

**BEFORE THE HEARING EXAMINER
CITY OF SEATTLE**

In the Matter of the Appeal of

**NEIGHBORS ENCOURAGING
REASONABLE DEVELOPMENT**

from a decision and interpretation by the
Director, Department of Planning and
Development, on a Master Use Permit

Hearing Examiner File:
**MUP-14-006(DR,W)
S-14-001**

Department Reference:
3013303

**ORDER ON APPLICANT'S
MOTION FOR PROTECTIVE
ORDER**

In response to discovery requests, the Applicant, Northlake Group, LLC, provided the Appellant with a hard copy and an electronic PDF copy of all architectural drawings submitted to the Department in connection with the Master Use Permit at issue in this appeal. The Appellant then asked for the digital files, in AutoCAD and Autodesk Revit., for the documents used to prepare the Design Review Board packets for the proposed project. The Applicant objected to providing the digital files, and the Appellant narrowed the request to the digital files for just three pages in the plan set: A3.02 (West elevations); A4.02 (N-S Section); and A0.08 (Perspectives) as a "start". On September 22, 2014, the Applicant filed a motion for a protective order, the Appellant filed a response opposing the motion, and the Applicant filed a reply to the response.

The Appellant requests the digital files to facilitate preparation of hearing exhibits, which the Appellant states can be prepared more easily and with less expense than if it was required to use a hard copy or PDF file. The Applicant cites HER 3.11 and asserts that the requested discovery is "unnecessary under the circumstances of the appeal". The Applicant notes that the project architect has indicated he would be "severely prejudiced" if required to produce the requested digital files because the Appellants could create the exhibits without compensating the architects for the copyrighted work. The architects also state that they could be liable if someone changed the files, used them to build something, and damage ensued. In response, the Appellant confirmed that it would not use the files for that purpose.

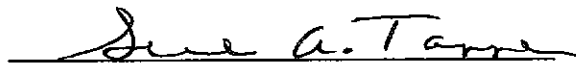
HER 1.03 provides that in interpreting the Hearing Examiner Rules, the Examiner may look to the Superior Court Civil Rules for guidance. Superior Court Civil Rule ("CR") 26(b)(1) provides that "[p]arties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action" CR 34 on production of documents provides that a party may request production of "any designated documents, electronically stored information, or things - including writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations - stored in any medium from which information can be obtained, either directly or, if necessary, after translation or conversion by the responding party into reasonably usable form" if the request is within the scope of Rule 26(b). CR 34(a)(1). CR 34(b)(3)(F)(iii) states that "[u]nless otherwise stipulated

or ordered by the court, for good cause shown, a party need not produce the same electronically stored information in more than one form.”

Like the respondents in *Lindberg v. Kitsap County*, 133 Wn.2d 729, 948 P.2d 806 (1997), discussed by both parties in their briefing, the Appellant wishes to use the requested digital files to prepare for hearing on the proposed project (although unlike the documents in *Lindberg*, the files requested here are not part of the public record). Therefore, the Appellant has shown good cause for production of the digital files. The Applicant's arguments concerning potential misuse of the files, and resulting potential liability, are not persuasive in the context of an administrative appeal of a land use decision, particularly if the request is limited to the three sheets specified by the Appellant's representative in his September 12, 2014 e-mail message attached to the Appellant's motion.

The Applicant's primary concern appears to be that the Appellant will use the architect's copyrighted work without paying for it. However, as in *Lindberg*, it appears that the Appellant's proposed use of the work constitutes "fair use" under the federal Copyright Act. See *Lindberg* at 741-744. On the other hand, the Examiner may lack jurisdiction to determine an issue under federal law. Therefore, the Examiner decides only that the Appellant has shown good cause for production of the digital files for plan sheets A3.02 (West elevations), A4.02 (N-S Section), and A0.08 (Perspectives) used to prepare the Design Review Board packets, and that the Applicant has not demonstrated that this discovery is unnecessary under the circumstances of the appeal. To that extent, the motion for protective order is DENIED.

Entered this 23rd day of September, 2014.


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