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BEFORE THE HEARING EXAMINER
FOR THE CITY OF SEATTLE

In the Matter of the Appeal of
SEATTLE PARKS AND RECREATION
From a denial of a Certificate of Approval by
the Director, Seattle Department of
Neighborhoods.

Hearing Examiner File:
R-24-001
Department Reference:
MHC 1/24
**PIKE PLACE MARKET HISTORICAL
COMMISSION’S RESPONSE TO
SEATTLE PARKS AND RECREATION’S
MOTION TO AMEND NOTICE OF
APPEAL AND REPLY TO PARKS’
RESPONSE TO MOTION TO DISMISS**

I. INTRODUCTION

The Seattle Hearing Examiner should deny Seattle Parks and Recreation’s (“SPR’s”) Motion to Amend Notice of Appeal (“Motion”) and should instead grant Friends of the Market (“Friends”) Motion to Dismiss already argued on March 5, 2024.

After applying the factors provided in Hearing Examiner Rule (“HER”) 5.07, SPR has not shown good cause as to why it should be allowed to amend its Notice of Appeal (“Appeal”) this late in the proceedings, more than a month and a half after the Appeal was filed, to include new appeal issues not included in the original Appeal after the appeal period expired. This request comes after Friends of the

1 Market (“Friends”) already filed its Motion to Dismiss that was already argued on March 5, 2024.

2 The Hearing Examiner should grant the relief requested in Friends’ Motion to Dismiss and
3 dismiss SPR’s appeal.

4 On December 13, 2023, the Pike Place Market Historical Commission (“Commission”) held a
5 lengthy hours-long meeting at which SPR’s application to, among other things, permanently remove the
6 totem poles from Victor Steinbrueck Park (“Application”) was considered. The Commission’s appointed
7 staff from the Department of Neighborhoods (“DON”) provided a presentation on the Application, a
8 SPR staff member also presented its Application to the Commission, and 19 people provided oral
9 testimony speaking eloquently and passionately about the Application.¹ Regarding the oral testimony,
10 one person spoke in favor of SPR’s Application, and 18 people spoke in opposition to it.

11 SPR, in its presentation of the Application, as well as the members of the public that provided
12 oral testimony, raised social, historical, and tribal issues and the Commission deliberated on the
13 Application considering those social, historical, and tribal issues through a racial equity lens. Indeed,
14 members of local tribes provided oral testimony in opposition to SPR’s Application.

15 Ultimately, the Commissioners applied their discretion and determined that approving the
16 Application to permanently remove the totem poles would be inconsistent with Guideline 2.12.6 which
17 provides that Victor Steinbrueck Park’s “character-defining features should be retained and should not
18 be altered, disguised or concealed.” The guideline specifically identifies the totem poles as being among
19 the park’s character-defining features. Further, the Commission also determined that approving the
20 Application would be inconsistent with Guideline 3.6 which states that “[S]ignificant historical signs,
21 symbols or icons of the Market must be preserved . . . If a significant historical sign, symbol, or icon of
22

23 ¹ The written decision includes an unintentional error that indicates the meeting of the Commission took place on December 14, 2023. The correct date on which the meeting of the Commission took place was December 13, 2023.

1 the Market is moved from its site, it should be displayed in a public place within the District.” The
2 Commission determined the totem poles to be an iconic element of the Market and that the proposal to
3 permanently remove them, and not replace them within the park or another location in the District,
4 would be inconsistent with this guideline.

5 SPR filed its Appeal on January 23, 2024, and raised only one issue — that Commission
6 Guideline 1.4 provides the Commission with broad discretion and that the Commission should have
7 exercised its broad discretion differently and interpreted the Guidelines differently in a way that would
8 have allowed SPR to permanently remove the totem poles.

9 SPR’s appeal does not assert error with the Commission’s decision, only that that the
10 Commission could have applied its discretion differently and could have reached a different
11 interpretation that would have resulted in approval its Application. SPR’s Appeal does not assert that the
12 Commission violated the terms of the chapter or rules, regulations or guidelines under
13 SMC 25.24.080.D.1. Further, SPR’s Appeal does not assert that action of the Commission in denying
14 SPR’s Application was based upon a recommendation made in violation of the procedures set forth in
15 chapter 25.24 or procedures established by adopted rules, regulations or guidelines under
16 SMC 25.24.080.D.2.

17 Only now, more than a month and a half after the original Appeal was filed and after a Motion to
18 Dismiss was filed and argued, does SPR seek to amend its Appeal in its attempt to cure the deficiency of
19 the original Appeal.

20 **II. RESPONSE/REPLY**

21 After weighing the factors provided in HER 5.07, the Hearing Examiner should deny SPR’s
22 Motion to Amend Notice of Appeal because SPR has not shown good cause as to why it should be
23 allowed to add appeal issues after the expiration of the appeal period, especially appeal issues not

1 identified in the Appeal.

2 HER 5.07 provides in full:

3 On a party's motion, for good cause shown, the Examiner may allow an
4 appeal to be amended. In deciding whether to allow amendment, the
5 Examiner may consider whether the amendment has been timely filed,
6 would prejudice a party's fair hearing opportunity, or raises jurisdictional
7 issues (e.g., if a party is seeking to add appeal issues not identified in the
8 notice of appeal after the appeal period has expired); the reason for any
9 delay in raising the issue; and any other relevant factors.

7 HER 5.07 sets out the factors the Hearing Examiner should consider when determining whether
8 SPR has shown good cause that would allow them to amend their Appeal as requested. This Response
9 will address these factors and show that the Hearing Examiner should deny SPR's Motion because SPR
10 has not shown good cause.

11 **A. SPR unreasonably delayed obtaining legal representation, and then proceeded to
12 unreasonably delay the filing of the Motion.**

13 First, SPR was fully aware of the Commission's decision as early as December 13, 2023. David
14 Graves from SPR attended the meeting and knew immediately the Commission's decision. SPR then
15 unreasonably and inexcusably delayed obtaining legal counsel for more than a month until after it filed
16 its appeal on January 23, 2024. The fact that SPR is a city department with effortless access to legal
17 representation makes this delay all the more unreasonable. Regardless, pro se litigants are bound by the
18 same rules of procedure and substantive law as attorneys. *Patterson v. Superintendent of Public*
19 *Instruction*, 76 Wn. App. 666, 671, 887 P.2d 411 (1994), *review denied*, 126 Wn.2d 1018, 894 P.2d 564
(1995).

20 Second, SPR unreasonably delayed filing its Motion, to the point it is now untimely. HER 5.07
21 does not provide a specific deadline for filing a motion to amend, but the delay in filing the Motion is
22 clearly a factor to consider. SPR filed its Appeal on January 23, 2024, and then proceeded to wait more
23 than a month and half until March 12, 2024, a total of 49 days, to file the Motion. SPR's Motion comes

1 only after Intervenor Friends filed a Motion to Dismiss, and after the Commission filed its Response that
2 agreed with Friends' requested relief.

3 Setting aside SPR's inexcusable delay in obtaining legal representation, Maxwell Burke was
4 appointed as SPR's counsel on January 28, 2024. Decl. Burke. The timing of Burke's appointment
5 allowed SPR two full weeks (Monday, January 28 through Friday, February 9) during which time the
6 Motion could have been filed prior to Burke's planned leave of absence.

7 Clearly, the timing of Burke's planned leave of absence was not ideal; however, Burke had
8 arranged for coverage during his planned leave of absence. See Decl. Burke. The attorney covering for
9 Burke could have either filed the Motion during Burke's absence or could have assisted with the
10 preparation of a Reply during Burke's absence had SPR timely filed the Motion by February 9, 2024.

11 On Tuesday, February 6, 2024, Burke emailed the Commission's counsel, Daniel Mitchell, to
12 inform him that SPR **might** seek to add additional issues. Burke Decl. (Emphasis added). Mitchell
13 responded the same day thanking SPR for informing him of that possibility but made clear that the
14 Commission reserved the right to bring further pleadings or objections "based on any additional
15 arguments/issues that might be raised in the future." Decl. Burke. The Commission's responsive email
16 should in no way be interpreted as written consent on the part of the Commission to the requested relief
17 in SPR's Motion as the appropriate time for the Commission to raise objections to such Motion would
18 be after the Motion is filed. But SPR did not file a motion to amend the Appeal by February 9, 2024,
19 despite Burke's planned leave of absence until March 4, 2024.

20 Even though it may have been reasonable for Burke not to have anticipated any significant
21 activity initiated by the Commission during his parental leave, more relevant to the consideration of this
22 factor regarding the filing delay is that it was unreasonable for SPR to have waited until Burke's return
23 to office on March 4, 2024, just a day before the scheduled Prehearing Conference, to file the Motion. In

1 fact, SPR did not file the Motion until March 12, after the Motion to Dismiss was heard on March 5,
2 2024.

3 Further, considering Friends had filed its Motion to Intervene that was still pending prior to
4 Burke’s parental leave, it was foreseeable that Friends would be granted intervening party status and
5 potentially bring its Motion to Dismiss prior to the Prehearing Conference. This did in fact occur, was
6 foreseeable, and Burke’s Declaration makes clear that coverage was arranged during his absence.

7 **B. SPR should not be allowed to add appeal issues not identified in the Notice of Appeal
8 after the appeal period has expired which would prejudice the Commission.**

9 HER 5.07 specifically includes within the rule a categorical example of motions that the Hearing
10 Examiner must consider and that is whether a party is seeking to add appeal issues not identified in the
11 Notice of Appeal after the appeal period has expired. That is exactly what SPR is seeking to do here, and
12 the Hearing Examiner should not allow it.

13 When filing an administrative appeal with the Hearing Examiner, the rules require that an appeal
14 shall be in writing and contain a brief statement of the appellant’s issues on appeal, noting appellant’s
15 “specific objections” to the decision. HER 5.01(d)(3). This requirement of specificity in issue
16 identification is a common requirement in administrative appeals, and land use appeals in particular,
17 because it advances the strong public policy favoring administrative finality in land use decisions. *Twin*
18 *Bridge Marine Park, L.L.C. v. State, Dept. of Ecology*, 162 Wn.2d 825, 845, 175 P.3d 1050 (2008). The
19 onus is properly placed on the appellant challenging a land use decision to specifically identify each
20 issue the appellant seeks to challenge in its appeal, and to do so timely prior to the appeal deadline. For
21 example, similar to the Hearing Examiner rule, the Land Use Petition Act requires a “separate and
22 concise statement of each error alleged” under RCW 36.70C.070(7). The Growth Management Hearings
23 Board requires a petition for review (“PFR”) contain a “detailed statement of issues presented for
resolution by the board.” RCW 36.70A.290(1).

1 The Growth Management Hearings Board held, when faced with a similar request from an
2 appealing party to amend their PFR to include new issues not raised in the original petition, that although
3 refinement and/or clarification of the issues can occur after the appeal period has elapsed, “for the Board
4 to allow new, previously unarticulated issues to be presented would simply amount to a PFR becoming
5 an issue “placeholder” contrary to [RCW 36.70A.290]’s requirement for a “detailed statement of the
6 issues.” *Toward Responsible Development v. City of Black Diamond*, CPSGMHB No. 10-3-0014 (Order
7 Denying Motion to Amend Prehearing Order, January 18, 2011) at 3. After the decision in *Toward*
8 *Responsible Development*, WAC 242-02-260 was subsequently repealed and replaced with
9 WAC 242-03-260 (July 22, 2011), adding the prohibition against raising new challenges. *Kenmore MHP*
10 *LLC et al. v. City of Kenmore*, GMHB Case No. 19-3-0012 (Order Clarifying Basis for Denial of Motion
11 to Amend, September 22, 2023) at fn. 6.

12 Similar to the Growth Management Hearings Board holding in *Toward Responsible*
13 *Development*, the Hearing Examiner should likewise not allow new, previously unarticulated issues to be
14 presented after the expiration of the appeal deadline, as it would render HER 5.01(d)(3)’s requirement to
15 identify “specific objections” in the notice of appeal as meaningless, or as simply a “placeholder.”
16 HER 5.07 clearly articulates that a consideration for the Hearing Examiner in deciding whether to allow
17 an appeal to be amended is whether the requested amendment would add new appeal issues that were
18 not identified in the original appeal after the time for appeal has expired. It is the only categorical type of
19 proposed amendment specifically referenced in HER 5.07 as an example to be considered, evidencing its
20 importance. In fact, this consideration as to whether the motion to amend seeks to add new appeal issues
21 not identified in the original appeal is a consideration that was carried over from the former HER 3.07.
22 This is a longstanding consideration under the HERs and the Hearing Examiner should reach the same
23 result as did the Growth Management Hearings Board in *Toward Responsible Government*. In this more

1 specific area of administrative land use decision-making, HER 5.07 is more closely aligned with the
2 rules of the Growth Management Hearings Board than with Civil Rule 15, which provides a much
3 different standard that applies to all areas of civil law including family law, tort, and contracts etc.²

4 The Commission would be prejudiced if the Appeal were allowed to be amended to include
5 additional issues not included in the original Appeal after the appeal period has expired, especially after
6 the unreasonable delays. The Commission has already presented its argument in its Response to Friends'
7 Motion to Dismiss that SPR's Appeal is without merit as it presents only one issue that, even if taken as
8 true, does not state a claim upon which the Hearing Examiner could grant SPR relief under
9 SMC 25.24.080.D. If SPR were to be allowed to amend its Appeal to include additional issues not raised
10 in the original appeal, the Commission would be prejudiced because it would widen the scope of the
11 administrative record that would need to be prepared to address issues not raised in the Appeal, lengthen
12 the hearing on the merits, and require much time and resources spent on preparing Commissioners for
13 the hearing. This would be overly burdensome on the Commission, especially at this late stage in the
14 proceedings.

15 **C. The original Appeal does not set forth facts and arguments that have legal merit.**

16 The Appeal does not set forth facts and arguments that have legal merit. SPR seeks to amend the
17 Appeal to cure the legal deficiency by introducing new issues not asserted in the original Appeal after
18 the deadline to appeal has already expired. For all the reasons provided above, SPR's Motion should be
19 denied.

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21 _____
22 ² CR 15 has a much more liberal standard that provides that leave to amend should be freely given except where prejudice
23 to opposing party would result. HER 5.07 does not provide the standard in CR 15 and instead provides specific factors to
consider that is more similar to the Growth Management Hearings Board administrative rules that prohibit the addition of
issues not raised in the original appeal. Under HER 1.03(d), the Hearing Examiner need not look to the CRs for guidance,
and has discretion to determine the practice or procedure most appropriate and consistent with providing fair treatment,
and efficiency.

1 The one and only issue raised in SPR's Appeal is whether the Commission should have
2 exercised its discretionary powers differently under Guideline 1.4 to have reached a different
3 interpretation and allowed the permanent removal of the existing poles.

4 The Commission disagrees with SPR that its decision to deny SPR's Application to permanently
5 remove the totem poles was "racially inequitable" as SPR now argues for the first time in its Response to
6 Motion to Dismiss. Reasonable minds can differ on that conclusion. In fact, tribal members as well as
7 non-tribal members spoke passionately at the December 13 meeting in opposition to SPR's Application
8 to permanently remove the totem poles. If this appeal reaches a hearing on the merits, the Commission is
9 ready to defend its interpretation of the guidelines and articulate the different public comments that were
10 received and considered as part of the Commission's decision-making.

11 Regardless, even taking SPR's statements in its Appeal as true, at best, SPR asserts on page 3,
12 lines 1–13 of its Response to Motion to Dismiss that the Commission could have reached a different
13 conclusion. The paragraph cited in SPR's Response to Motion to Dismiss on page 2, lines 18–21,
14 provide SPR's rationale for why it thinks the Commission should have reached a different interpretation
15 of its Guidelines.

16 However, what SPR's Appeal was required to have done, which it did not do, is assert how the
17 Commission's decision and interpretation of the guidelines that formed the basis of its decision violated
18 the terms of chapter 25.24 SMC, or adopted rules, regulations, or guidelines. SPR does not do that. Quite
19 the opposite, SPR's Appeal seems to acknowledge that because the existing totem poles are specifically
20 identified as "character defining features" of the park as outlined in Guideline 2.12.6 that "their removal
21 is prohibited. . ." Appeal, p. 3.

22 SPR erroneously argues that its Appeal raised as a procedural error, or put the Commission on
23 notice that it was attempting to assert that the Commission violated SMC 25.24.030.D. See Response to

1 Motion to Dismiss, p. 3, lines 14–21. SPR’s claim here is without merit and nothing about the Appeal
2 can be read to have asserted, or even put the Commission on notice that it might be asserting any
3 procedural errors on the part of the Commission’s decision-making. The Commission disagrees
4 substantively with SPR’s claim because the Commission did consider the Application and deliberate
5 using a racial equity lens when it reviewed and decided SPR’s Application. But importantly here, SPR
6 did not raise this as an issue in its Appeal, and this new issue should not be allowed to be raised now at
7 this late stage in the proceedings.

8 **III. CONCLUSION**

9 For all the foregoing reasons, the Hearing Examiner should deny SPR’s Motion and grant
10 Friends’ Motion to Dismiss.

11
12 Respectfully submitted this 22 March 2024.

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CERTIFICATE OF SERVICE

I certify that on this day I caused a true and correct copy of foregoing document to be served on the following in the manner indicated below:

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Dated this March 22, 2024, at Seattle, Washington.

s/Eric Nygren
Eric Nygren, Legal Assistant