

**BEFORE THE HEARING EXAMINER  
CITY OF SEATTLE**

In the Matter of the Appeal of

**SEATTLE PARKS AND RECREATION,**

from a denial of a Certificate of Approval by  
the Pike Place Market Historical Commission

Hearing Examiner Files:  
**R-24-001**

**ORDER ON MOTION TO  
DISMISS**

**1. Procedural Background.** Seattle Parks and Recreation appealed a Pike Place Market Historical Commission decision denying its request to remove totem poles at Pike Place Market and replace them with other artwork. Friends of the Market intervened,<sup>1</sup> then moved to dismiss. The Commission supported dismissal. Parks did not file a response to the motion within the required seven days,<sup>2</sup> but noted via e-mail it opposed dismissal and intended to file briefing and amend its appeal. At the March 5, 2024, prehearing conference, the parties argued the motion. Following argument, the Examiner allowed Parks to file a response, with the Commission and Friends allowed a reply. Parks was later granted a request to file a sur-reply. With its response, Parks also moved for permission to amend its appeal.

**2. Hearing Examiner’s Scope of Authority.** The Seattle Municipal Code authorizes Hearing Examiner review of Commission decisions.

The Hearing Examiner may reverse or modify an action of the Commission **only** if the Hearing Examiner finds that:

1. Such action of the Commission **violates the terms of this chapter or rules, regulations or guidelines** adopted pursuant to the authority of this chapter; or
2. Such action of the Commission is based upon a recommendation made in violation of the [applicable] procedures....<sup>3</sup>

Under this language, the Examiner may grant an appeal if an appellant demonstrates the Commission’s decision conflicts with an adopted code, rule, regulation or guideline. Without a conflict, the Examiner cannot reverse.

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<sup>1</sup> Motion to Intervene (February 4, 2024); Order on Motion to Intervene (February 13, 2024).

<sup>2</sup> Hearing Examiner Rules of Practice and Procedure 3.17(b).

<sup>3</sup> SMC 25.24.080(D)(1) and (2), emphasis added.

**3. Parks' Original Appeal.** Parks' appeal did not allege a procedural violation or identify a code, rule, regulation, or guideline the Commission's decision conflicted with. The appeal instead stated the guidelines prohibit Parks' totem pole removal request. The appeal states that **"the existing totem poles are identified as 'character defining features' of the park as outlined in Guideline 2.12.6 and their removal is prohibited...."**<sup>4</sup> The appeal added that the guidelines "make no allowance or accommodation for the ultimate disintegration and removal of existing totem poles" but "[t]he Commission **should have exercised their** [sic, its] **discretionary power** and allowed the permanent removal of the existing poles so SPR [Parks] could" install other artwork.<sup>5</sup>

**4. Parks' Motion to Amend its Appeal.** After the March 5 oral argument on the motion to dismiss, Parks moved to amend its appeal. The motion was filed nearly two months after the appeal deadline.<sup>6</sup> The Hearing Examiner Rules of Practice and Procedure allow for timely appeal amendments that do not raise jurisdictional concerns.

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

Parks was aware of the potential for appeal for some time. The Commission met to determine the matter on December 13, 2023, with its written decision dated January 9, 2024. Parks filed its appeal on January 22, 2024, then waited 49 days to move for appeal amendment, filing the motion to amend after Friends moved to dismiss, after the deadline for responding to the motion had run, and after oral argument. Parks' rationale for the late appeal amendment request was that legal counsel was not retained until after appeal filing. Unlike many pro se litigants, Parks has access to counsel through the City Attorney's Office. Regardless, pro se litigants are bound by the same rules of procedure and substantive law as attorneys.<sup>8</sup> The motion to amend was not timely.

When filing an administrative appeal with the Hearing Examiner, the rules require that the appeal include "[a] brief statement of the appellant's issues on appeal, noting appellant's specific objections to the decision or action being appealed."<sup>9</sup> The onus is on

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<sup>4</sup> Appeal, p. 3, emphasis added.

<sup>5</sup> Appeal, p. 3, emphasis added.

<sup>6</sup> SMC 25.24.080(A); Decision (January 9, 2024); Appeal (January 22, 2024); Motion to Amend Notice of Appeal (March 12, 2024).

<sup>7</sup> HER 5.07, emphasis added.

<sup>8</sup> *Patterson v. Superintendent of Public Instruction*, 76 Wn. App. 666, 671 (1994), *rev. den.* 126 Wn.2d 1018 (1995).

<sup>9</sup> HER 5.01(d)(3).

the appellant challenging a land use decision to identify each issue the appellant seeks to challenge before the appeal deadline. This requirement is common to land use practice.

As with this forum's filing requirements, the Land Use Petition Act, Ch. 36.70C RCW, requires a "separate and concise statement of each error alleged,"<sup>10</sup> and the Growth Management Hearings Board requires a petition for review to include a "detailed statement of issues...."<sup>11</sup> As before the Examiner, issue refinement or clarification may occur after the appeal deadline, but "for the Board to allow new, previously unarticulated issues to be presented would simply amount to a PFR [petition for review] becoming an issue 'placeholder' contrary to .290's requirement for a 'detailed statement of the issues.'"<sup>12</sup>

The motion to amend the appeal is not a clarification of existing issues. The new appeal replaces and contradicts the original appeal, raising four issues not originally present.<sup>13</sup> The original appeal stated that what Parks requested<sup>14</sup> contradicts the guidelines. The appeal went on to state that the Examiner was being asked to order the Commission to take actions which the appeal described as discretionary. The Examiner has no jurisdiction over the Commission's discretionary acts. The new appeal, with its four new issues, claims that the Commission decision contradicts the guidelines and code.

The motion to dismiss does not raise a mere technicality. Allowing unarticulated issues to be presented after the appeal deadline would render HER 5.01(d)(3)'s requirement to identify "specific objections" in the notice of appeal meaningless and allow an appeal to simply be a "placeholder." This is inefficient and unfair to the other parties who are not timely appraised of the issues.<sup>15</sup> This is an important concern for efficient case processing and in the land use context, where public policy favors land use decision finality.<sup>16</sup> The approach contradicts HER 5.01 and SMC 25.24.080(1), which require an appeal identifying the issues to be filed within fourteen days of the Commission's decision. This a jurisdictional matter. Jurisdictional issues are present when "a party is seeking to add appeal issues not identified in the notice of appeal after the appeal period has expired."<sup>17</sup>

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<sup>10</sup> RCW 36.70C.070(7).

<sup>11</sup> RCW 36.70A.290(1).

<sup>12</sup> *Toward Responsible Development v. City of Black Diamond*, GMHB #10-3-0014, Order on Motion to Amend Prehearing Order (January 18, 2011), p. 3. After this decision, WAC 242-02-260 was repealed and replaced with WAC 242-03-260, which prohibits appeal amendments from raising new issues. *Kenmore MHP LLC v. City of Kenmore*, GMHB #19-3-0012, Order Clarifying Basis for Denial of Motion to Amend (September 22, 2023), FN 6.

<sup>13</sup> The new issues are labeled A-D. The headings are: (A) The Commission violated SMC 25.24.030.D by failing to consider actual and perceived racial inequities; (B) Replacing the totem poles with new local tribal art is consistent with the Code criteria for evaluating Certificates of Approval; (C) The Commission may not deny a Certificate of Approval application based on Commission guidelines; (D) SPR's request is consistent with Commission guidelines.

<sup>14</sup> Removal of totem poles and replacement with work from local, Native artists.

<sup>15</sup> HER 1.03(d). The amendment request was submitted after the motion to dismiss and after the Prehearing Order, which was issued March 6 and established the case schedule.

<sup>16</sup> *Twin Bridge Marine Park, L.L.C. v. Dept. of Ecology*, 162 Wn.2d 825, 845 (2008).

<sup>17</sup> HER 5.07.


Parks references the Civil Rules, requesting that its land use appeal be treated akin to a civil complaint filed in Superior Court. However, it is the Hearing Examiner Rules which govern. The Civil Rules use different standards for civil law matters, including for family law, tort, and contracts. This appeal forum is one of limited jurisdiction which bears greater similarity to the Growth Management Board and other land use appeal settings than to Superior Court exercise of its general jurisdiction.<sup>18</sup> Though the Civil Rules may be used as guidance, the local rules of procedures and code govern.<sup>19</sup> And, even in the Superior Court setting, when the Superior Court exercises its appellate land use authority, the requirement that the appeal identify the issues applies.<sup>20</sup> So, when exercising this authority, the rules would not be those for complaint amendment under the Civil Rules; the land use petition required to trigger review is not a complaint.<sup>21</sup> The rules would be similar to those applicable here.

**5. Conclusion.** The Examiner may only reverse a Commission decision for procedural or regulatory violations. Such violations include adopted rules, regulations, or guidelines. The appeal identified no substantive violations, asserting to the contrary, that what was being requested conflicted with applicable authority. The Examiner cannot order the Commission to take discretionary action and cannot provide relief when the requestor states its request violates applicable requirements. As the appeal identified no legal basis for relief, and the untimely appeal amendment cannot be used to cure these defects, the appeal must be dismissed.

### ORDER

The motion to dismiss is **GRANTED**. The appeal is dismissed.

Entered March 28, 2024.

  
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Susan Drummond, Deputy Hearing Examiner

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<sup>18</sup> Wash. Const. Art. IV, § 6 (Jurisdiction of Superior Courts).

<sup>19</sup> HER 1.01 (the HER “supplement Seattle Municipal Code and ordinances” and “govern” Examiner practice and procedure); 1.03(d) (Civil Rules may be used as “guidance”).

<sup>20</sup> RCW 36.70C.070(7).

<sup>21</sup> RCW 36.70C.040.

**CERTIFICATE OF SERVICE**

I certify under penalty of perjury under the laws of the State of Washington that on the date below I sent true and correct copies of the attached **ORDER ON MOTION TO DISMISS** to each person below in **Seattle Parks and Recreation**, Hearing Examiner File **R-24-001** in the manner indicated.

| <b>Party</b>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                  | <b>Method of Service</b>                                                                                                                                                                                                         |
|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <p><b>Respondent Legal Counsel</b><br/> <b>Pike Place Market Historical Commission</b><br/> City Attorney’s Office</p> <p>Daniel Mitchell<br/> <a href="mailto:daniel.mitchell@seattle.gov">daniel.mitchell@seattle.gov</a></p> <p>Commission Liaison, Department of Neighborhoods:</p> <ul style="list-style-type: none"> <li>• Minh Chau Le,<br/> <a href="mailto:minhchau.le@seattle.gov">minhchau.le@seattle.gov</a></li> <li>• Department: Sarah Sodt<br/> <a href="mailto:sarah.sodt@seattle.gov">sarah.sodt@seattle.gov</a></li> </ul> | <input type="checkbox"/> U.S. First Class Mail<br><input type="checkbox"/> Inter-office Mail<br><input checked="" type="checkbox"/> E-mail<br><input type="checkbox"/> Hand Delivery<br><input type="checkbox"/> Legal Messenger |
| <p><b>Appellant Legal Counsel</b><br/> <b>Seattle Parks and Recreation</b><br/> City Attorney’s Office</p> <p>Maxwell Burke<br/> <a href="mailto:maxwell.burke@seattle.gov">maxwell.burke@seattle.gov</a></p> <p>Parks Department:</p> <ul style="list-style-type: none"> <li>• David Graves<br/> <a href="mailto:david.graves@seattle.gov">david.graves@seattle.gov</a></li> </ul>                                                                                                                                                           | <input type="checkbox"/> U.S. First Class Mail<br><input type="checkbox"/> Inter-office Mail<br><input checked="" type="checkbox"/> E-mail<br><input type="checkbox"/> Hand Delivery<br><input type="checkbox"/> Legal Messenger |
| <p><b>Friends of the Market, Intervenor</b></p> <p>Margaret Pihl<br/> <a href="mailto:margaretpihl1@gmail.com">margaretpihl1@gmail.com</a></p>                                                                                                                                                                                                                                                                                                                                                                                                | <input type="checkbox"/> U.S. First Class Mail<br><input type="checkbox"/> Inter-office Mail<br><input checked="" type="checkbox"/> E-mail<br><input type="checkbox"/> Hand Delivery<br><input type="checkbox"/> Legal Messenger |

Dated: March 28, 2024

/s/ Angela Oberhansly  
Angela Oberhansly  
Legal Assistant