

BEFORE THE HEARING EXAMINER
CITY OF SEATTLE

In the Matter of the Appeal of
MAGNOLIA COMMUNITY COUNCIL AND
OTHERS
from a decision issued by the Director, Seattle
Department of Construction and Inspections

Hearing Examiner File:
MUP-21-016 (CU)

Department Reference:
3028072-LU

APPLICANT'S OBJECTIONS TO
WITNESS/EXHIBIT LISTS AND MOTION
TO EXCLUDE

I. INTRODUCTION

Respondent Oceanstar, LLC ("Applicant") objects to witnesses and exhibits included in the Supplemental Witness and Exhibit List filed by Appellant Magnolia Community Council ("MCC"). The Hearing Examiner ("Examiner") should not permit MCC to call these witnesses or to introduce these exhibits because they address subjects not at issue in this hearing and because they are untimely. Although the Hearing Examiner Rules of Practice and Procedure do not require a party to make evidentiary objections prior to hearing, the Applicant makes these objections in the hope of streamlining the hearing by raising these objections and allowing them to be resolved in advance.

1 Most egregiously, MCC's supplemental witness list states it plans to call a new witness,
2 Michael Nanney, to testify about maintenance of the Applicant's property by the prior property
3 owner before the Applicant acquired it in 2013, the prior property owner's negotiation of a view
4 and landscape maintenance covenant, and the sale of the property to the Applicant. These
5 matters are far outside the scope of this hearing. The only thing this hearing is about is whether
6 the Seattle Department of Construction and Inspections ("SDCI") appropriately conditioned the
7 Environmentally Critical Areas Conditional Use Permit ("CUP") – which was required only
8 because of the presence of steep slopes on the property – to address impacts of the two proposed
9 single-family homes ("Project"). Maintenance actions by a prior owner years before the CUP
10 was issued are not relevant. The Examiner has already held she lacks jurisdiction over the view
11 covenant. And, certainly, real estate negotiations between private parties are well outside the
12 subject matter of this hearing. To the extent that MCC argues this testimony is relevant to the
13 issue of view impacts, this witness should have been disclosed on MCC's original exhibit list due
14 on July 15, 2021. The Examiner should exclude this witness's testimony.

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18 In addition, the Applicant objects to other MCC testimony and exhibits that are irrelevant
19 or were not timely identified. These include the testimony of Elizabeth Campbell and MCC
20 Exhibits 31-33, identified for the first time on MCC's supplemental witness and exhibit list. In
21 addition, they include the testimony of Shary Flenniken and MCC Exhibits 22-29, identified on
22 MCC's rebuttal witness and exhibit list.

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24 The Examiner should exclude these witnesses and exhibits.

25 II. FACTS

26 As agreed during the May 18, 2021, prehearing conference and as provided in the May
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1 19, 2021, Prehearing Order in this case (“Prehearing Order”), MCC was required to file its
2 witness and exhibit list (“MCC W/E List”) by July 15, 2021. The Prehearing Order also required
3 MCC to file its rebuttal witness and exhibit list (“MCC Rebuttal W/E List”) by July 29, 2021.
4 MCC filed both the MCC W/E List (which lists 14 witnesses and 21 exhibits) and the MCC
5 Rebuttal W/E List (which lists one witness and eight exhibits).
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7 On June 28, 2021, the Examiner issued an Order on Applicant’s Motion to Dismiss
8 (“Dismissal Order”). The Dismissal Order states that the Examiner lacks jurisdiction over the
9 view and landscape maintenance covenant, an easement relating to the landmarked portion of the
10 property, and memorandum of understanding regarding the impacts of the replacement of the
11 Magnolia Bridge that are the subject of some of MCC’s claims but would consider those
12 documents solely for “context.” Dismissal Order at 2-3.
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14 On July 19, 2021, the Examiner issued an Order on Applicant’s Motion to Quash
15 (“Subpoena Order”) that denied MCC’s subpoena requests as overbroad and unduly burdensome.
16 The Subpoena Order confirmed that “the question before the Examiner is not whether the
17 Applicant could have or should have designed the project differently. The question is whether
18 the **Department** erred in how it conditioned the project.” Subpoena Order at 2 (emphasis in
19 original).
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21 On August 11, 2021, MCC filed a Motion for Issuance of Subpoenas and Request for
22 Expedited Briefing Schedule and Ruling (“Subpoena Motion”). The Subpoena Motion included
23 requests for the Examiner to order the depositions of two of the project architects and two
24 principals of a company related to the Applicant who are planning to reside in the Project along
25 with their families.
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1 On August 16, 2021, as agreed by the parties, Applicant provided MCC with copies of
2 documents responsive to MCC's subpoena requests.

3 On August 19, 2021, the Examiner held another prehearing conference ("Second
4 Prehearing Conference"). During the Second Prehearing Conference, the Examiner denied
5 MCC's deposition requests because they relate to a claim not brought in MCC's appeal and were
6 untimely. The Examiner also confirmed – as had been previously stated in the Examiner's ruling
7 on Applicant's Motion to Dismiss – that the Applicant's "intent" regarding the use of the Project
8 is not relevant to this hearing, which only concerns what the City permitted.
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10 During the Second Prehearing Conference, MCC indicated it may call an arborist to
11 testify to the height of trees to be planted in connection with the Project. The Examiner allowed
12 MCC to file a supplemental witness and exhibit list by August 23, 2021. She also allowed the
13 Applicant and City to file objections and/or supplemental witness and exhibit lists by August 30.
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15 On August 23, 2021, MCC filed a supplemental witness and exhibit list ("MCC
16 Supplemental W/E List") including three witnesses and four exhibits. One of the new witnesses
17 is an arborist. The other two witnesses are not arborists and, as described by the witness list, the
18 new witnesses will discuss topics unrelated to the height of trees and irrelevant to this appeal.
19 One of these is Mr. Nanney, who the list states will discuss the actions of a prior property owner,
20 a covenant over which the Examiner lacks jurisdictions, and private real estate negotiations.
21 These matters are not relevant. The other is Elizabeth Campbell, who will testify about
22 community activities relating to Ursula Judkins Viewpoint and a documentary about the
23 viewpoint she made in 2013. These matters do not relate to Project impacts. MCC also filed a
24 new exhibit list containing exhibits that all predate 2013, when Applicant acquired the Property,
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1 and are not relevant to the issues before the Examiner.

2 On August 25, 2021, MCC filed a second supplemental witness and exhibit list ("MCC
3 Second Supplemental W/E List") including one exhibit.

4 The Applicant now files these objections and motion to exclude.

6 **III. AUTHORITY**

7 **A. Evidence may be excluded when it is irrelevant, unreliable, or immaterial.**

8 The Hearing Examiner Rules of Practice and Procedure ("HER") provide: "The
9 Examiner may exclude evidence that is irrelevant, unreliable, immaterial, unduly repetitive, or
10 privileged." HER 2.17(a). HER 2.09(a) and (e) authorize the Examiner to set deadlines for
11 disclosure of witnesses and exhibits during the prehearing conference.

13 **B. The Examiner should exclude the testimony of Michael Nanney, who was identified 14 for the first time on MCC's supplemental witness list.**

15 The Examiner should exclude the testimony of Mr. Nanney because his testimony is not
16 relevant to any issue in this appeal. To the extent MCC claims his testimony relates to view
17 impacts, he could have been identified in MCC's initial witness and exhibit list, which was due
18 on July 15, 2021.

19 MCC's supplemental witness list states:

20 Michael Nanney is the former managing director of Pacific Northwest Communities, Inc
21 (PNC) and VP, Forest City Military Communities Northwest. Mr. Nanney may testify
22 about the management of the Admiral's House property for the US Navy and PNC,
23 including landscape maintenance, public view issues, the need for and negotiation of the
view corridor and landscape maintenance covenant, and the sale of the Admiral's House
property to Oceanstar.

24 The Applicant purchased the property on which the Project is located from Pacific
25 Northwest Communities ("PNC") in 2013. PNC acquired the property from the U.S. Navy. Mr.
26 Nanney's testimony relates to the management of the property by these former owners prior to
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1 2013 – eight years before the Project was approved. This testimony will include landscape
2 maintenance and public view issues during that time. This information is outdated and not
3 relevant to the impacts of the Project. Mr. Nanny’s testimony will also relate to the “need for
4 and negotiation of” the view and landscape maintenance covenant – but the Examiner has
5 already ruled she lacks jurisdiction over this covenant. MCC appears to be attempting to
6 introduce extrinsic evidence about the meaning of a covenant that is not even before the
7 Examiner. The Examiner should not allow this irrelevant testimony. Finally, Mr. Nanney will
8 testify about the sale of the Admiral’s House property to the Applicant. The details of this
9 private real estate transaction are not before the Examiner. Indeed, MCC seems to be attempting
10 to raise yet a new untimely issue. Nothing in MCC’s notice of appeal raises any claim regarding
11 the private real estate transaction between the Applicant and PNC. If it had, the Applicant would
12 have moved to dismiss. The Examiner should not allow MCC to provide testimony on this
13 irrelevant and untimely subject.

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15 To the extent that MCC claims that Mr. Nanney’s testimony relates to view impact of the
16 Project, the Examiner should still exclude this witness. MCC raised view issues in its appeal.
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18 MCC was required to disclose its witnesses by July 15, 2021 – more than a month ago. There is
19 no excuse for MCC’s untimely identification of this witness. The Examiner should not allow
20 this “sandbagging” to occur.

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22 The Examiner should exclude Mr. Nanney’s testimony in its entirety.

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24 **C. The Examiner should exclude the testimony of Elizabeth Campbell, who was
25 identified for the first time on MCC’s supplemental witness list.**

26 The Examiner should exclude the testimony of Ms. Campbell because it is not relevant
27 and she was not timely identified as a witness.

1 MCC's witness list states:

2 Elizabeth Campbell is a Magnolia resident, a friend and co-worker of Ursula
3 Judkins, and a long-time community volunteer in matters regarding Ursula Judkins
4 Viewpoint. Ms. Campbell may testify about her work with Ursula Judkins, the
5 community involvement with Ursula Judkins Viewpoint, including its naming, her
6 preparation of an Ursula Judkins documentary, the formation and work of the Friends of
7 Ursula Judkins Viewpoint, and the community efforts to improve and protect Ursula
8 Judkins Viewpoint.

9 With respect to Ms. Campbell's community work, this testimony is not relevant. The
10 sole matter before the Examiner is whether SDCI should have imposed additional conditions on
11 the CUP, not what community activities may have occurred in the past relating to the park.
12 Much of Ms. Campbell's testimony appears to relate to matters that occurred well before the
13 Project application, including her work with Ursula Judkins, who passed away more than 20
14 years ago,¹ and preparation of a 2013 documentary. MCC may claim this testimony is relevant
15 to its claim about view impacts, but if so, MCC should have named Ms. Campbell in its original
16 witness list, due June 15, 2021.

17 The Examiner should exclude this testimony.

18 **D. The Examiner should exclude MCC Exhibits 31-33, identified for the first time on
19 MCC's supplemental exhibit list.**

20 The Examiner should exclude MCC Exhibits 30-33, which were identified for the first
21 time on MCC's supplemental exhibit list. These exhibits are either irrelevant, untimely, or
22 both.²

23 MCC Exhibit 30 is a Landmarks Board report regarding the Admiral's House. This
24 exhibit should have been disclosed on MCC's original witness list.

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26 ¹ <https://archive.seattletimes.com/archive/?date=20001209&slug=TTJU2IM3U>

27 ² The Applicant does not object to MCC Exhibit 34, although it was added even after the deadline for supplemental
28 exhibits, because it was a document produced through discovery.

1 MCC Exhibit 31 is an email exchange from 2011 between Mr. Nanney and Gene
2 Mullins. This exhibit discusses Mr. Nanney's understanding of the view covenant. The
3 Examiner should exclude this document since, first, the Examiner lacks jurisdiction over the
4 interpretation of the covenant and, second, the covenant speaks for itself. To the extent MCC
5 claims this document relates to its view impact claim, MCC should have disclosed it by July 15,
6 2021, when its original witness and exhibit list was due.
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8 MCC Exhibit 32 is a 2008 email exchange concerning the Seattle Parks Department's
9 maintenance of the Ursula Judkins Viewpoint. The Parks Department's discussions of its
10 maintenance authority within the Ursula Judkins Viewpoint is not relevant to the issue in this
11 appeal: the impacts of the Project under review. To the extent MCC claims this document relates
12 to its view impact claim, MCC should have disclosed it by July 15, 2021, when its original
13 witness and exhibit list was due.
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15 MCC Exhibit 33 is an approximately 25-minute documentary discussing the work of
16 Ursula Judkins. It contains stray references to the Admiral's House and nearby view but no
17 mention of material relevant to this appeal. MCC's understanding of Ms. Judkins' actions and
18 preferences is not relevant to whether this Project, as permitted by the City, will have impacts on
19 the park as it exists today. This exhibit should be excluded as irrelevant. In addition, as with
20 each of Exhibits 30-32, this Exhibit was available to MCC in time for its initial disclosure
21 deadline in July, and MCC should not be permitted to documents now that the deadline has
22 passed.
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25 **E. The Examiner should exclude other MCC testimony and exhibits that are irrelevant**
26 **or were not timely identified.**

27 The Examiner should exclude other MCC testimony and exhibits that are irrelevant,
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1 based on the subject matter of this appeal and the Examiner's rulings on the various motions, or
2 were not timely identified. These include the following:

3 MCC Exhibits 22-29 were included in the MCC Rebuttal W/E List, but all of these
4 exhibits are documents that were either created by MCC or publicly available prior to MCC's
5 deadline for initial disclosure. None of the exhibits are identified as rebutting or responding to
6 any issue that was raised by the Applicant's or City's witness and exhibit list.

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8 Exhibits 22-26 also contain information that significantly predates the project (*see e.g.*,
9 Exhibit 24, a 2005 video) and is not relevant to the matter before the Examiner.

10 In addition, MCC Exhibits 27, 28, and 29, are irrelevant to this matter. These exhibits are
11 conceptual drawings, a land use presubmittal conference application, and height calculations for
12 a four-home proposal on the property that was never pursued. That proposal is not under review
13 in this appeal, and these exhibits should be excluded as irrelevant.

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15 The testimony of Shary Flenniken should also be disallowed. Although listed on the
16 MCC Rebuttal W/E List, Ms. Flenniken is not identified as rebutting or responding to any issue
17 that was raised by the Applicant's or City's witness and exhibit list and is simply a late-disclosed
18 witness whose testimony should not be permitted.

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20 These witnesses and exhibits are not provided in rebuttal or in response to discovery
21 materials; they are simply late disclosures that should not be permitted. In addition, many of
22 them are irrelevant. The Examiner should exclude these witnesses and exhibits.

23 **F. Reservation of rights**

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25 The Applicant reserves its right to raise additional objections at hearing. The Applicant
26 also reserves its right to call witnesses and introduce exhibits in rebuttal.

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IV. CONCLUSION

The Applicant requests the Hearing Examiner to enter an order excluding the witnesses and exhibits listed above.

DATED this 30th day of August, 2021.

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s/David P. Carpman, WSBA #54753
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