BEFORE THE HEARING EXAMINER
FOR THE CITY OF SEATTLE

In the Matter of the Appeal of MAGNOLIA COMMUNITY COUNCIL AND OTHERS; and FRIENDS OF THE LAST 6,000 From a decision issued by the Director, Seattle Department of Construction and Inspections	Hearing Examiner File: MUP 21-016 (CU) and MUP 21-017 (ECA) Department Reference: 3028072-LU APPLICANT'S RESPONSE TO MCC MOTION FOR ISSUANCE OF SUBPOENAS AND REQUEST FOR EXPEDITED BRIEFING SCHEDULE AND RULING

The Hearing Examiner should deny the Motion for Issuance of Subpoenas and Request for Expedited Briefing Schedule and Ruling ("Motion") filed by Appellant Magnolia Community Council ("MCC"). The Motion fails to establish that the requests it makes are either relevant or reasonable. To the contrary, the four depositions it seeks are unduly burdensome, harassing, and unnecessary under the circumstances of the appeal. MCC does not demonstrate that any purpose would be served by requiring these depositions. The only topic MCC identifies in its Motion as the subject of the depositions is whether the Applicant Oceanstar LLC ("Applicant") has the subjective intent to use the two single family homes

MCCULLOUGH HILL LEARY, PS
701 Fifth Avenue, Suite 6600
Seattle, WA 98104
206.812.3388
206.812.3389 fax

comprising the project ("Project") for an illegal unpermitted commercial use. This is not an issue in the appeal. Pursuant to Hearing Examiner Rule of Practice and Procedure ("HER") 3.11 and 3.12(b), the Examiner should prohibit the discovery requested by MCC. In the alternative, the Examiner should strictly limit discovery to the depositions of the Applicant Oceanstar LLC's ("Applicant's") experts on issues that are part of this appeal and require MCC to compensate those experts for their time relating to the depositions.

I. FACTS

MCC seeks to depose four people: Robert Desautel, Walter Kuhr, Eric Drivdahl, and Tom Brown. Mr. Desautel and Mr. Kuhr are the founders and President and Vice President, respectively, of a commercial fishing company that owns (through its sister company, Oceanstar LLC) the property on which the Project is located and has its offices at the Admiral's House on the property.[1] They and their families will occupy the two homes that comprise the Project. Declaration of Courtney A. Kaylor in Support of Response to MCC Motion for Issuance of Subpoenas and Expedited Briefing Schedule and Ruling ("Kaylor Dec."), Ex. A, p. 2. Their expertise lies in the areas of commercial fishing and business operations. They are not architects, landscape architects, or arborists, and rely on their expert consultants (who are also expert witnesses in this appeal) to address procedural and substantive compliance with the Seattle Municipal Code ("City Code" or "SMC") requirements for the Project. MCC wishes to question them about their and their families' personal intended use of the homes, a topic that is far outside the scope of this appeal. For this reason, the Applicant has declined to make them available for depositions.

[1] See https://www.globalseas.com/company/team/; https://www.globalseas.com/contact/.

MCCULLOUGH HILL LEARY, PS
701 Fifth Avenue, Suite 6600
Seattle, WA 98104
206.812.3388
206.812.3389 fax

Mr. Drivdahl and Mr. Brown are with Gelotte Hommas Drivdahl, the Project architects. They are two of the Applicant's expert witnesses in this matter. The Applicant previously offered to make them available for depositions on July 19, 20 and 22, 2021. The Applicant sought an agreement with MCC that the depositions would address topics relevant to this appeal, which MCC refused to provide. The Applicant also requested MCC's agreement to pay their expert fees for the depositions. Ultimately, MCC declined the opportunity to depose these witnesses on relevant matters in July. Declaration of Courtney A. Kaylor in Support of Applicant's Response to MCC Motion for Continuance ("Kaylor Dec. on Continuance"), Ex. G. MCC now seeks to depose these experts on their clients' intended use of the homes, a matter outside the scope of this appeal, without paying for their time in connection with the depositions.

While seeking to depose multiple people on irrelevant issues, MCC also sought extensive written discovery. Despite the Applicant's efforts to negotiate a reasonable scope for MCC's document requests, MCC moved for issuance of inappropriately broad subpoenas. The Examiner denied that motion. *See* Order On Applicant's Motion to Quash ("Order Quashing Subpoenas"). MCC also sought a two-month delay in the hearing in this matter so it could conduct more discovery. Again, the Examiner appropriately denied this motion. *See* Order on Appellant MCC's Motion to Continue Hearing ("Order Denying Continuance"). Ultimately, to resolve the discovery dispute, the Applicant agreed – while reserving its argument that the discovery was unnecessary to the appeal – to assemble and provide documents responsive to a narrower (but still extensive) subpoena. The response to MCC's request for production of documents required the Applicant to use the services of an outside information technology ("IT") consultant and devote staff time to performing "key word" searches of all of its electronic

MCCULLOUGH HILL LEARY, PS
701 Fifth Avenue, Suite 6600
Seattle, WA 98104
206.812.3388
206.812.3389 fax

correspondence and other electronic records dating to 2017. The Applicant's architects also had to devote substantial time to these searches. These efforts produced thousands of documents which then had to be reviewed individually by the Applicant's attorneys. In addition to the time spent by the Applicant's IT consultant, staff and architects, the response effort required over 50 hours of review time by attorneys and paralegals. Ultimately, due to MCC's focus on the "use" of the Project and various private covenants in its document requests, the search produced few relevant documents, but the effort was considerable.

MCC now seeks yet more discovery on matters far outside the scope of the appeal.

Throughout this appeal, MCC has approached this matter as if it were civil litigation, frequently referencing the civil rules and seeking the same extensive discovery as one might expect in such a case. But this is an Examiner appeal and is governed by different rules. Discovery is more limited in an Examiner case and parties are not entitled to use discovery as a weapon to increase cost and delay. HER 3.11, 3.12(b). There is a reason that civil cases take over a year and hundreds of thousands of dollars to resolve while Examiner cases are typically resolved in three to four months at far less cost: Examiner cases often proceed with no discovery at all, and where discovery is allowed, it is limited to what is reasonable and relevant. HER 3.12(b). The Examiner should not allow MCC to transform the Examiner process into a civil litigation matter, with the potential for abuse of the discovery process that plagues civil cases.

Instead, the Applicant requests that the Examiner put an end to MCC's use of the discovery process to cause delay and to drive up the Applicant's appeal costs. The Examiner should deny MCC's request for depositions.

MCCULLOUGH HILL LEARY, PS
701 Fifth Avenue, Suite 6600
Seattle, WA 98104
206.812.3388
206.812.3389 fax

II. ARGUMENT

A. Legal Standards

In an appeal before the Examiner: "Appropriate prehearing discovery, including written interrogatories, and deposition upon oral and written examination, is permitted." HER 3.11. "In response to a motion, or on the Hearing Examiner's own initiative, the Examiner may compel discovery, or may prohibit or limit discovery where the Examiner determines it to be unduly burdensome, harassing, or unnecessary under the circumstances of the appeal." *Id.*

"A motion for a subpoena for a person shall include the person's name and address, **show the relevance** of that person's testimony, and **demonstrate the reasonableness** of the scope of the subpoena sought." HER 3.12(b) (emphasis added).

B. MCC's fears of future permit and code violations are not at issue in this appeal.

The Motion fails to "show the relevance" of the testimony requested, as required by HER 3.12(b), and must be denied for that reason alone. In addition, because the testimony is legally irrelevant, the depositions are not "[a]ppropriate" and are "unnecessary under the circumstances of the appeal" as provided by HER 3.11. This provides an equally sufficient reason for denial of the Motion. In the motion, MCC asserts it has "fears of a non-residential use" and that the Applicant must demonstrate its "intended" use of the Project's buildings. Motion, pp 3-4. MCC seeks discovery regarding the Applicant's "intended" use of the Project. But this issue is not relevant to this appeal.

MCC relies on two code sections to support its argument that the "intended" use is relevant and it should be allowed discovery about the Applicant's intentions. First, MCC cites SMC 25.09.260.B.3.b, which provides (with emphasis supplied): "Single-family *dwelling units*

MCCULLOUGH HILL LEARY, PS
701 Fifth Avenue, Suite 6600
Seattle, WA 98104
206.812.3388
206.812.3389 fax

shall be the sole type of principal use *permitted* through the environmentally critical areas conditional use regulations . . . ." *See* Motion, p. 1. MCC asserts that the Applicant must demonstrate its "intended use" of the homes to meet this standard. Motion, pp. 3-4. Second, MCC cites SMC 23.42.042.C, which provides that the Director may deny a conditional use if "the proposed use is materially detrimental to public welfare or injurious to property in the zone or vicinity in which the property is located." *See* Motion at 4. MCC then states the Applicant's supposed "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." Motion, p. 4. MCC asserts it is entitled to discovery about the Applicant's intent for the use of the Project based on these sections. These City Code sections do not support MCC's argument, which fails for multiple reasons.

First, this claim was not raised in MCC's appeal. In its motion for subpoenas, MCC claims for the first time that the Applicant must establish that its use will be a single-family use to gain conditional use permit ("CUP") approval under SMC 25.09.260.B.3b and SMC 23.42.042.C. Motion, pp. 1, 4. Yet this claim appears nowhere in MCC's notice of appeal. *See* Appeal of Analysis, Recommendation and Decision of the Director MUP No. 3028072-LU ("MCC Appeal"). Instead, MCC's appeal alleged the "intended" use of the Project is commercial rather than residential only in the context of its State Environmental Policy Act ("SEPA") issue. MCC Appeal, pp. 3-4. This claim was raised nowhere else in the notice of appeal. In the Order on Applicant's Motion to Dismiss ("Dismissal Order"), the Examiner dismissed MCC's SEPA issue, necessarily also dismissing the intended use claim embedded in that issue. Dismissal Order, p. 2. MCC was required to raise all of its appeal issues in its notice

MCCULLOUGH HILL LEARY, PS
701 Fifth Avenue, Suite 6600
Seattle, WA 98104
206.812.3388
206.812.3389 fax

of appeal. HER 3.01(d). MCC cannot raise new issues based on SMC 25.09.260.B.3b and SMC 23.42.042.C for the first time now, more than three months after its appeal was filed.

Second, neither of the code sections MCC cites refer to "intended" use. Instead, SMC 25.09.260.B.3.b refers to the "permitted" use and SMC 23.42.042.C refers to "proposed" use. Here, single-family use is the only use proposed by the Applicant and approved by the Department of Construction and Inspections ("Department") in the conditional use permit ("CUP"). It is axiomatic that the Examiner is reviewing the decision actually made by the Department, which approved a single-family use – not a decision to approve a different use, which the Department did not make. *See* SMC 23.76.022.A.2 (Type II decisions subject to appeal); SMC 23.76.022.C.6 (scope of review includes compliance with Type II procedures and compliance with substantive criteria). As the Examiner stated in the Order Quashing Subpoenas, "[h]ome design and use are relevant to the extent the **approved design and use** will impair stair usage of views." Order Quashing Subpoenas, p. 2 (emphasis added). "Because it is the Department's, rather than the Applicant's decisions which are at issue, this narrows the issue. Deciding whether there was error requires understanding **what was approved** . . ." *Id*. (Emphasis added). The Examiner could not have been clearer. Only the **approved design** and **approved use** are at issue here. MCC appears to read this language as authorizing discovery on the "approved design" and "a use that was not approved." This twisted reading is illogical and legally erroneous. The code sections MCC relies on do not provide any authority for the Examiner to consider a use that was not proposed or approved.

Third, the intent of the owners is not relevant to the determination of whether there is a single-family use under the Land Use Code. Instead, a "single-family dwelling unit" is a type of

MCCULLOUGH HILL LEARY, PS
701 Fifth Avenue, Suite 6600
Seattle, WA 98104
206.812.3388
206.812.3389 fax

"residential use" that is defined as "a detached principal structure having a permanent foundation, containing one dwelling unit . . ." SMC 23.84A.032 – "R." A "dwelling unit" is a separate area in a building having a food preparation area, bathroom, and sleeping rooms. SMC 23.84A.046.A. [2] In short, the existence of a single-family use is determined under the Land Use Code by reference to its physical characteristics rather than by an applicant's subjective intent. MCC does not claim the homes do not have the physical characteristics that define them as single-family residences. Further, as the Examiner knows, land use approvals run with the land and are not personal to the property owner. Thus, the subjective intent of one property owner is irrelevant to the land use approval process. MCC's desired inquiry into the intent of the Applicant is entirely irrelevant.

Finally, the issue MCC raises is actually a code enforcement claim over which the Examiner lacks jurisdiction. MCC is alleging that the Applicant will, at some future date, cease to comply with its permit, which authorizes only the residential uses described by the Applicant in its application and approved by the Department. *See* SMC 23.40.002, SMC 23.90.002. But these allegations do not relate to the MUP application and approval process. *See* SMC 23.76.022.C.6. Instead, the City enforces permit conditions and other Code requirements through the suspension and revocation procedures of SMC 23.76.034 and the enforcement procedures of SMC Chapter 23.90. MCC's claim is really an assertion that the City will fail to enforce the permit conditions limiting the Applicant to residential use of the Property. This claim of hypothetical future code violation is outside the scope of the Examiner's jurisdiction as

[2] MCC states one of its "fears" is that the Project will be used for short-term rental. SMC 23.42.060.A provides that "[s]hort-term rental uses are permitted in any structure established as a dwelling unit," subject to certain limitations. The potential for short-term rental use does not mean the Project is no longer a dwelling unit. "Event use," which seems to be MCC's true fear, is not allowed in single-family zones, in which the Project is located. SMC 23.44.006.

MCCULLOUGH HILL LEARY, PS
701 Fifth Avenue, Suite 6600
Seattle, WA 98104
206.812.3388
206.812.3389 fax

provided by SMC 23.76.022.C.6.

In sum, the subjective intent of the Applicant regarding the use of the Project is not relevant to this appeal. As the Examiner has made clear, in this appeal the Examiner is reviewing only "what was approved" by the Department. Order Quashing Subpoenas, p. 2. MCC ignores the Examiner's ruling, arguing throughout the Motion that an unapproved intent is relevant. This disregards not only the Examiner's prior ruling but the express language of the two City Code provisions on which MCC relies, neither of which provides a basis for its claims, as well as other provisions of the City Code. MCC fails to show the relevance of the testimony it seeks, as required by HER 3.12(b). The Motion must be denied. Because the requested testimony is irrelevant, it is unnecessary under the circumstances of appeal and should also be denied pursuant to HER 3.11.

C. Unnecessary and Unduly Burdensome

The Motion must also be denied because it fails to "demonstrate the reasonableness of the scope" of the requested subpoena, as required by HER 3.12(b). MCC does not attempt to show that any actual purpose relevant to the appeal would be served by requiring depositions at this stage. Instead, the arguments in the motion demonstrate that such a requirement would be "unduly burdensome" and "harassing." *See* HER 3.11.

As the Applicant demonstrated at pages 2-8 of its Opposition to MCC's Motion for Continuance ("Continuance Opposition"), the requests in the Motion are only the latest in a series of irrelevant and overly burdensome requests asserted by MCC throughout this appeal. This chronology disproves any suggestion by MCC that subpoenas are necessary for any reason other than MCC's repeated attempts to pursue its rejected "potential commercial use" theory.

MCCULLOUGH HILL LEARY, PS
701 Fifth Avenue, Suite 6600
Seattle, WA 98104
206.812.3388
206.812.3389 fax

Notably, once MCC amended its requests for document production so that they were reasonably related to the appeal issues, the Applicant agreed to provide (and has provided) responsive documents, at great effort and expense. But despite repeated requests by the Applicant for MCC to confine its deposition requests to relevant issues, MCC has refused to do so – a refusal that is continued in the Motion with MCC's insistence that it is "entitled to discovery on the vital issue in this appeal of Oceanstar's intended use of the Project Buildings." Motion at 6. MCC's protestation that an "expedited" schedule is necessary is unavailing because any delay has resulted solely from its own intransigence.

Under these circumstances, it would not be "appropriate" for the Examiner to compel the deposition of Applicant's witness prior to hearing. *See* HER 3.11. Instead, all indications are that the depositions MCC seeks would be "unduly burdensome" at best and "harassing" at worst. *See id*. Despite the Examiner's repeated explanations of the legally relevant questions in this appeal, MCC has continually failed to explain why a deposition is necessary to explore these questions, which are "not factually or legally complex," Order Denying Continuance at 2, and which MCC may put before the same witnesses at hearing in just a few weeks. As the Applicant pointed out in its Continuance Opposition, MCC has not argued that any evidence or factual questions can be resolved only through a deposition or that depositions will facilitate a more efficient hearing. *See* Continuance Opposition at 9-11. MCC nonetheless repeats its failure to reference any factual issue other than its irrelevant and dismissed "commercial use" allegations. This demonstrates that there is no actual need for the depositions MCC requests, which will not relate to an appeal issue. As such, allowing MCC to conduct these depositions would serve no purpose other than to harass the Applicant and its witnesses.

MCCULLOUGH HILL LEARY, PS
701 Fifth Avenue, Suite 6600
Seattle, WA 98104
206.812.3388
206.812.3389 fax

The harassing effect of requiring depositions of Applicant's witnesses would only be compounded in light of the time – and resulting costs – that Applicant has been required to devote to discovery in this case so far, including the preparation and filing of a successful motion to quash MCC's subpoenas and a successful opposition to MCC's request to delay the hearing by two months. Again, once MCC narrowed its document requests, the Applicant agreed – while reserving its argument that the discovery was unnecessary, and despite considerable time and expense – to assemble and provide responsive evidence.

In light of MCC's repeated refusal to explain why depositions are necessary for any relevant issue, however, it must be assumed that MCC intends to use the depositions for only purposes stated in the Motion: to harass the witnesses by questioning them about irrelevant matters and to harass the Applicant by requiring it to expend resources on redundant and unnecessary depositions. Its request should be denied.

D. Any Depositions Must Be Narrowly Tailored

For the reasons stated above, the Motion must be denied because it fails to comply with HER 3.12(b). Moreover, in light of MCC's repeated failure to limit its deposition requests to relevant issues or to show that any purpose would be served by taking deposition testimony, the Examiner should not permit MCC to amend its requests or require the Applicant to devote any additional time to discovery in this matter.

In the alternative, even if the Examiner were to permit MCC to amend its subpoena requests (which the Examiner should not do), the scope of any depositions should be strictly limited to the issues remaining in this appeal. As explained in the Applicant's opposition to MCC's first request for subpoenas, these issues are strictly limited to whether additional

MCCULLOUGH HILL LEARY, PS
701 Fifth Avenue, Suite 6600
Seattle, WA 98104
206.812.3388
206.812.3389 fax

conditions should be imposed to mitigate impacts (1) to the view from Ursula Judkins Viewpoint; (2) relating to the use of the exterior Project stairs; (3) relating to a Memorandum of Understanding regarding the potential replacement of the Magnolia Bridge; and (4) to the Admiral's House landmark. Applicant's Response to Ex Parte Motion for Issuance of Subpoenas Duces Tecum, p. 3. If permitted to question Applicant witnesses, MCC must be prevented from taking advantage of the Examiner's absence to raise irrelevant and harassing questions concerning its "fears" of an unpermitted commercial use and from delving into unrelated matters regarding the Applicant's internal affairs. Any order allowing MCC to conduct depositions should expressly prohibit MCC from raising these issues and should permit the Applicant's witnesses to refuse to answer any questions that are outside the scope of the appeal.

Any such order should also limit depositions to the Applicant's expert witnesses, its architects Mr. Drivdahl and/or Mr. Brown. The other two individuals who MCC seeks to depose, Mr. Desautel and Mr. Kuhr, are the principals of the Applicant and the individuals who will occupy the houses at issue in this appeal. MCC seeks to take their depositions to inquire as to the details of their and their families' intended personal use of the homes, a matter that is irrelevant here and would only serve to harass these individuals. They are the owners of a successful commercial fishing business; they are not developers or architects. They rely on their architects and other experts in all matters relevant to this appeal.

In addition, if MCC is permitted to depose Project architects Mr. Drivdahl and Mr. Brown, MCC should be required to pay for those witnesses' time. The Applicant has already been required to pay the costs for Mr. Drivdahl's and Mr. Brown's time in assembling and providing documents responsive to MCC's prior subpoenas, and it will be required to

MCCULLOUGH HILL LEARY, PS
701 Fifth Avenue, Suite 6600
Seattle, WA 98104
206.812.3388
206.812.3389 fax

compensate them further for their testimony at hearing. MCC attempts to characterize these witnesses as "fact witnesses," even asserting they are not identified as experts on the Applicant's witness list. Motion, p. 6. This is incorrect. They are the Project architects. They are involved in this matter solely due to their expertise. They are not lay or "fact" witnesses. The Applicant's witness list clearly states both Mr. Drivdahl and Mr. Brown's qualifications and their resumes are included in the Applicant's exhibits, demonstrating that they are being called as experts. Applicant's Witness and Exhibit List, pp. 1-3. Both witnesses will testify regarding Project design and respond to claims by the appellants in this matter. *Id*., pp. 1-2. HER 3.12(a) provides that "expert witnesses often require reimbursement for their time and/or travel expenses." As with MCC's other arguments, the cases it cites from the civil litigation context are inapplicable to Hearing Examiner proceedings. The Examiner has previously recognized that when a witness testifies about the professional expertise they utilized during the design and/or review process for a project under appeal, that witness is testifying "as an expert." *E.g. Appeal of Kasraie*, HE File No. MUP-20-028, Decision at 5 (Mar. 11, 2021) (City staff member testified as expert regarding how he applied Code classification to project under review); *Appeal of Ruden*, HE File No. MUP-20-026, Decision at 3 (Feb. 9, 2021) (contractor who developed construction plans testified about project impacts "as an expert for managing project construction"). It is not appropriate to require the Applicant to expend further resources in light of MCC's continued refusal to cite any factual question other than its commercial-use allegations and continued failure to explain why the depositions it seeks would be relevant. MCC should not be permitted to harass the Applicant by requiring it to pay its architects (as well as its counsel) for continued participation in unnecessary and burdensome discovery efforts.

MCCULLOUGH HILL LEARY, PS
701 Fifth Avenue, Suite 6600
Seattle, WA 98104
206.812.3388
206.812.3389 fax

III. CONCLUSION

The Applicant respectfully requests that the Hearing Examiner deny the Motion and proceed with the hearing in this matter as scheduled. In the alternative, the Applicant respectfully requests that the Hearing Examiner: (1) require MCC to narrow its deposition requests to depositions of Mr. Drivdahl and/or Mr. Brown on issues relevant to this appeal, (2) require MCC to pay Mr. Drivdahl and Mr. Brown for their time in connection with the depositions, and (3) prohibit MCC from asking questions related to its allegations of an unpermitted commercial use in the Project during any depositions that take place.

DATED this 18th day of August 2021.

s/Courtney A. Kaylor, WSBA #27519
s/David Carpman, WSBA #54753
Attorneys for Oceanstar LLC, Applicant
McCULLOUGH HILL LEARY, PS
701 Fifth Avenue, Suite 6600
Seattle, WA 98104
Tel: 206-812-3388
Fax: 206-812-3398
Email: courtney@mhseattle.com
Email: dcarpman@mhseattle.com