

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,	)	
	)	REPLY IN SUPPORT OF
v.	)	MCC MOTION FOR CONTINUANCE
	)	
CITY OF SEATTLE,	)	
	)	
Respondent.	)	
_____	)	

I. INTRODUCTION AND RELIEF REQUESTED

Oceanstar admits that since May 25, days after the prehearing conference, MCC has stated its desire to obtain documents and conduct depositions to prosecute its appeal. Declaration of Courtney A. Kaylor in Support of Applicant's Response to MCC Motion for Continuance (Kaylor Declaration or Kaylor Dec.), Exhibit A. Seventy two days later, as of an agreement between MCC and Oceanstar entered into on Friday, August 6, as to the form of subpoenas duces tecum, Oceanstar for the first time acknowledges that it is in possession of documents that are necessary and relevant to issues in this appeal. Oceanstar has agreed to produce those documents by August 16. MCC is left with three days to prepare for the hearing, without an opportunity to depose Oceanstar's governors and architects, much less prepare to cross examine Oceanstar's designated witnesses, including one of the Project architects, at the hearing.

MCC respectfully submits that its efforts reflect its steadfast diligence and good faith to get the document and deposition discovery it is entitled to in order to prosecute its appeal, and good cause exists to continue the hearing. As addressed in more detail below, Oceanstar's arguments in its Response are self serving, inaccurate and unfounded and should be disregarded.

## **II. ARGUMENT AND AUTHORITY**

The Hearing Examiner (Examiner) is well aware of the efforts to get to this point. She has issued her rulings in response to the seven briefs filed prior to MCC's current Motion for Continuance (Motion) and has by now reviewed the 48 separate emails attached to the Kaylor Declaration. In her Order on Oceanstar's motion to dismiss, the Examiner identified Chap. 25.09 SMC and SMC 23.42.042 mitigation issues to be addressed in the appeal (Order, pp. 2-4). In her Order on Applicant's Motion to Quash, the Examiner provided guidance for narrowed requests that would be relevant to appeal issues. MCC subsequently revised its requested subpoenas and has now presented them to the Examiner with Oceanstar's agreement for issuance. There is no time to take the depositions MCC has requested and needs to fairly prepare and even if there were, time will be required to address what MCC believes are Oceanstar's unfounded objections to taking those depositions.

### **A. Witness lists and the public portal do not address MCC's need for a continuance.**

Oceanstar argues a continuance should be denied because (1) MCC has listed witnesses (including the owners of Oceanstar, who Oceanstar refuses to produce for depositions, and Oceanstar's architects, who Oceanstar refuses to produce without agreement to pay their hourly expert rate) and exhibits, as required by the Prehearing Order (with specific reservations of rights to supplement after completion of discovery) and (2) MCC has had access to the public portal (Kaylor Dec., Ex. M). Oceanstar argues this evidence should be sufficient and there is no need for MCC to introduce "even more material" during the hearing. Response, p. 9

MCC believes responsive documents from Oceanstar and its architects will demonstrate a multitude of impacts on the UJV views and the use of the north stair access from the Project that

should have been considered and mitigated by the Department. At the very least, the documents will show the basis -- or more accurately, the lack of a basis -- for Oceanstar's architects' claims at public hearings and in written SDCI submittals that the architects would take steps to perform an analysis of the existing view corridor, and that the Project's goal was "to maintain current views to Elliott Bay and Seattle skyline for park users and nearby homeowners."<sup>1</sup> The Examiner should admit and consider this evidence that supports an exercise of discretion under SMC 23.42.042 and SMC 59.09.260 to impose mitigating conditions to protect the UJV view and reverse or remand the Decision.

Further, listing an adverse party or witness <sup>on a witness list</sup> does not indicate the listing party's belief she does not need the adverse party or witness' depositions; in fact, it usually indicates it is more critical to have a deposition to be prepared for what the witness will say. <sup>at the hearing</sup> More importantly, Oceanstar's arguments totally ignore its and its architects unique and pervasive knowledge of the Project, the impacts on the UJV view, stair use, and other public interests, and actions or alternatives to be considered in a conditional use application. They are the ones that did the research, came up with the design, considered the impacts, made the decisions and submitted (or did not submit) information in support of their application for CUP approval. They are the only ones with complete knowledge of what these efforts entailed and therefore are the only source of that information.

The ACUP process is similar in several key ways to the FAA process for obtaining its approval for proposed aircraft design changes. The manufacturer submits information it selects for governmental approval regarding a design change, which the FAA reviews, evaluates, solicits further information and issues or withholds its approval, just as the Director processes an ACUP application. Once the ACUP or design change is approved, an appeal or unfortunate aircraft incident or crash triggers further proceedings and investigations. This appeal, raising claims that the Director erred in not imposing mitigation to address adverse public impacts of the Project, is similar to governmental investigations into approved design changes after an airplane crash. Oceanstar's arguments that

---

<sup>1</sup> For a fuller discussion and record citations, see MCC Response to Applicant's Motion to Dismiss, pp. 6-7.



MCC does not need Oceanstar's and its architects' documents or testimony to prepare for the appeal hearing would be comparable to an argument, for example, that the government did not need to hear from Boeing as it investigated the tragic 737 MAX crashes.<sup>2</sup> Boeing was a full, essential participant in all the investigations because of its unique knowledge, its records and decisions in the design and implementation of the 737 MAX design changes.

This is an extreme example only because MCC believes Oceanstar's argument that MCC does not need Oceanstar's and its architects' discovery is extreme. Oceanstar and its architects have unique information and records essential to MCC's fair prosecution of its appeal. Oceanstar knows this. Oceanstar has designated one of its architects as a witness, stating: "Mr. Drivdahl may testify regarding the [P]roject... including its location, design, and other characteristics." Applicant's Witness and Exhibit List, p. 1. In its Response to Ex Parte Motion for Issuance of Subpoenas Duces Tecum, Oceanstar argued the Project may have been discussed in weekly board meetings of its corporate counterpart, Global Seas, for four years. Response, p. 6. Despite its extreme arguments to the contrary, Oceanstar's documents and depositions are vital to a fair appeal for MCC and ultimately a fair consideration of all the issues for the Examiner. As set forth in the Motion, good cause exists to continue the hearing to allow MCC to obtain this essential discovery.

**B. Oceanstar's deposition offers were not bona fide.**

Though less extreme, Oceanstar makes other arguments in its Response that blink reality or conflate terms. For one example, Oceanstar repeatedly references its offers to make its architects available for depositions and points to reserving dates for those depositions as cooperative. These offers though ignore what MCC made clear from the start: MCC wanted to obtain responsive documents before taking depositions. Taking depositions before having responsive documents

---

<sup>2</sup> MCC does not minimize or disrespect the tragic human consequences of those crashes nor suggest that this appeal is a life-or-death matter. Boeing participated in several investigations and at least one government investigation found that a lack of transparency on Boeing's part to the FAA was one of many contributing factors to the crashes. <https://transportation.house.gov/imo/media/doc/2020.09.15%20FINAL%20737%20MAX%20Report%20for%20Public%20Release.pdf> at 13, last visited August 5, 2021.

prevents thorough preparation for the deposition and invites the need for additional questioning when responsive documents are received. Further, after a few proffered dates, Oceanstar then demanded that the architects be paid an expert witness fee. Coulson Declaration in Support of Ex Parte Motion, Ex. 5. Oceanstar responded to MCC's cited authority that professionals who develop facts not in anticipation of litigation are not entitled to expert witness fees by claiming that ALL their work was "in anticipation of litigation." Kaylor Dec., Ex. J. Oceanstar provided no authority for this position, refused to produce a copy of their architects' engagement agreement, and stated if MCC wanted to depose architects without paying for their time, "you will need to bring a motion". *Id.* Rather than demonstrate cooperation, Oceanstar's position (which by itself unfortunately demonstrates the necessity for more time for resolution by the Examiner to obtain discovery) is yet another factor in support of MCC's motion for a continuance.

**C. Oceanstar's arguments conflate terms.**

Oceanstar arguments also conflate relevancy and materiality. For example, in its Motion, MCC states:

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).

Oceanstar argues that this description fails to meet the requirement of "materiality" under CR 40(e). Response, p. 10. Oceanstar cites a case dealing with "materiality" under securities law misrepresentation claims (*Fed. Home Loan Bank of Seattle v. Credit Suisse Sec. (USA), LLC*, 194 Wn.2d 253, 449 P.3d 1019 (2019)) and a criminal case dealing with suppressed evidence (*State v. Boyd*, 29 Wn. App. 584, 629 P.2d 930 (1981)), neither of which are instructive to this appeal. Further, relevant evidence has two components: materiality and probative value (1 McCormick on Evidence, § 185 (8<sup>th</sup> ed.)), so MCC's specification of the evidence sought as relevant includes its materiality.

### 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 9th day of August, 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](mailto: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 REPLY IN SUPPORT OF MCC 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: michaelh.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 9th day of August, 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