

**BEFORE THE HEARING EXAMINER
CITY OF SEATTLE**

In the Matter of the Appeal of

Hearing Examiner File:
MUP-21-016 (ECA CUP)

**MAGNOLIA COMMUNITY COUNCIL
AND OTHERS,**

Department Reference:
3028072-LU

from a decision issued by the Director,
Seattle Department of Construction
and Inspections.

**2nd PREHEARING ORDER AND
ORDER ON APPELLANT
MCC'S MOTION FOR
SUBPOENAS**

1. Motion. Magnolia Community Council and Others requested deposition subpoenas, which Applicant Oceanstar, LLC opposed. The Seattle Department of Construction and Inspections took no position. After reviewing the motion and response, the Examiner held a pre-hearing conference on August 19 to allow oral argument and address hearing dates. At the hearing, the Examiner denied the motion.

2. Background. MCC appealed the Department decision on May 6. The case was consolidated with the Friends of the Last 6,000 appeal challenging the same decision. A pre-hearing conference was held May 18. With party consensus, five days were reserved for hearing (August 19, 23, and 25, and September 7 and 8).¹ Friends' appeal has since settled and was dismissed August 24.

3. Hearing Dates. MCC requested a two-month continuance on July 28. In response, the Examiner struck the August 19th hearing day and allocated August 23 and 25 to the Friends' appeal. At the pre-hearing conference, it became apparent that one or both August hearing days would not be needed for the Friends' appeal so were available for the MCC appeal. MCC did not wish to use these days and preferred that the hearing not proceed in September. MCC stated two witnesses had availability issues due to religious holidays. All parties had agreed to the August and September hearing dates. MCC identified this new concern only after its two-month extension was denied (a nearly three-week continuance was granted instead). Nevertheless, a third hearing day (September 21) was provided to address the concern and ensure enough hearing days for the MCC appeal.²

4. Subpoena Request. The parties appeared to have resolved all outstanding discovery issues. Agreed upon language and deadlines were submitted to the Examiner for document subpoenas, which the Examiner issued. However, after receiving the Order on

¹ PreHearing Order (May 19, 2021).

² Oceanstar's counsel may require some accommodation on September 21 due to another litigation matter, which the Examiner granted in advance. This was not the applicant's preferred date, but was agreed upon to resolve the matter.

Appellant MCC's Motion to Continue Hearing, which granted only a partial continuance, MCC filed its motion for deposition subpoenas. Arguing it was based on a newly raised issue and sought irrelevant information, Oceanstar opposed the motion.

The Examiner has jurisdiction only over issues timely raised in an appeal. As addressed in the Order on Applicant's Motion to Dismiss (June 28, 2021), appeals must identify specific objections, and untimely issues are not considered.³ The Hearing Examiner Rules allow for dismissal if an appeal "fails to state an issue for which the Hearing Examiner has jurisdiction to grant relief or is without merit on its face...."⁴ By Code and Rule, the Examiner cannot entertain issues an appeal does not timely raise. If the Examiner lacks jurisdiction over an issue, she lacks authority to order discovery on it.

Consistent with the Examiner's jurisdictional limitations, a party seeking a deposition subpoena must "show the relevance of that person's testimony, and demonstrate the reasonableness of the scope of the subpoena sought."⁵ If this showing is not made, the Examiner may limit discovery. "[T]he Examiner may ... prohibit or limit discovery where the Examiner determines it to be unduly burdensome, harassing, or unnecessary under the circumstances of the appeal."⁶

MCC seeks to depose four individuals. Two (Mr. Desautel and Mr. Kuhr) are the founders and President and Vice President of a commercial fishing company which owns the project site and has its offices there. Mr. Drivdahl and Mr. Brown are architects with Gelotte Hommas Drivdahl and will testify as expert witnesses. Oceanstar had agreed to making its witnesses available for deposition on relevant questions.⁷ MCC declined, desiring more expansive discovery.

MCC seeks information on how the applicant intends to use the two residences. It bases its deposition request on SMC 25.09.260(B)(3)(b) which provides, "[s]ingle-family dwelling units shall be the sole type of principal use permitted through the environmentally critical areas conditional use regulations." It asserts the Applicant must demonstrate its intended use of the homes to meet this standard. MCC also cites to SMC 23.42.042(C), stating the residences' potential commercial use will be detrimental to the public welfare and injures a public viewpoint. The MCC appeal did not raise these issues.⁸ Because MCC sought deposition testimony on evidence unrelated to issues within Examiner jurisdiction, the subpoena motion was denied at the hearing.⁹ The ruling does not preclude deposition

³ SMC 23.76.022(C)(3)(a) ("specific objections ... shall be stated in the written appeal"); HER 3.01(d)(3) (appeal must include "specific objections"); *Moehring*, HE #MUP-18-001, Order on Motion to Dismiss (March 15, 2018), p. 3.

⁴ HER 3.02(a); HER 2.16 (allowing for dismissal and other dispositive motions).

⁵ HER 3.12(b).

⁶ HER 3.11.

⁷ Kaylor Declaration filed to support Oceanstar's opposition to continuance (August 4, 2021), Exhibit G.

⁸ The Code provides for Examiner review of the Department's decision. The approval runs with the land, not the property owner. If any owner operates the use inconsistent with the approval or code, this becomes an enforcement issue.

⁹ As the motion was denied, there was no need to rule on the dispute over payment of expert witness fees.

subpoenas tailored to seek relevant information. But discovery may not be used to further delay the proceedings as occurred with the document subpoenas. The deposition motion was filed more than 90 days after appeal filing, which coincides with when the appeal would have been heard had the August 19, 23, and 25 hearing days not been stricken.

5. Hearing Testimony. Testimony is limited to that relevant to the issues the Examiner has jurisdiction over, and repetitive testimony precluded. As the prehearing order addresses, excepting impeachment, only listed witnesses and exhibits may be offered.¹⁰

6. Other Deadlines. At the last pre-hearing conference, MCC noted that as the Friends of the Last 6,000 appeal may settle, and it had reserved the right to rely on the witnesses of other parties, it may wish to call the arborist Friends had listed and alluded to possibly identifying other witnesses. Oceanstar objected as deadlines were set and there are no new issues. At the conference, it was not clear if MCC would in fact identify new witnesses, so the Examiner did not rule on the objection, but reserved the parties' right to object. The parties agreed if MCC identified any new witnesses or exhibits it would list same by August 25, with any Oceanstar and Department rebuttal witnesses and exhibits listed by August 30.

ORDER

MCC's motion for subpoenas is **DENIED**. As previously ordered, this appeal will proceed on **September 7 and 8**, with a third hearing day of **September 21** reserved. Each day will commence at 9:00 AM. Supplemental rebuttal witness and exhibit deadlines are August 25 for MCC and August 30 for Oceanstar and the Department, with the parties' right of objection reserved.

Entered August 30, 2021.

/s/Susan Drummond
Susan Drummond, Deputy Hearing Examiner

¹⁰ PreHearing Order (May 19, 2021), p. 2. *See also* Order on Applicant's Motion to Quash (July 19, 2021), footnote seven ("The Examiner does have a question on conditional use permit mitigation scope when the permit is used to address critical areas, as opposed to the more traditional conditional use which addresses use permissibility. The mitigation assessment may change when a use is permitted outright rather than conditionally. The order does not address this question.").

**BEFORE THE HEARING EXAMINER
CITY OF SEATTLE**

CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on this date I sent true and correct copies of the attached **2nd Prehearing Order and Oder on Appellant MCC'S Motion for Subpoenas** to each person listed below, or on the attached mailing list, in the matter of **MAGNOLIA COMMUNITY COUNCIL AND OTHERS.**
Hearing Examiner File: **MUP-21-016 (ECA CUP)** in the manner indicated.

| Party | Method of Service |
|--|---|
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Dated: August 30, 2021

/s/ Angela Oberhansly
Angela Oberhansly
Administrative Specialist