

THE HEARING EXAMINER OF THE CITY OF SEATTLE

MAGNOLIA COMMUNITY COUNCIL,)	
MIKE APPEL, M. JEANNE COULSON,)	
EDWARD R. COULSON, DEBBIE)	Hearing Examiner File: MUP 21-016
MULLINS, JONATHAN E. MULLINS, and)	and MUP 21-017
JANIS TRAVEN,)	
)	Department Reference: 3028072-LU
Petitioners,)	
)	MCC MOTION FOR CONTINUANCE
v.)	
)	
CITY OF SEATTLE,)	
)	
Respondent.)	
_____)	

I. INTRODUCTION & RELIEF REQUESTED

Since days after the prehearing conference in this appeal, MCC has diligently sought the document and deposition discovery it needs to prepare for the hearing scheduled to begin on August 19. Despite MCC's continuous efforts to seek discovery from Oceanstar, its corporate and individual web, and its architects, not one page of documents has been produced, not one deposition has been scheduled, and not one subpoena has been issued. The Hearing Examiner (Examiner) ruled in her July 19 Order on Applicant's Motion to Quash (Order) that MCC's narrowed requests for documents would be relevant to issues in the appeal and could be tailored to avoid undue burden. MCC sent revised subpoenas duces tecum to Oceanstar on July 20 and has yet to receive a full agreement from Oceanstar, and Oceanstar continues to make objections to all proposed depositions. While MCC is hopeful these disputes will be resolved in accordance with the

Examiner's direction for the parties to confer, resolution will take time as will the actual discovery. Maintaining the current hearing dates beginning August 19 makes it practically and prejudicially impossible for MCC to prepare for the hearing. Accordingly, there is good cause for a continuance of the hearing date. MCC respectfully requests that the hearing be continued (1) to allow 30 days following document production to review documents, schedule and take depositions and (2) to allow 30 days after completion of the last deposition to receive and review transcripts and prepare for the hearing.

II. FACTUAL BACKGROUND

A. Discovery efforts prior to the Order.

The facts pertaining to discovery in this appeal prior to July 19 are set forth in MCC's Reply Brief in Support of Ex Parte Motion for Issuance of Subpoenas Duces Tecum (Reply) and the Declaration of Edward R. Coulson in Support of Ex Parte Motion for Issuance of Subpoenas Duces Tecum (Coulson SDT Dec.) and are briefly summarized here.

One week after the prehearing conference, on May 25, MCC's representative, Edward Coulson (Coulson) emailed the parties to the appeal, outlining what he thought MCC's discovery needs would be. Coulson SDT Dec. ¶ 6. On June 1, Coulson and the lawyers for Oceanstar and Friends conducted a conference call. Coulson presented a tentative discovery schedule, including document productions and depositions, subject to Oceanstar's filing a motion to dismiss the appeal. *Id.*, ¶ 7.

On June 28, the Examiner issued her Order on Oceanstar's motion to dismiss. As to MCC, the Order dismissed only one of its claims, leaving MCC's remaining six claims to be decided in this appeal.¹ On the next day, Coulson and Oceanstar's attorneys discussed MCC's motion for issuance of subpoenas duces tecum. Ms. Kaylor (Kaylor) said she would review the motion again and agreed to a follow up conference call on July 1. Coulson SDT Dec., ¶ 11. On July 1, Kaylor emailed

¹ The Order dismissed MCC's claim challenging the Department's initial SEPA-exempt determination for this project. However, MCC admitted that was a claim it was not asserting in this appeal. MCC Response, p. 4 ("MCC is not challenging SDCI's SEPA exempt determination in this appeal.").

Coulson less than one hour before that call and cancelled it, following up with a flurry of emails about the motion and other discovery issues, such as Oceanstar's owners and architects' depositions. *Id.* at ¶ 12. Without any further conferences, Kaylor and Coulson requested and filed briefing, leading to the Examiner's Order on July 19.

B. Order.

In her July 19 Order, the Examiner denied issuance of the subpoenas duces tecum but ruled that narrowed requests for documents would be relevant to issues in the appeal and could be tailored to avoid undue burden, pursuant to HER 3.12(b) and HER 3.11. Order, p. 4. The Examiner advised MCC to revise the subpoenas and coordinate with opposing counsel "to minimize the need for a second Examiner discovery ruling." *Id.* The Examiner also asked the parties to confer to resolve future discovery disputes.

C. Discovery efforts since the Order.

The parties have made some progress since the Order on document discovery, but Oceanstar raises objections to depositions that the parties will have to resolve. MCC is hopeful that all the issues will be resolved without further Examiner involvement. However, finalizing the subpoenas duces tecum and agreeing on and conducting depositions will take additional time. For the purposes of this motion, the need for this additional time constitutes good cause to continue the current hearing date.

MCC revised its subpoenas duces tecum in accordance with the Order and transmitted them to Oceanstar on July 20. Declaration of Edward R. Coulson in Support of Motion for Continuance (Coulson Dec.), ¶ 3. On July 22, Kaylor responded, stating she was reviewing them with her client. *Id.* at Ex. 1. In a July 27 email, Kaylor made suggestions as to the form of the subpoenas, but advised she was still evaluating the time to respond to the subpoenas. Coulson responded and will set a conference call. *Id.* at ¶ 6, Ex. 4.

On July 22, Kaylor sent an email to Coulson, repeating Oceanstar's position that depositions of Oceanstar's owners were not warranted. Kaylor also repeated Oceanstar's position that its

architects were hired from the beginning of its application as experts "in anticipation of" litigation (an appeal) and thus cannot be deposed without paying for their time. Kaylor did not address authority provided by MCC in a previous Coulson email that directly contradicts this position. Coulson Dec., Ex. 2. Coulson responded to Kaylor's email on July 23, supplying additional authority for MCC's position and transmitting a revised subpoena duces tecum to the architects to include a request for a copy of the engagement agreement between Oceanstar and its architects. A copy of this entire email exchange is at Coulson Dec., ¶ 4, Ex. 2, and a copy of the revised subpoena is attached as Ex. 3.

MCC is committed to resolution of these disputes, reviewing responsive documents, preparing for and conducting depositions in as efficient and expeditious a manner as possible. Based on its appeal experience so far, MCC estimates it will take 30 days to review responsive documents and schedule depositions. Coulson Dec., ¶ 5. Once the depositions are complete, MCC estimates review and hearing preparation will take an additional 30 days. *Id.* MCC respectfully requests a continuance that allows this vital discovery and preparation to take place.²

II. AUTHORITY

HER 2.20 (a) provides: "A scheduled hearing may be continued . . . on the motion of a party for good cause shown." "Good cause" is not defined in the Rules, but is a well-known concept in the daily lives and decisions of lawyers, judges, and hearing examiners. MCC respectfully submits under the facts of this case, MCC has presented good cause for a continuance.

Further, under HER 1.03(c), the Examiner may look to the Superior Court civil rules for guidance. CR 40(e) provides:

A motion to continue a trial on the ground of the absence of evidence shall only be made upon affidavit showing the materiality of the evidence expected to be obtained, and that due diligence has been used to procure it, and also the names and address of the witness or witnesses.

² MCC has included in its witness and exhibit disclosures reservations of rights to identify additional witnesses and exhibits, if necessary, after completion of this discovery.

MCC meets these requirements. In response to Oceanstar's objections to the evidence sought by MCC, the Examiner has already ruled on the materiality of the evidence, albeit in narrowed requests, to the Director's exercise of discretion required under SMC 23.42.042(B), such as the project's impacts on the use of the proposed north stair access to UJV or its public views. Order, p. 2. The Coulson declarations in support of the motion for issuance and in support of this motion demonstrate the due diligence that MCC has used since the prehearing conference to obtain this evidence, along with the names of the potential witnesses.

Cases under CR 40(e) are also instructive. In *Balandzich v. Demeroto*, 10 Wn App 718 (1974), the court outlined both the court's broad scope of discretion under CR 40(e) and factors to consider in exercising that discretion:

Whether a motion for continuance should be granted or denied is a matter discretionary with the trial court, reviewable on appeal for manifest abuse of discretion. *Jankelson v. Cisel*, 3 Wash.App. 139, 473 P.2d 202 (1970). In exercising its discretion, the court may properly consider the necessity of reasonably prompt disposition of the litigation; the needs of the moving party; the possible prejudice to the adverse party; the prior history of the litigation, including prior continuances granted the moving party; any conditions imposed in the continuances previously granted; and any other matters that have a material bearing upon the exercise of the discretion vested in the court.

Id. at 720.

Under this analysis, all applicable factors in this appeal weigh in favor of a continuance. Given that Oceanstar's project application was initiated in 2017, moving the hearing date as MCC requests is a small percentage of the time required for final disposition of Oceanstar's application. This is particularly true in light of the appeal time (over one month) already consumed by Oceanstar's mostly unsuccessful motion to dismiss MCC's claims.

MCC's needs justify the continuance. As a matter of basic fairness, MCC should be entitled to adequate time to investigate and prepare for the hearing. The discovery sought relates to important issues in this appeal, such as protection of the public view, especially given representations by the architects in public meetings and submittals that the view would be protected,

the use of the north stair access to UJV, and the Project's impacts on longstanding restrictive covenants and easements. This evidence is all relevant to the Director's exercise of discretion under SMC 23.42.042(B). Without a continuance, MCC is practically prevented from obtaining and substantially prejudiced by not being able to obtain this discovery, and deprived of its right to a fair hearing.

The possible prejudice to Oceanstar of a continuance is nonexistent or very slight. The time for a continuance is very small in comparison to the total time to gain possible approval of this huge project, and Oceanstar's preparation for the hearing is not unfairly burdened or delayed. Oceanstar also chose to spend time and had all the time it asked for to bring its motion to dismiss, taking time away from MCC to conduct its discovery. It is only fair that the time for MCC to perform this essential part of its preparation now be allowed.

The tremendous discrepancies in knowledge and resources of the parties are two other factors in favor of granting a continuance. Oceanstar has owned the property since 2013 and, with its architects, lawyers, and other professionals, has been researching codes, investigating the site, and preparing and presenting detailed designs, plans, and submittals for the Project since 2017. In contrast, MCC had one possible opportunity to comment on the Project in September 2019, and was out of the picture until issuance of the Decision on April 22, 2021. Oceanstar also has the lopsided advantage of financial ability to employ numerous workers and professionals with immense research, design and legal resources to defend this appeal. MCC is an all-volunteer, community-based, grass-roots organization with extremely limited resources but a fervent interest in protecting a valuable community asset. MCC should receive consideration for its limited resources, time and efforts available to muster and prosecute this appeal.

III. CONCLUSION

MCC has diligently pursued its right to conduct document and deposition discovery in this appeal. Providing MCC the time to conduct this discovery constitutes good cause under HER 2.20(a) and related superior court civil rules authority. MCC respectfully requests that the

hearing be continued (1) to allow 30 days following document production to review documents, schedule and take depositions and (2) to allow 30 days after completion of the last deposition to receive and review transcripts and prepare for the hearing.

DATED this 28th day of July, 2021.

/s/

Edward R. Coulson
Authorized Representative for Appellants
Magnolia Community Council and Others
1522 Thorndyke Ave. W., Seattle, WA
206-953-2579, coule@schweetlaw.com

DECLARATION OF SERVICE

I declare under penalty of perjury under the laws of the State of Washington that on this date, I sent true and correct copies of the MCC MOTION FOR CONTINUANCE and DECLARATION OF EDWARD R. COULSON IN SUPPORT OF MOTION FOR CONTINUANCE to each person listed below, in the manner indicated.

Margaret M. Boyle
Email: margaret@boylemartin.com
Authorized Representative of Friends of the Last 6,000
Method of Service: E-mail

Michael Houston
Email: michaelt.houston@seattle.gov
Authorized Representative of SDCI
Method of Service: E-mail

Erika Ikstrums
Seattle Department of Construction and Inspection
Email: erika.ikstrums@seattle.gov
Method of Service: E-mail

John C. McCullough
Email: jack@mhseattle.com
Courtney A. Kaylor
Email: courtney@mhseattle.com
David Carpman
Email: dcarpman@mhseattle.com
Attorneys for Oceanstar LLC, Applicant
Method of Service: E-mail

Maddi Warnock
Email: mwarnock@mhseattle.com
Method of Service: E-mail

Tom Brown
Gelotte Hommas Drivdahl
tomb@ghdarch.com
Method of Service: E-mail

SIGNED this 28th day of July, 2021, in Seattle, Washington.

/s/

Edward R. Coulson

Authorized Representative for Appellants

MAGNOLIA COMMUNITY COUNCIL

AND OTHERS

1522 Thorndyke Ave. W., Seattle, WA

206-953-2579, coule@schweetlaw.com