

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 ISSUANCE OF
v.	)	SUBPOENAS AND REQUEST FOR
	)	EXPEDITED BRIEFING SCHEDULE AND
	)	RULING
CITY OF SEATTLE,	)	
	)	
Respondent.	)	
_____	)	

I. INTRODUCTION AND REQUEST FOR RELIEF

The single-family use of the subject property is a required element of the conditional use permit that must be proven, per SMC 25.09.260.B.3.b (emphasis added):

b. Single-family dwelling units shall be the ***sole type of principal use permitted*** through the environmentally critical areas conditional use regulations . . .

The Applicant has refused to provide discovery in response to MCC's requests regarding this required element of the CUP, making this motion necessary.

MCC first requests that the Hearing Examiner (Examiner) issue subpoenas for the depositions of Robert Desautel and Walter Kuhr, two of the owners of Oceanstar, LLC. This requires the Examiner to overrule Oceanstar's refusal to make these deponents available.

Second, this motion requests that subpoenas issue for Eric Drivdahl and Tom Brown, Oceanstar's Project architects, without the requirement sought by Oceanstar that MCC pay their fees as expert witnesses, because they are being deposed as fact witnesses, not as experts.

Unfortunately, MCC's attempts to meet and confer with Oceanstar to resolve the disputes over the requested depositions were unsuccessful, necessitating this motion.

In light of MCC's need for the depositions sought and the approaching continued hearing dates, MCC requests an expedited briefing schedule and ruling on this motion, in accordance with HER 2.16(b) and (d).

## **II. FACTUAL BACKGROUND**

On April 3, 2017, Oceanstar's architects filed with SDCI a Land Use Pre-Submittal Conference Information, seeking an administrative conditional use permit under SMC 23.42.042 and 25.09.260 for the construction of four buildings totaling 20,000 sf with 14 parking spaces in the steep slope and environmentally critical area behind the Admiral's House and in front of Ursula Judkins Viewpoint (UJV). The submittal stated: "The process and procedures for notice of decision and appeal of this administrative conditional use shall be as prescribed for Type II land use decisions in Chapter 23.76", to which Oceanstar added a comment; "This is a public noticing process with administrative decision by the director. It is appealable to the hearing examiner." "Pre-Sub Application & Questions," 6/16/17, SDCI Permit and Property Records, No. 3028072 ([web6.seattle.gov/dpd/edms](http://web6.seattle.gov/dpd/edms)) ("SDCI Records"),

On the SEPA Checklist Oceanstar submitted to SDCI, dated May 10, 2019, Question A-11 asked Oceanstar to describe the proposed uses of the Project. Rather than provide an answer, Oceanstar stated: "Two single family residences connected by an underground parking garage." Oceanstar presented no other evidence in the record of Oceanstar's intended use of these Project Buildings. MCC's appeal lists plentiful evidence of Oceanstar's non-residential use of the Project Buildings, such as underground parking for 13 cars, shared amenities, and imaginary property lines. Appeal, pp 3-4.

In an ACUP submittal report also dated May 10, 2109, Oceanstar admitted that "the view from [UJV] overlooking downtown, the bay and Mount Rainier is a significant neighborhood amenity" and stated: "Rooflines are held below [UJV's] average grade to maintain views from the park into Elliot Bay and beyond to the Seattle skyline." Later, at the one meeting held for the public to comment on Oceanstar's proposal, Oceanstar's architect promised the audience the Project would protect UJV and its view.

In the Decision, the Director found that Oceanstar's proposal met the requirements of SMC 25.09.260(B)(3)(b). Decision, p. 5.

### **III. ARGUMENT AND AUTHORITY**

#### **A. The Decision is a Type II decision and not entitled to deference on appeal.**

Under SMC 25.09.260(A)(1), the Director is authorized to approve an environmentally critical areas administrative conditional use pursuant to SMC 23.42.042 and 25.09.260. SMC 25.09.260(B)(3)(b) states in pertinent part: "Single family dwelling units shall be the sole type of principal use permitted through the environmentally critical areas conditional use regulations...". SMC 25.09.260(D) requires the Director to issue written findings and conclusions to support the decision and that "The process and procedures for notice of decision and appeal of this administrative conditional use shall be as prescribed for Type II land use decisions in Chapter 23.76." SMC 23.76.022(C)(7) provides: Standard of Review. The Director's decisions made on a Type II Master Use Permit shall be given substantial weight, except for determinations on variances, conditional uses, and special exceptions, which shall be given no deference." (emphasis added).

#### **B. 25.09.260(B)(3) requires that the Director consider the use of the Project Buildings.**

Because SMC 25.09.260 allows conditional uses, single family dwelling units are not permitted outright. Instead, in order to receive an ACUP, the burden of proof is on the applicant to show that the sole principal use permitted is single family use to allow the Director to approve the application. In its SDCI submittals, as pointed out above, Oceanstar never presented evidence of its intended use of the Project Buildings. Oceanstar's assertions that the Project Buildings are single



family dwelling units do not constitute a showing of the Project Buildings' intended use. Thus, the Director has failed to follow SMC 25.09.260 and failed in the Decision to impose appropriate mitigating conditions to address the Project's adverse public impacts on UJV and its view.

**C. The scope of appeal inquiry and discovery should include Oceanstar's intended use and its adverse public impacts on UJV.**

MCC's fears of a non-residential use, such as use of the Buildings by Oceanstar or successors for short term rentals, a use defined as a commercial use under SMC 23.84A.024"L", have been listed in prior filings. See, e.g., MCC Response to Motion to Dismiss, pp. 4-5. If these fears are well founded, then the Director has erred in approving the CUP. Even if the fears are not well founded, the Director erred because Oceanstar did not present any evidence about its intended use of the Project Buildings.

The Director's failure to consider the intended use of the Project Buildings is also error under SMC 23.42.042(C), specifically incorporated into the ECA process by SMC 25.09.260(A)(1).

SMC 23.42.042(C) provides:

The Director may deny or recommend denial of a conditional use if the Director determines that adverse impacts cannot be mitigated satisfactorily, or that the proposed use is materially detrimental to the public welfare or injurious to property in the zone or vicinity in which the property is located.

See, *In re Steen*, MUP 98-005.

MCC in its appeal asserts the Oceanstar's potential commercial use of the Project Buildings will be detrimental to the public welfare in general and grossly injurious to the use of UJV and the protection of its public view in particular. MCC should be entitled to have discovery regarding Oceanstar's actual intended use of the Project Buildings and the impact of that use on UJV. The best immediate source of that discovery is the depositions of the two apparently principal governors of Oceanstar and its architects. In order to fairly and fully pursue its appeal, MCC requests that the Examiner permit such discovery.

**D. Subpoenas should issue for the depositions of Oceanstar governors Desautel and Kuhr.**

Despite numerous requests and citations of authority for its position by MCC, Oceanstar has refused to make the apparent principal governors of Oceanstar, Messrs. Desautel and Kuhr, available for depositions. See, e.g., Declaration of Courtney A. Kaylor in Support of Applicant's Response to MCC Motion for Continuance (Kaylor Dec.), Ex. J.<sup>1</sup>

On August 10, the Examiner issued subpoenas duces tecum to Messrs. Desautel and Kuhr for documents that are material and relevant to issues in this appeal. These issues were listed in MCC Ex Parte Motion for Issuance of Subpoenas Duces Tecum (Third Revision):

(1) the existence and effect of recorded property restrictions as they provide context for the exercise of discretion under SMC 23.42.042(B);

(2) tree height restrictions necessary to mitigate the adverse public view impact of the Project;

(3) regrading to mitigate the adverse public view impact of the Project;

(4) factors to determine the reasonableness of removal of the north side exterior stair access of the Project;

(5) the existence and effect of the Memorandum of Agreement, dated October 21, 2011, as it provides context for the exercise of discretion under SMC 23.42.042(B); and

(6) the Project's proposed construction practices and changes to the Admiral's House and its landmark boundary and necessity of review by the Landmarks Preservation Board and others as part of the exercise of discretion under SMC 23.42.042(B) or (C).

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<sup>1</sup> At one-point, Oceanstar claimed these gentlemen "are commercial fishermen, not architects or lawyers, and they rely on their professional consultants (and attorneys) to address these issues." Kaylor Dec. Ex F. Yet, in opposition to MCC's Ex Parte Motion for Subpoenas Duces Tecum, Global Seas, an Oceanstar affiliate of which Messrs. Desautel and Kuhr are also governors, claimed handwritten notes of four years' worth of weekly Global Seas meetings might contain discussions about the Project and needed to be reviewed. Declaration of Phillip M. Powell in Support of Applicant's Response to Ex Parte Motion for Issuance of Subpoenas Duces Tecum, ¶ 3. Given these contradictions, and HER 3.11 and CR 26(b)(1)'s broad scope of discovery, the depositions should be allowed. If it turns out the Oceanstar deponents indeed don't have any knowledge of this Project, the depositions will be short.

For the same reasons the subpoenas duces tecum were issued, the Examiner should issue the deposition subpoenas so MCC may obtain relevant and necessary deposition testimony regarding these issues. In addition, as set out in II.C. above, MCC is entitled to discovery on the vital issue in this appeal of Oceanstar's intended use of the Project Buildings and should be allowed deposition testimony on this issue as well.

**E. Subpoenas should issue for GHD architects Drivdahl and Brown.**

As with the Oceanstar governors, the Examiner issued subpoenas duces tecum to Oceanstar's architects, Messrs. Drivdahl and Brown, for documents that are material and relevant to this appeal, as listed in the section above. Oceanstar admits that at minimum, Mr. Drivdahl has relevant and material knowledge about the Project Buildings and the Project's impacts on UJV and its public view, as they designated Mr. Drivdahl as a witness (not an expert witness) in its Applicant's Witness and Exhibit List, filed on July 22. There is little dispute that Mr. Brown, who at several points in the SDCI file is listed as the Applicant, possesses similar if not more extensive knowledge.

MCC is seeking these depositions for the architects' knowledge of facts and opinions they acquired or developed in their roles as Project architects, beginning in 2016, not for any facts or opinions in anticipation of this appeal.<sup>2</sup> Their knowledge relates to the issues identified above and the subpoenas should issue for depositions about that knowledge.

Yet, Oceanstar has refused to make these architects available for deposition without MCC paying for their time. Oceanstar informed MCC that if it desired to depose them as fact witnesses without payment of expert fees, "bring a motion." See, e.g., Kaylor Dec., Ex. F. MCC responded, citing the case of *Paiya v. Durham Construction Company, Inc.*, 69 Wn App 578, 579-580 (1993) for its holding that "Professionals who acquire or develop facts not in anticipation of litigation are not entitled to expert witness fees." Kaylor Dec., Ex. J. Oceanstar never addressed this authority.

On July 10, MCC asked Oceanstar for a copy of the expert engagement agreement between Oceanstar and GHD. *Id.* Oceanstar's attorney eventually responded, refusing to provide any

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<sup>2</sup> No expert opinions are listed in Oceanstar's description of Mr. Drivdahl's testimony.



engagement agreement. Oceanstar claimed it was clear from the publicly available file that Messrs Drivdahl and Brown are engaged as experts (which does not answer the question of whether they should be paid expert fees for depositions) and "Since hearing examiner appeals are part of the City's permit process, their work was necessarily 'in anticipation of' this proceeding." *Id.* MCC responded, offering additional cites and again asked Oceanstar to provide GHD's expert engagement agreement, if any, and GHD's agreement to provide Project architectural services. *Id.* Oceanstar refused this request and objected to including a request for such an agreement in the subpoenas duces tecum directed to GHD.

MCC provided to Oceanstar the cases of *Baird v. Larson*, 59 Wn App 715, 801 P. 2d 247 (1990) and *Peters v. Ballard*, 58 Wn App 921, 795 P. 2d 1158 (1990). Kaylor Dec., Ex. J. In *Baird*, a CPA performed an appraisal of an orthodontic practice in conjunction with the sale of the practice. After the buyer defaulted, the CPA was called by the seller to testify at trial about his appraisal work. Following a judgment for the seller, the CPA claimed and the trial court awarded him expert witness fees for his deposition and trial testimony. The court of appeals reversed, stating "Professionals who have acquired or developed facts and opinions not in anticipation of litigation but from involvement as an actor in a transaction, are not entitled to expert witness fees." *Id.* at 720.

This case provides guidance in this appeal. In its witness disclosure, Oceanstar states Mr. Drivdahl "may testify regarding the project that is the subject of this appeal including its location, design, and other characteristics." (Emphasis added.)<sup>3</sup> MCC wants to depose the architects about their knowledge of facts and opinions acquired as the Project architects, not about any as yet undisclosed opinions they might have for the appeal hearing, and should be allowed to do so without paying expert fees for that testimony under *Baird*.

Further, Oceanstar's claim that the work GHD has done is "in anticipation of litigation (this appeal)" has been specifically addressed and rejected by Washington courts. In *Peters v. Ballard*,

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<sup>3</sup> The disclosure also states that Mr. Drivdahl may respond to testimony offered by the appellants. There is no reference to any expert testimony or opinions formed for this appeal.

58 Wn App 921, 795 P. 2d 1158 (1990), *rev. denied*, 115 Wn.2d 1022 (1990), the court held that the plaintiff's subsequent treating physician's knowledge and opinions were derived from his role as a subsequent treating physician, not as an expert, even though he offered expert opinions about plaintiff's prior treatment in his testimony. Citing the case of *Adkins v. Morton*, 494 A.2d 652, 657, (D.C. App 1985), the court held: "Under CR 26(b)(4), the distinction between an expert testifying as a fact witness and an expert witness who is testifying as a CR 26(b)(4) expert is whether the facts or opinions possessed by the expert were obtained for the specific purpose of preparing for litigation. " *Peters* at 927 (emphasis added). In light of the five years GHD has been working on the Project and the many years yet to come (assuming the Project is finally approved), as well as Oceanstar's failure to identify any opinions GHD will present at the appeal, it is fiction to claim the facts and opinions GHD possesses were obtained for the specific purpose of this appeal. If Oceanstar really believes that, they should at least produce the expert engagement agreement. Following the guidelines of *Peters*, MCC should not be required to pay expert fees for GHD depositions.

For the same reasons the subpoenas duces tecum were issued, the Examiner should issue the deposition subpoenas so MCC may obtain relevant and necessary testimony regarding these issues from GHD, without the requirement that MCC pay expert witness fees. In addition, based on the authority set out in Section II.C. above, MCC is entitled to discovery on the vital issue in this appeal of Oceanstar's intended use of the Project Buildings.

#### IV. CONCLUSION

For all the reasons set out above, MCC requests the Examiner issue the requested subpoenas. Because of MCC's need for the depositions and the approaching hearing dates, MCC respectfully requests an expedited briefing schedule, including a requested reply brief, and ruling on this motion, as allowed by HER 16(b) and (d).



DATED this 11th day of August, 2021.

/s/

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## 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 ISSUANCE OF SUBPOENAS AND REQUEST FOR EXPEDITED BRIEFING SCHEDULE AND RULING to each person listed below, in the manner indicated.

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SIGNED this 11th day of August, 2021, in Seattle, Washington.

/s/

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