not made such a request. The  
13 Examiner should deny the Motion.  
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## 16 **II. FACTS**

17 This matter relates to the City of Seattle Department of Construction and Inspection’s  
18 (“SDCI’s” or “Department’s”) approval (“Decision”) of an environmentally critical areas  
19 administrative conditional use permit (“CUP”) for the development of two single family homes  
20 (“Project”) on property in Magnolia. The Decision was appealed by two parties, MCC and  
21 Friends of the Last 6,000 (“Friends”) (collectively, “Appellants”), which raised a number of  
22 issues.  
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25 The Applicant moved to dismiss both appeals. In the Order on Applicant’s Motion to  
26 Dismiss (“Order”), the Examiner dismissed several of the issues in the appeals, including notably  
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1 all the State Environmental Policy Act (“SEPA”) claims (MCC Issue 3a and Friends’ Issues A &  
2 C). Order, p. 2. MCC’s appeal challenged the “intended use” of the Project, alleging the use is  
3 actually commercial rather than residential, but this issue was part of its SEPA claim, which was  
4 dismissed. Appeal of Analysis, Recommendation and Decision of the Director MUP No.  
5 3028072-LU (“MCC Appeal”), pp. 3-4; Order, p. 2. The only issues raised in MCC’s appeal that  
6 remain pending in this matter are:  
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- 8 • Views. “[W]hether the Department adequately mitigated view impacts under SMC  
9 23.42.042(B).” “A covenant may provide relevant context, but the Examiner can  
10 only address Code consistency. Covenant consistency cannot be addressed; SMC  
11 23.42.042(B) consistency can be.” Order, p. 2 (emphasis added). The view issue  
12 includes requested conditions relating to tree heights and grading at Ursula Judkins  
13 Viewpoint to protect or enhance views. Order, p. 3.
- 14 • Stairs. Whether the Examiner should require removal of the north side exterior stair  
15 access as SMC 23.42.042 mitigation. *Id.*
- 16 • MOU between City, SDOT and Prior Owner relating to Magnolia Bridge. “The  
17 Examiner lacks authority to review the decision for MOU consistency.” *Id.*  
18 (emphasis added). However, “a CUP may include mitigation to address ‘adverse  
19 impacts on . . . other properties in the zone or vicinity.’” *Id.* “[T]he MOU may be  
20 used to provide factual background and context.” *Id.*
- 21 • Admiral’s House. “[T]he Department determined the project is exempt [from  
22 Landmark Board review], and the Examiner lacks jurisdiction over an appeal of that  
23 determination so cannot address the designation question.” Order, p. 4 (emphasis  
24 added). However, “this issue also raises a question on whether mitigation should be  
25 imposed through SMC 23.42.042 . . . [t]he issue, as clarified, should remain.” *Id.*

26 MCC then sought discovery, including the Subpoenas that are the subject of this motion.  
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28 Counsel for the Applicant informed MCC’s representative of the Applicant’s objections to the  
relevance and scope of the requests, and attempted in good faith to resolve the parties’ dispute  
about discovery, but MCC nevertheless sought issuance of the Subpoenas. The Applicant now  
requests that the Examiner deny the Motion for Subpoenas.

### III. ARGUMENT

#### A. The Examiner may prohibit or limit discovery.

Discovery is not unfettered in a Hearing Examiner proceeding. Instead, with regard to production of documents, “[a] request for a subpoena for documents or other physical exhibits shall . . . indicate the relevance of the materials subpoenaed to the issues on appeal, and demonstrate the reasonableness of the scope of the subpoena sought.” HER 3.12(b). In addition, the Examiner has discretion to limit or prohibit discovery. “In response to a motion, or on the Hearing Examiner’s own initiative, the Examiner may . . . prohibit or limit discovery where the Examiner determines it to be unduly burdensome, harassing, or unnecessary under the circumstances of the appeal. HER 3.11. MCC’s requests are not relevant to pending appeal issues, are unnecessary under the circumstances of the appeal, and are burdensome. The Examiner should reject these requests.

#### B. The Examiner should reject MCC’s requests because they are not relevant or reasonable in scope and are burdensome.

The Examiner should reject all of MCC’s eight requests for documents because they are not relevant to appeal issues or reasonable in scope. HER 3.12(b). Further, they are unnecessary under the circumstances of the appeal and burdensome. HER 3.11.

##### 1. Requests #1, 3 and 4 are not relevant or reasonable in scope and are burdensome.

MCC’s first request is for:

1. All Documents, including without limitation, communications or agreements among representatives of Oceanstar, LLC, Golden Seas, LLC, Nina Fisheries, Inc., Robert Desautel, Walter Kuhr, Jr., Lil Kuhr and Kathy Shepard regarding the design, use, or potential disposition of the Buildings.

3. Minutes of all meetings that discuss or refer to the design, use, or potential disposition

1 of the Buildings.

2 4. All Documents, including any written communications of any kind with any person or  
3 entity, that discuss or refer to the design, use, or potential disposition of the Buildings that  
4 are not included in documents requested in requests 1 and 3 above.

5 Requests #1, 3 and 4 are not relevant to the issues pending in this appeal and are not  
6 reasonable in scope. The issues remaining on appeal are whether the Examiner should impose  
7 additional mitigation relating to impacts to (1) views, (2) use of the north side stairs, (3) adjacent  
8 property occupied by the Magnolia Bridge, and (4) the Admiral's House. Order, pp. 3-4. The  
9 "use" of the two proposed single-family homes (which MCC calls the "Buildings") is not at issue  
10 in this case – MCC's claims regarding the single-family use were contained in its SEPA issue,  
11 which was dismissed. MCC Appeal, pp. 3-4; Order, p. 3. The "potential disposition" of the  
12 single-family homes is also not at issue. Future ownership of the homes was not identified as an  
13 appeal issue (*see* MCC Appeal) and is not relevant to the Decision in this case, which is not  
14 personal to any one owner, but runs with the land. Finally, the "design" of the homes is relevant  
15 only to the extent it the design may affect views, use of the stairs, the Magnolia Bridge property  
16 or the Admiral's House. However, the design of the homes speaks for itself – the design is  
17 shown on, and controlled by, the approved plan set, which is a public record and freely available  
18 on SDCI's online permit database, Accela. Declaration of Courtney A. Kaylor ("Kaylor  
19 Declaration"), Ex. A, Sheets A1.01-A1.02, A2.01-A2.05, A3.01-3.02. There is no need for any  
20 discovery at all on this issue. The extremely broad request for all documents including  
21 communications or agreements between three companies and four individuals, with no limit as to  
22 the date of the documents, is not reasonable.

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26 This request is also burdensome. The Applicant is the owner of the Property on which  
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1 the Project will be located.<sup>1</sup> “Golden Seas, LLC,” the entity named in the Subpoena, is most  
2 likely a typographical error. Global Seas LLC (“Global Seas”) is a management company  
3 through which the Applicant operates. Global Seas has eight employees who may have  
4 documents, including correspondence, relating to the design, use, and/or potential disposition of  
5 the Project. In order to respond to the Subpoena, the Applicant would be required to search all of  
6 these employees’ electronic and written correspondence, both internal and external, and digital  
7 and paper files for any document mentioning the Project dating to prior to the presubmittal  
8 conference for the Project in 2017. This task would be extremely time consuming and would  
9 require the Applicant to retain an outside consultant to perform the search. Even with the  
10 assistance of an outside consultant, this broad a search over this length of time would require  
11 substantial employee time. This is particularly difficult now, during the pollock fishing season,  
12 which is Global Seas’ primary business, and is currently occupying all of its employees. Global  
13 Seas has in-house counsel who is involved in internal and external correspondence and  
14 preparation of documents in order to provide legal advice as well as utilizing outside counsel.  
15 All of the correspondence and documents would need to be reviewed for attorney-client and  
16 work product privilege. Even Request #3 (for meeting minutes) alone would require enormous  
17 effort. Global Seas holds weekly meetings at which handwritten minutes are taken. Most of the  
18 topics discussed do not involve the Project, but the Project may have been discussed at some  
19 meetings. Assuming that minutes from 2017 to 2021 must be produced and reviewed, this item  
20 alone involves the location, review and redaction of 192 sets of handwritten minutes. The same  
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26 <sup>1</sup> Nina Fisheries, Inc., also named in the Subpoena, is the Applicant’s governor. Robert Desautel, Walter Kuhr, Lil  
27 Kuhr and Kathy Shepherd, also named in the Subpoena, are Nina Fisheries, Inc.’s governors.

1 or greater effort would be required for other types of documents. The Applicant estimates the  
2 search would produce hundreds if not thousands of documents. This search and review process  
3 would be extremely burdensome and certainly could not be completed within 2 weeks, the time  
4 frame requested in the Subpoena. Declaration of Philip Powell (“Powell Declaration”), ¶3.

5 The Examiner should deny the Motion as to Requests #1, 3 and 4.

6 **2. Request #2 is not relevant or reasonable in scope and is burdensome.**

7 MCC’s second request is for:

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9 2. All Documents, including without limitation, communications or agreements among  
10 representatives of Oceanstar, LLC, Golden Seas, LLC, Nina Fisheries, Inc. Robert  
11 Desautel, Walter Kuhr, Jr., Lil Kuhr and Kathy Shepard regarding the use of the  
Admiral’s House from 2013 to the present.

12 Request #4 is not relevant to the issues pending in this appeal or reasonable in scope.

13 The “use of the Admiral’s House” is not an issue in this appeal. MCC’s notice of appeal does  
14 not raise an issue regarding the use of the Admiral’s House, nor could it do so, since the Decision  
15 does not relate to the use of the Admiral’s House, but rather only to the development of the  
16 Project. MCC Appeal; Decision. Indeed, the request does not mention the Project at all, but  
17 asks for documents relating to the use of the Admiral’s House independent of the Project. The  
18 request also seeks documents dating back to 2013 – eight years ago – although the Project  
19 application was submitted in 2019 (with a preapplication conference in 2017). Request #4 bears  
20 no relationship to the issues in this appeal and its scope is not reasonable.

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22 Further, the request is burdensome. The Applicant has owned the Admiral’s House since  
23 2013. The Admiral’s House is used for a variety of purposes, including office and events such as  
24 weddings. Since 2013, several companies have had their offices in the house. Hundreds of  
25 weddings and other events have occurred. As written, the Subpoena would require the Applicant  
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1 to identify and provide:

- 2 • Documents relating to the purchase, including all due diligence materials relating to  
3 allowed uses and all related materials associated with the purchase and sale  
4 transaction.
- 5 • Leases and other documents, including correspondence and payment records, relating  
6 to the individuals and companies that have leased space in the building since 2013.
- 7 • Documents relating to normal maintenance and repair supporting these uses, such as  
8 contractor, landscaping, and cleaning contracts since 2013.
- 9 • Agreements and correspondence relating to weddings and other events – down to  
10 correspondence with the brides, their families, caterers, and other people and entities  
associated with these events – since 2013.

11 Powell Declaration, ¶4.

12 In addition to internal communications and files, there are hundreds of potential and  
13 actual lessees, families and companies holding weddings and events, vendors, and a variety of  
14 other professionals, including attorneys, that the Applicant has worked with with regarding the  
15 Admirals House operations. In order to respond to the Subpoena, the Applicant would be  
16 required to search all of its employees' electronic and written correspondence, both internal and  
17 external, and digital and paper files for any document relating to the use of the Admiral's House  
18 dating to 2013. This task would be extraordinarily time consuming and, like Requests #1, #3 and  
19 #4, would require the Applicant to retain an outside consultant to perform the search. Even with  
20 the assistance of an outside consultant, this broad a search over this length of time would require  
21 an enormous amount of employee time. The search would generate thousands or possibly tens of  
22 thousands of documents. All of these documents would need to be reviewed for privilege, since  
23 both in-house and outside counsel have been involved in matters relating to the use of the  
24 Admiral's House. The effort would be incredibly burdensome, could not possibly be done in 2  
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1 weeks as MCC requests, and would generate no documents actually relevant to this appeal.

2 Powell Declaration, ¶5.

3 The Examiner should deny the Motion as to Request #4.

4 **3. Requests #5, #6 and #7 are not relevant or reasonable in scope.**

5 MCC's fifth , sixth and seventh requests are for:

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7 5. All Documents that refer to or discuss the View Corridor and Landscape Maintenance  
8 Covenant, dated December 13, 2012, last recorded under King County Recorder No.  
20130613001828.

9 6. All Documents that refer to or discuss the Historic Preservation Easement and  
10 Covenants, dated June 7, 2013, and recorded under King County Recorder No.  
20130611002100.

11 7. All Documents that refer to or discuss a 2011 Memorandum of Agreement or any other  
12 agreement among the Federal Highway Administration, State Historic Preservation  
13 Office, Washington Department of Transportation, City of Seattle, and Pacific Northwest  
14 Communities, LLC.

15 Requests #5, #6 and #7 are not relevant to the issues pending in this appeal or reasonable  
16 in scope. The Examiner has clarified that she lacks subject matter jurisdiction to enforce private  
17 covenants referenced in Requests #5 and #6. Order, pp. 2-4. With regard to the view covenant,  
18 the Examiner determined, "[c]ovenant consistency cannot be addressed." Order, p. 2. With  
19 regard to the MOA, the Examiner stated, "[t]he Examiner lacks authority to review the decision  
20 for MOU consistency." *Id.*, p. 3. Yet, Requests #5 and #7 ask only about these documents.

21 While the Examiner allowed consideration of these documents as background information to  
22 determine if additional mitigation is warranted under SMC 23.42.042, the Requests do not even  
23 mention the Project, but rather request information regarding the covenant and MOU  
24 independent of the Project. Consistency with the Historic Preservation Easement referenced in  
25 Request #7 was not raised in MCC's appeal. MCC Appeal. The Easement is therefore irrelevant  
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1 to the issues pending in this appeal. Even if it had been raised, which it was not, enforcement of  
2 easements is outside the scope of the Examiner's authority, just as with the covenant and MOA.  
3 Like Requests #5 and 6, Request #7 does not even mention the Project. This broad request for  
4 documents relating to three agreements over which the Examiner lacks jurisdiction, untethered to  
5 the Project or its alleged impacts, is not reasonable in scope.  
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7 Requests #5, 6 and 7 are also burdensome. Like the other requests, they would require an  
8 extensive search of digital and written communications and files among all employees. Since  
9 there is no date range provided, and the requests do not relate to the Project, the search would  
10 have to encompass all of the Applicant's ownership, since 2013. For the reasons previously  
11 described, such a search would require an outside consultant and significant employee time,  
12 could not be completed in 2 weeks, and would be a huge burden. Powell Declaration, ¶6.  
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14 The Examiner should deny the Motion as to Requests #5, #6, and #7.

15 **4. Request #8 is not relevant or reasonable in scope.**

16 MCC's eighth request is for:

17 8. All Documents, including without limitation, any written communications of any kind  
18 with the Landmarks Preservation Board ("Board") or others, that discuss or refer to  
19 Admiral's House status as a designated landmark or the impact of Oceanstar's  
20 construction practices to construct the Buildings on the Admiral's House and its  
designated landmark area on the Property.

21 Request #8 is not relevant to the issues pending in this appeal or reasonable in scope.

22 The first part of this request, seeking all documents that discuss or refer to the Admiral's House  
23 status as a designated landmark, does not even mention the Project. The landmark status of the  
24 Admiral's House is not at issue in this appeal. Since this part of the request does not relate to the  
25 Project, the request is not relevant to a pending appeal issue. The second part of the request,  
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1 relating to the Applicant's so-called "construction practices to construct the Buildings on the  
2 Admiral's House and its designated landmark area on the Property," is also not relevant. The  
3 approved plans clearly show that the Project will not be constructed "on the Admiral's House" or  
4 indeed on any portion of the property that is designated as a landmark. Kaylor Declaration, Ex.  
5 A, Sheets A0.03, A1.01, L1.1 and L3.0 (showing limits of disturbance outside historic/landmark  
6 boundary). Therefore, there are no documents responsive to this request, as worded. Further, it  
7 is unclear what is meant by "construction practices," but this is an appeal of a CUP, not a  
8 building permit. Accordingly, "construction practices" are not a subject of the Decision and are  
9 not relevant to this appeal.  
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12 Request #8 is also burdensome because it requires a search of multiple employees' digital  
13 and written records for any document that mentions the Admiral House's landmark status. Since  
14 there is no date range in the request, the search would need to extend back to 2013 when the  
15 Applicant bought the Admiral's House. As with the previous requests, an outside consultant as  
16 well as substantial employee time would be needed to respond to this request. Documents would  
17 need to be reviewed for privilege. This search and review process would be burdensome and  
18 could not be completed within 2 weeks. In all, the Applicant estimates that conducting the  
19 searches required to comply with the Subpoenas could easily exceed a hundred hours of  
20 consultant and employee time. Powell Declaration, ¶7.  
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22 The Examiner should deny the Motion as to Request #8.  
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#### 24 IV. CONCLUSION

25 The Applicant respectfully requests that the Hearing Examiner deny the Motion. The  
26 Applicant would not object to discovery requests that relate to pending appeal issues, are tailored  
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1 to obtain needed information that cannot be found in SDCI's public database and are not unduly  
2 burdensome. MCC has not presented any such requests.

3 DATED this 7<sup>th</sup> day of July 2021.

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