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BEFORE THE HEARING EXAMINER
FOR THE CITY OF SEATTLE

In the Matter of the Appeal of
**NEIGHBORS ENCOURAGING
RESPONSIBLE DEVELOPMENT**
From a decision by the Director, Department of
Planning and Development, regarding a Master
Use Permit

Hearing Examiner file:
MUP-14-006

Department Reference:
3013303

MOTION FOR PROTECTIVE ORDER

Motion for Protective Order

The Appellant moves, pursuant to HER 3.11, for a protective order. The Applicant has asked for discovery that is unduly burdensome, harassing and unnecessary under the circumstances of the appeal.

The Applicant has already provided Appellant with copies of each and every architectural drawing that was submitted to the City and reviewed in connection with the Master Use Permit decision on appeal. The Applicant provided the City both hard copy and pdf copy versions of the submissions. Similarly, the Appellant has received both hard copy and pdf copy versions of all submissions to the City.

The Appellant has now asked for these very same documents — in a third format: AutoCad. This is the digital version of the documents. The only purpose the Appellant has

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1 identified for this request is “to facilitate hearing preparation and hearing exhibits.” Eglick
2 9/12/14 Email, attached. However, hearing preparation may be completed with the existing two
3 formats of the documents. Hearing exhibits may also be prepared with the existing two formats
4 of the documents.

5
6 The Project Architect indicates that he would be severely prejudiced if required to
7 produce these documents in AutoCad form. Architects in general do not allow third parties to
8 use their copyrighted, digital files. They are, for example, subject to professional liability if
9 someone uses their digital files, alters them, builds something, and damage ensues. And since
10 this is their professional work product, it would be possible with the digital files to make exhibits
11 or other uses of the files without compensating the copyright owners. This is in fact what
12 Appellant wants to do with these files—use them to prepare exhibits without compensating the
13 architect.
14

15 The case cited by Appellant in support of its request, in fact supports this motion for a
16 protective order. *Id.* In *Lindberg v. Kitsap County*, 133 Wn.2d 729 (1997), the plaintiff sought
17 to obtain hard copies of the documents in the County’s files, for hearing preparation. The Court
18 held that since those documents had been relied on by the County for its decision, the appellant
19 was entitled to them as well.
20

21 Similarly here, Appellant has received copies of all the documents, in the same formats,
22 as were available to the City. There is no information on AutoCad that is not contained in the
23 hard copies of the documents.
24

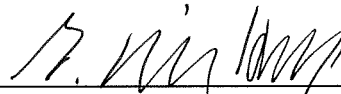
25 The Project Architect also confirms that the pdf documents that have been provided to
26 Appellant are all to scale, and can be used by Appellant to make exhibits.
27
28

1 In this light, it is appropriate for the Hearing Examiner to enter a protective order to limit
2 discovery as to the AutoCad digital files owned by the Project Architect. Production of those
3 files, in light of the fact that all of the information on them has already been provided to
4 Appellant in two other formats, is “unduly burdensome, harassing, or unnecessary under the
5 circumstances of the appeal.”
6

7 Dated this 22nd day of September, 2014.
8

9 Respectfully submitted,

10 McCULLOUGH HILL LEARY, P.S.
11

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13 _____
14 G. Richard Hill, WSBA 8806
15 Attorneys for Applicant
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Rich Hill

From: Peter Eglick <eglick@ekwlaw.com>
Sent: Thursday, September 18, 2014 4:08 PM
To: Rich Hill
Cc: Fred Schmidt; garry.papers@seattle.gov; Mills, William
Subject: RE: Follow up on Request for Production of Electronic Plans

Greetings Rich,

The 9/17 response is disappointing.

Its characterization of the request is not correct.

Lindberg v. Kitsap County was cited in response to the claim that copyright prevents production.

The 9/17 response states: "If you wish to pursue this matter further, let me know. I will prepare a motion for protective order."

This is to inform you that we do wish to pursue this matter further.

Cheers,

Peter

Peter J. Eglick

Eglick Kiker Whited PLLC
EKWLAW.COM
Phone: 206-441-1069
Address: Suite 3130, 1000 Second Avenue, Seattle, WA 98104

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From: Rich Hill [mailto:Rich@mhseattle.com]
Sent: Wednesday, September 17, 2014 1:56 PM
To: Peter Eglick
Cc: Fred Schmidt; Jim Thorpe; Radim Blazej; Scott Jeffries; garry.papers@seattle.gov; Mills, William
Subject: RE: Follow up on Request for Production of Electronic Plans

Hi Peter –

Thank you for your September 12 email memorandum.

You have asked the project architect to produce the AutoCad and/or Revit digital files used to prepare the DRB Packets.

I have explained in the emails below the several reasons why this is an unreasonable request.

You have stated that the reason for your request is "to facilitate hearing preparation and hearing exhibits." The project architect advises that he has produced hard copies, and pdfs, of all of the documents the City used in its review. These

documents are to scale. Any exhibits the appellants wish to make relating to the project, I am assured, can be made from the pdf versions that have been produced.

I have reviewed the case you cited, *Lindberg v. Kitsap County*. Interestingly, in that case the plaintiffs were seeking to have hard copies of the documents in the County's files, for purposes of hearing preparation. You already have a complete copy of the City's files for preparation of your case, including all of the project architect's submissions to the City.

Since you have all of the City's files, and hard copies and pdfs of the documents, you have from our perspective all that is necessary under the circumstances of the appeal. The digital files will provide no additional substantive information relating to DPD's project approval. Their release, as indicated below, prejudices the project architect.

In this light, from the applicant's perspective, the discovery request does not meet the criteria for production, under Hearing Examiner Rule 3.11.

If you wish to pursue this matter further, let me know. I will prepare a motion for protective order.

Rich

G. Richard Hill
Attorney at Law

McCullough Hill Leary, PS

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From: Peter Eglick [mailto:eglick@ekwlaw.com]
Sent: Friday, September 12, 2014 4:53 PM
To: Rich Hill
Cc: Fred Schmidt
Subject: Follow up on Request for Production of Electronic Plans
Importance: High

The request was made to facilitate hearing preparation and hearing exhibits. The idea that there is a copyright interest that precludes production of plans, electronically or otherwise, as part of and for use in a hearing examiner appeal is news to me. See *Lindberg v. Kitsap County*, 133 Wn2d 729 (1997). In any event, no commercial use is proposed or intended. To try to focus this and perhaps allay concerns, please start by producing the electronic files for A3.02 (West elevations), A4.02 (N-S Section), and A0.08 (Perspectives). We can revisit the issue if it turns out additional files are needed.

Peter J. Eglick

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From: Rich Hill [<mailto:Rich@mhseattle.com>]
Sent: Thursday, September 11, 2014 3:09 PM
To: Peter Eglick
Cc: radim@caronarchitecture.com; Scott Jeffries
Subject: RE: Follow-up to yesterday's request

Thanks Peter. I forwarded your request to Radim and Scott.

In speaking with them, I learned that architects virtually never allow third parties to use their digital files. For example, DPD is given only paper and pdf versions of plans.

The reasons for this, they tell me, is that they are subject to professional liability if someone uses their files, alters them, builds something, and damage ensues. Also, since this is their professional work product, it would be possible with the digital files to make exhibits or other uses of the files without compensating the copyright owners.

So, for these reasons, they would resist your client's request for the files, particularly since hard copies of all the documents have been provided. If there are any you don't have, let us know.

With that said, they understand that your client may wish to use the files for purely benign purposes. So, perhaps you could let us know what they need and we can try to work out a way to address it.

G. Richard Hill
Attorney at Law

McCullough Hill Leary, PS

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From: Peter Eglick [<mailto:eglick@ekwlaw.com>]
Sent: Thursday, September 11, 2014 11:42 AM
To: Rich Hill
Cc: Jane Kiker; Fred Schmidt
Subject: Follow-up to yesterday's request

Hi Rich,

Following up our conversation yesterday, we are requesting the digital files (Autocad and Revit: these are Greek to me, but what I have been advised to request) used to prepare the DRB packets for 3078 SW Avalon.

Please get back to me on this soon.

--Peter

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