

BEFORE THE CITY OF SEATTLE
OFFICE OF HEARING EXAMINER

NEIGHBORS ENCOURAGING REASONABLE
DEVELOPMENT,

Appellant,

v.

DIRECTOR, SEATTLE DEPARTMENT OF
PLANNING AND DEVELOPMENT, and

RADIM BLAZEJ,

Respondents.

Hearing Examiner File No. MUP-14-006

(DPD Application No. 3013303)

**APPELLANT'S RESPONSE TO
APPLICANT'S MOTIONS IN LIMINE,
TO SHORTEN TIME, AND FOR MORE
SPECIFIC LIST OF EXHIBITS**

I. Applicant's Motion in Limine Is Based on an Incorrect Premise and Impermissibly Vague

Applicant's Motion in Limine is based on this premise:

Many of the exhibits identified by Appellant in its lists appear to be designed to address issues associated with Type I Master Use Permit decisions, rather than the Type II decisions that are currently on appeal to the Hearing Examiner.

Motion at 2. However, not even one of the at least sixteen individual documents listed on the Appellant's current Exhibit List is called out by Applicant as falling within Applicant's concern. Nor are any the listed document aggregations identified as concerns. In the absence of such specifics, the Motion in Limine does not appear to be a serious effort, but rather an exercise to drive up the cost and burden on the Appellant in pursuing this appeal.

**APPELLANT'S RESPONSE TO APPLICANT'S MOTIONS IN
LIMINE, TO SHORTEN TIME, AND FOR MORE SPECIFIC LIST OF
EXHIBITS - 1**



1 Appellant's September 18, 2014 Initial Partial Response to Applicant's Motions in
2 Limine, to Shorten Time, and for More Specific List of Exhibits (copy attached and
3 incorporated here by reference) has addressed Applicant's Motion in Limine flawed premise
4 that issues which may have some relation to procedural shortcomings are automatically not
5 within the Examiner's appeal jurisdiction. Not all procedural issues are outside the
6 Examiner's jurisdiction. And the fact that testimony and evidence concerning matters within
7 the Examiner's jurisdiction may also happen to implicate Type I matters does not support
8 exclusion.
9

10 Applicant's casually framed motion has nonetheless created a heavy prehearing
11 litigation cost for Appellant in what is supposed to be a citizen friendly process. The Motion
12 in Limine is so generic that its grant would not resolve anything or result in any efficiencies.
13 Applicant can object as appropriate to any particular hearing exhibit or testimony if and when
14 offered. However Applicant's vague and sweeping Motion in Limine, based on an incorrect
15 premise, should be denied.
16

17 **II. Applicant's Exhibit List Motion is Not Well-Taken**

18 Applicant complains that "However, several of the listed exhibits comprise literally
19 hundreds of pages of documents each. Listing them provides no indication what exhibits
20 Appellant will actually offer at hearing, or for what purpose, and no basis for Applicant to
21 know how to respond to them." Motion at 3. Applicant's objection that it does not know "for
22 what purpose" an exhibit will be offered presumes a requirement that does not exist – as
23 reflected in the Applicant and DPD lists that themselves do not call out purposes for exhibits.
24 Nor has Applicant bothered to conduct any discovery to inform itself on Appellant's
25
26

1 approach. Further, the Appellant's Exhibit List calls out numerous individual exhibits,
2 although Applicant's motion pretends otherwise. Some document aggregations are listed.
3 These are essentially the documentary record of the application. They are listed because
4 Appellant does not know in advance what assertions will be made by Applicant (or in some
5 cases DPD witnesses) that may relate to items in the project file.

6 With these two overarching points in mind, the following is a review of the
7 Appellant's Exhibit List with explanatory annotations in *red italics* on items that appear to be
8 within the Applicant's vaguely worded motion:
9

- 10 1. Documents from DPD project files for MUP # 3013303 (documents available
11 at <http://web6.seattle.gov/dpd/edms/>) including but not limited to public
12 comment letters, correction notices, DRB packages, DRB Reports and
13 Recommendations, consultant documents, notices, application and plans.

14 *The individual project decisions are separately called out below. But because*
15 *Appellant does not know what the Applicant (or in some case DPD) will say*
16 *on particular points, Appellant reserves the right to introduce additional items*
17 *from the DPD file.*

- 18 2. Notice of Appeal and attachments

19 *The attachments include the Director's Decision, etc.*

- 20 3. July 11, 2014 Land Use Interpretation No. 14-005
21 4. July 17, 2014 Land Use Interpretation No. 14-005 Supplemental
22 5. August 1, 2014 Land Use Interpretation No. 14-005 Supplemental Addendum
23 6. Drawings, overlays or other graphic representations depicting the proposed
24 project, impacts and/or reasonable alternatives. [NOTE: a request is pending
25 with the applicant for production of the materials needed for preparation of
26 these items.]

The bracketed note above is self-explanatory; Applicant's Motion for
Protective Order has been denied but the items at issue have not yet been
produced by Applicant.

1 7. Curriculum Vitae for Expert Witnesses

2 *These were provided with the Exhibit List.*

3 8. Filings in King County Superior Court Cause No. 14-2-012169-5, The
4 Northlake Group, LLC v. Mason, et al., King County Superior Court No. 14-2-
5 12169-5, docket available at:

6 http://dw.courts.wa.gov/index.cfm?fa=home.casesummary&crt_itl_nu=S17&casenummer=14-2-12169-5&searchtype=sName&token=6EC00CD9C7C5FC73B3D7EFC3F31B2BAC&dt=69CACAD04D0DECF8ACCF9C03C1F8FEBC&courtClassCode=S&caskey=168126104&courtname=KING%20CO%20SUPERIOR%20CT

7
8
9 *This is the Court docket for the pending King County lawsuit brought by*
10 *Northlake (the Applicant and Mr. Hill's client) against the project site's record*
11 *title owner because she asserted to DPD that Northlake has no ownership*
12 *interest in the site or right to represent itself to DPD as authorized with regard*
13 *to the property. A summary judgment motion is now pending in superior court*
14 *with a hearing date of October 3, 2014. The docketed materials may be*
15 *necessary depending on whether testimony at the MUP appeal hearing*
16 *pretends that at the time that the Director's Decision was issued Northlake*
17 *was authorized to call itself the owner and/or authorized representative of the*
18 *Owner -- a MUP requirement.*

15 9. Declaration of Sandra E. Mason dated May 5, 2014

16 10. July 30, 2014 Letter from Peter J. Eglick to Diane Sugimura

17 11. August 15, 2014 letter from Diane Sugimura to Peter Eglick

18 12. May 16, 2014 Email and enclosure from Diane Davis to Molly Hurley

19 13. November 26, 2013 letter from Joseph Finley to Jim Thorpe

20 14. April 2, 2014 letter from Joseph Finley to Daniel Bugbee

21 15. August 7, 2014 letter from G. Richard Hill to Diane Sugimura

22 16. Amended August 7, 2014 Letter from G. Richard Hill to Diane Sugimura

23 17. April 30 - May 9, 2014 e mail exchange between Radim Blazej and Garry
24 Papers re parking, with attachments
25
26

- 1 18. Email exchange between Scott Jeffries and Garry Papers dated December 20,
2 2013
3 19. April 30, 2014 – May 9, 2014 Email exchange among Radim Blazej, David
4 Partridge and Mike Mahoney
5 20. Documents related to other recent or pending residential development projects
6 in proximity to 3078 SW Avalon Way, including:

7 *These items are listed simply to establish the existence of other nearby
8 developments in the impacted neighborhood, including their addresses,
9 resident/unit counts, and parking arrangements.*

10 Project 6294013, located at 3266 SW Avalon Way, documents available at
11 <http://web6.seattle.gov/dpd/edms/>;
12 Project 6404485, located at 3268 SW Avalon Way, documents available at
13 <http://web6.seattle.gov/dpd/edms/>;
14 Project 3014342 located at 3050 SW Avalon Way, documents available at
15 <http://web6.seattle.gov/dpd/edms/>; and
16 Project 3012306 located at 3261 SW Avalon Way, documents available at
17 <http://web6.seattle.gov/dpd/edms/>.

- 18 21. Metro KC Transit Route Information; service descriptions and definitions.
19 <http://metro.kingcounty.gov>
20 22. Documents included with July 3, 2014 Letter from DPD, William Mills, to
21 Peter J. Eglick re document production, with attachments (DPD has already
22 distributed these documents to the parties)

23 *These are part of the project file. Because Appellant does not know what the
24 Applicant (or in some case DPD) will say on particular points, Appellant
25 reserves the right to introduce additional items from the DPD file.*

- 26 23. Documents included with July 7, 2014 Letter from DPD, William Mills, to
Peter J. Eglick re supplemental document production, with attachments (DPD
has already distributed these documents to the parties)

*These are part of the project file. Because Appellant does not know what the
Applicant (or in some cases DPD) will say on particular points, Appellant
reserves the right to introduce additional items from the project file.*

- 24 24. Documents included with July 8, 2014 Email from DPD, William Mills, to
25 Peter J. Eglick re supplemental document production, with attachments (DPD
26 has already distributed these documents to the parties)

1 *These are part of the project file. Because Appellant does not know what the*
2 *Applicant (or in some cases DPD) will say on particular points, Appellant*
3 *reserves the right to introduce additional items from the DPD file.*

- 4 25. Documents included with July 22, 2014 Letter from DPD, William Mills, to
5 Peter J. Eglick re supplemental document production, with attachments (DPD
6 has already distributed these documents to the parties)

7 *These are part of the project file. Because Appellant does not know what the*
8 *Applicant (or in some cases DPD) will say on particular points, Appellant*
9 *reserves the right to introduce additional items from the DPD file.*

- 10 26. Documents included with August 2, 2014 Letter from DPD, William Mills, to
11 Peter J. Eglick re supplemental document production, with attachments (DPD
12 has already distributed these documents to the parties)

13 *These are part of the project file. Because Appellant does not know what the*
14 *Applicant (or in some cases DPD) will say on particular points, Appellant*
15 *reserves the right to introduce additional items from the DPD file.*

- 16 27. Documents included with August 20, 2014 Letter from DPD, William Mills, to
17 Peter J. Eglick re supplemental document production, with attachments (DPD
18 has already distributed these documents to the parties)

19 *These are part of the project file. Because Appellant does not know what the*
20 *Applicant (or in some cases DPD) will say on particular points, Appellant*
21 *reserves the right to introduce additional items from the DPD file.*

- 22 28. Exhibits listed by DPD or the applicant.

- 23 29. Items used for purposes of impeachment or rebuttal.

24 Applicant also demands that Appellant be required “to provide a specific copy of each
25 exhibit.” Motion at 3. However, the City and the Applicant either already have each and every
26 item listed (with the exception of witness resumes, which were provided when the Appellant’s
Exhibit List was served) or they can as readily print the item out from the designated public source
as Appellant can. Sending the Applicant or the City copies of copies that they already have is not

1 a constructive use of resources – including trees. Applicant apparently agrees with this despite its
2 motion. Applicant’s Exhibit List calls out eight items, many multipage and expensive to copy
3 (e.g. all of the various design review “packets”), but the Applicant provides copies for none.
4 Instead, the Applicant states, “All exhibits have, to the best of Applicant’s knowledge, been
5 provided in response to Appellant’s discovery requests.”

6 For all of the reasons discussed above, Applicant’s motions should be denied.

7 Dated this 23rd day of September, 2014.

8
9 EGLICK KIKER WHITED PLLC

10 

11 By _____
12 Peter J. Eglick, WSBA #8809
13 Attorney for Appellant

CERTIFICATE OF SERVICE

I, Fred Schmidt, an employee of Eglick Kiker Whited PLLC, declare that I am over the age of eighteen, not a party to this lawsuit and am competent to testify as to all matters herein.

On September 23, 2014, I caused to be delivered, a true and correct copy of the foregoing document by e-mail to the following individuals:

Garry Papers
Department of Planning and Development
PO Box 34019
Seattle, WA 98124-4019
garry.papers@seattle.gov

G. Richard Hill
McCullough Hill Leary, P.S.
701 Fifth Avenue, Suite 6600
Seattle, WA 98104
Rich@mhseattle.com

William Mills
Department of Planning and Development
PO Box 34019
Seattle, WA 98124-4019
William.Mills@seattle.gov

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED: September 23, 2014 at Seattle, Washington.



Fred Schmidt





Peter J. Eglick
eglick@ekwlaw.com

September 18, 2014

*Via Email (Hearing.Examiner@seattle.gov)
and Facsimile ((206) 684-0536)*

Sue Tanner
Hearing Examiner
City of Seattle
700 Fifth Avenue, Suite 4000
PO Box 94729
Seattle WA 98104

RE: Time Sensitive: Appellant's Initial Partial Response to Applicant's Motions in Limine, to Shorten Time, and for More Specific List of Exhibits
Hearing Examiner File No. MUP 14-006

Dear Hearing Examiner Tanner:

This is in partial initial response to the Motions in Limine, to Shorten Time, and for More Specific List of Exhibits received today from the Applicant. I write before the shortened response deadline to address one issue in particular, Applicant's Motion in Limine claiming, without specification, that Appellant is trying to "address issues associated with Type I Master Use Permit decisions". Motion at 2 lines 3-5. This is apparently an objection to the following notice that Appellant would not bring a separate prehearing dispositive motion:

For the sake of efficiency and in light of the indications by the Examiner in the July 23, 2014 conference call that this matter will proceed to hearing regardless, Appellant continues to request a remand on procedural grounds, but will present its evidence and arguments for this at the hearing rather than in a separate motion [sic] prehearing motion. All rights are reserved in this regard.

The Applicant's in limine motion does not specify what specific issues and therefore what type of evidence it contends are out of bounds. It hints but does not directly say that it depends on generally characterizing remand arguments as strictly Type I because they relate to the acknowledged fact that the project was (mis)represented to the public and the Design Review Board as Land Use Code compliant. If granted, Applicant's demand would indiscriminately bar evidence on matters that are within the Examiner's jurisdiction. In contrast, if Applicant's limine

request is not granted, specific, legitimate objections can still be appropriately handled at the hearing if and when they arise.

In any event, Appellant is entitled to present evidence that, for example, the Design Review Board's and consequently Director's decisions fell short, inter alia, with regard to substantive Height, Bulk, and Scale ("HBS") mitigation. The acknowledgement by DPD, in its (second) response to the Appellant's Request for Interpretation, that the project as presented to the Design Review Board violated the Land Use Code Floor Area Ratio ("FAR") limit is relevant to this HBS contention and within the Examiner's jurisdiction.

Further, for example, the Examiner also has jurisdiction over whether the project, when subjected to Design Review (an integral part of the MUP process), was in compliance with SMC 23.41.014.F.2 ("Projects subject to design review must meet all codes and regulatory requirements applicable to the subject site"). See In the Matter of the Appeal of Claudia Ludwig et al., Hearing Examiner File: MUP-13-009 (DD) at fn. 3 (SMC 23.76.022 relating to administrative appeals of Type I and Type II master use permits expressly authorizes the Examiner to consider procedural issues on appeal including those that relate to the procedures for Type II decisions).¹

In addition, the question of whether the project was in compliance with the Land Use Code (including SMC 23.41.014.F.2) is also important in reviewing Design Review including its key public participation component. See In re Friends of Olympic Sculpture Park et al., Hearing Examiner File Nos. MUP -09-021, 09-022 (DR, W), January 14, 2010 at Conclusion 5, 6, 7, 8.

Applicant's motion (page 1, lines 17-20) pretends, apparently referring to the July 23, 2014 conference call, that the Examiner has already ruled that such matters are outside her jurisdiction. No such ruling was made. In fact, when the Appellant requested a written ruling the Examiner expressly indicated that the conference call discussion was just that and nothing had been decided. The September 19 motion date was then set as an outside date option for Appellant based on Appellant's suggestion that there might be some economy realized in a motion before the hearing.

However, subsequently, in reviewing the record, and particularly after deposing DPD's Mr. Mills and Mr. Papers last week, it became apparent that such a motion would not appreciably save any time because the testimony and evidence involved would have to be presented in any event.

To the extent that after reviewing this letter, the Examiner determines that a motion is required by September 19, please consider this letter as such a motion and please provide the Appellant with an opportunity to Reply.

¹ The Land Use Code MUP procedures also require that an application must be submitted by, inter alia, the property owner or contract purchaser. SMC 23.76.010 A.1. In an unusual twist, the documentary record here demonstrates noncompliance, apparently known to DPD, at the time of issuance of the Director's Decision.

EGLICK KIKER WHITED PLLC

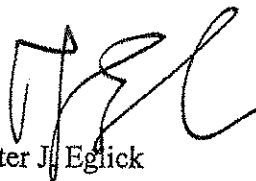
September 18, 2014

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Finally, per the Examiner's Order of earlier today, Appellant will respond separately on September 23, 2014, to the remainder of Applicant's motion.

Respectfully,

EGLICK KIKER WHITED PLLC

A handwritten signature in black ink, appearing to read 'PEGLICK', written over a printed name.

Peter J. Eglick

cc: G. Richard Hill
William D. Mills
Garry Papers
Client