

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28  
29

BEFORE THE HEARING EXAMINER  
FOR THE CITY OF SEATTLE

In the Matter of the Appeals of: ) Hearing Examiner File No.:  
 ) **MUP-17-001**  
END PRISON INDUSTRIAL )  
COMPLEX, et al. ) DCI Project No. 3020845  
 )  
From a decision by the Director, ) **MOTION TO DISMISS PATRICK**  
Department of Construction and ) **DONNELLY AND STRIKE RELATED**  
Inspections, on a Master Use Permit ) **FILINGS**

---

**I. INTRODUCTION**

Appellants, Ending the Prison Industrial Complex (EPIC) and over seventy other community based organizations and interested individuals (hereinafter Appellants), respectfully request that the Hearing Examiner dismiss Patrick Donnelly as a party to the appeal of the Director’s decision to approve a Master Use Permit and strike any papers, pleadings, or motions that he has filed or may file in this matter. Mr. Donnelly is not a “party” as that term is defined under Hearing Examiner Rule 2.02 and so he may not participate in this appeal.

**II. FACTS**

King County seeks to build a new jail to incarcerate children and teenagers on the site located at 1211 East Alder Street in Seattle. On September 2, 2015, King County filed an MOTION TO DISMISS- 1

1 application for a Master Use Permit from the City of Seattle. In its documents, King County  
2 stated that Mr. Donnelly was its agent solely for contact purposes related to the application.  
3 Exhibit 1 (Statement of Financial Responsibility/Agent Authorization). Mr. Donnelly is the  
4 architect on the project and has no financial interest in the project. *Id.* On the Plan Cover Sheet  
5 stating the applicant information for the permit, King County is listed as the owner and Mr.  
6 Donnelly is indicated to be a “contact person.” Exhibit 2 (Plan Cover Sheet).  
7

8 On December 22, 2016, the City of Seattle granted King County a Master Use Permit for  
9 the property. On January 4, 2017, the Appellants timely filed an appeal of the decision.  
10

11 In response to this appeal, King County and Mr. Donnelly, in his capacity as agent for  
12 King County, entered separate appearances alleging to be proper parties in the suit. King County  
13 entered an appearance through the prosecuting attorney’s office and Mr. Donnelly entered an  
14 appearance with McCullough Hill, PS. Exhibits 3 & 4 (Notice of Appearance by King County;  
15 Notice of Appearance by Patrick Donnelly). At no point did the Appellants name Mr. Donnelly  
16 as a party.  
17

### 18 III. ARGUMENT

19 The Hearing Examiner should dismiss Patrick Donnelly as a party to this appeal or,  
20 perhaps more aptly, should confirm that he is not and never was a party. Mr. Donnelly did not  
21 make himself a proper party merely by submitting a notice of appearance in this case.  
22

23 Mr. Donnelly is not a “party” as defined by the Hearing Examiner Rules (HER). He is  
24 neither the “owner” of the property nor an “applicant” within the definition of HER 2.02(e) or  
25 Director’s Rule 5-2003. He has no financial or other legally cognizable interest. Rather, as King  
26 County’s agent, Mr. Donnelly’s interest in this matter is purely derivative of King County’s  
27

1 interest. His participation adds unnecessary procedural complications, unduly burdens the  
2 Appellants and the Hearing Examiner, and does not represent any position that King County will  
3 not also advance. Accordingly, he should be dismissed from this appeal.

4 **A. Mr. Donnelly does not meet any of the definitions of “party” under applicable rules**  
5 **and therefore must be dismissed.**

6 In order to participate in this proceeding, Mr. Donnelly must show that he is a “party” as  
7 that term is defined in the Hearing Examiner Rules. *See* HER 2.02(t). HER 2.02(t) defines a  
8 “party,” in relevant part as, “the person, organization, or other entity that has filed an appeal or is  
9 granted a hearing automatically by law...[or] the person, organization, or other entity who filed  
10 the application, request, or petition for a permit or other type of City authorization or action that  
11 is the subject of the appeal...[or] the owner of the of the property subject to the City decision or  
12 other action.” HER 2.02(t). Mr. Donnelly does not fall within any of these definitions.

13  
14  
15 **1. Mr. Donnelly is not a party under the Hearing Examiner Rules because he is**  
16 **not an applicant.**

17 Under the Hearing Examiner Rules, an “applicant” is the “person, organization or other  
18 entity *who files the application or otherwise formally requests* a permit or other type of City  
19 action that is the subject of an appeal or other review by the Hearing Examiner.” HER 2.02(e)  
20 (emphasis added).

21 Seattle City Land Use Code 23.76.010 states in relevant part:

22  
23 **Applications for Master Use Permits shall be made by the property owner,**  
24 **lessee, contract purchaser, a City agency, or other public agency proposing a**  
25 **project** the location of which has been approved by the City Council by  
26 ordinance or resolution, or by an authorized agent thereof. A Master Use Permit  
applicant shall designate a single person or entity to receive determinations and  
notices from the Director.

27 SMC 23.76.010 (emphasis added). Mr. Donnelly does not fall within any of these categories of  
28 recognized “applicants.” Instead, he is merely the person that King County designated “to

29 MOTION TO DISMISS- 3

1 receive determinations and notices from the Director.”

2 King County’s documents make this abundantly clear. King County filed a Statement of  
3 Financial Interest in support of its Master Use Permit application. Director Rule 5-2003  
4 governing the Statement of financial interest defines an applicant as “[a] person or entity *with a*  
5 *financial interest in the project.*” Director’s Rule 5-2003 (emphasis added). King County admits  
6 in its application that Mr. Donnelly “does not have a financial interest in the project.” Exhibit 1.  
7

8 Moreover, Rule 5-2003 explicitly excludes agents and architects from the definition of  
9 “applicant”:

10 “Applicant,” under this definition does not include **architects, agents,** or other  
11 design professionals who submit applications on behalf of a property owner. Such  
12 person may not sign in lieu of the Owner or the Applicant as defined by the rule.

13 Director’s Rule 5-2003 (emphasis added). Mr. Donnelly is the architect on this project and in its  
14 application materials. King County identifies Mr. Donnelly as its “agent” related to the project.  
15 Exhibit 1. Because Mr. Donnelly is an architect *and* an agent, he is specifically excluded from  
16 being an applicant under Director’s Rule 5-2003.  
17

18 King County’s Statement of Financial Responsibility explicitly recognizes that Mr.  
19 Donnelly is not the “applicant” of the permit. The City of Seattle requires an applicant who is not  
20 the owner of the property to complete the second page of the Statement of Financial  
21 Responsibility/Agent Authorization form. *See* Exhibit 1. King County completed the first page  
22 in which it identified Mr. Donnelly as its agent, an agent without any financial interest in the  
23 project. *Id.* In this project, King County did not submit this second page since the agent doesn’t  
24 have a financial interest. Lowney Decl.  
25

26 Instead, King County filled out an “Agent Authorization” which says that Patrick  
27 Donnelly and his architectural firm may act merely as King County’s “agent for this project.”  
28

1 Exhibit 1. It says that he is the County's "agent is the applicant on this project for contact  
2 purposes only and does not have a financial interest in this project." *Id.*

3 By contrast, King County is identified in several relevant documents filed in support of  
4 its application as both the "owner" and the "applicant." *See e.g.* Exhibits 1 & 2. The application  
5 and supporting documents confirm that Mr. Donnelly is not an owner or an applicant. Instead,  
6 he is merely King County's "agent" and "contact person." Thus, he does not meet the relevant  
7 criteria to qualify as a party pursuant to HER 2.02(t). He must therefore be dismissed.  
8

9 **B. The land use rules barring Mr. Donnelly from participating in this appeal are based  
10 upon well-established legal principles that require a party to have an actual  
11 cognizable interest in the matter, an interest which Mr. Donnelly does not possess.**

12 Mr. Donnelly is an improper party and barred from appearing in this action. The  
13 requirement under the Hearing Examiner Rules that an appeal be defended by a party with an  
14 actual cognizable interest is in line with long-standing, well established legal principles requiring  
15 that actions to be litigated by parties with actual interests at stake.

16 **1. Existing law on real parties in interest and agency support a finding that Mr.  
17 Donnelly is not a party.**

18 Superior Court Civil Rule 17 provides guidance on who may be considered a party by  
19 requiring that "every action shall be prosecuted in the name of the real party in interest." CR 17.<sup>1</sup>  
20 A real party in interest is the person who possesses the right sought to be enforced. *Peyton Bldg.,  
21 LLC v. Niko's Gourmet, Inc.*, 180 Wn. App. 674, 680, 323 P.3d 629 (2014). The real party in  
22 interest is "the person who, if successful, will be entitled to the fruits of the action." *Northwest  
23*

24  
25  
26 <sup>1</sup> Under the City of Seattle Hearing Examiner Rules, "when questions of practice or procedure arise that are not  
27 addressed by these Rules, the Hearing Examiner shall determine the practice or procedure most appropriate and  
28 consistent with providing fair treatment and due process. The Hearing Examiner may look to the Superior Court  
29 Civil Rules for guidance." HER 1.03(c).

1 *Independent Forest Mfrs. v. Dep't of Labor and Indus.*, 78 Wn. App. 707, 716, 899 P.2d 6  
2 (1995).

3 It is black letter law that agents may not litigate matters on behalf of their principals  
4 without an independent, legally recognized interest. *Kim v. Moffett*, 156 Wash. App. 689, 698,  
5 234 P.3d 279, 283–84 (2010) (agent may not forward legal claim of principal without own  
6 legally recognized interest); *Denman v. Richardson*, 284 F. 592, 594 (W.D. Wash. 1921) (agent  
7 may not bring litigation on behalf of principal); *Maynor v. Onslow Cty.*, 488 S.E.2d 289, 291  
8 (N.C. 1997) (an agent of the owner is not a real party in interest and cannot maintain an action  
9 without the owner). The Oregon Land Use Board of Appeals has ruled in a similar case that a  
10 person who is not the applicant for a permit and has no other legally cognizable interest in the  
11 challenged land use decision has no standing to challenge that decision. *Wetherell v. Douglas*  
12 *Cty.*, 54 Or. LUBA 782; 2007 Ore. Land Use Bd. App. Lexis 76 (May 23, 2007) (the person who  
13 sought to litigate the land use appeal did not sign the application and was only identified as a  
14 representative of the actual owner. She therefore could not be considered an “applicant under any  
15 reasonable definition of that term”).  
16  
17  
18

19 Mr. Donnelly is not a real party in interest because he is an agent who does not possess  
20 the right to be enforced or defended in this matter. The right to be enforced in this case is King  
21 County’s ability to begin work on construction of the youth jail. And, the principal, King  
22 County, as the true applicant and owner of the property on which the youth jail would be  
23 constructed, possesses that right. *See* Exhibits 1 & 5 (No Protest Agreement). Furthermore,  
24 because Mr. Donnelly’s agency is limited to being a contact person for King County, he has no  
25 financial interest in the project and will not be entitled to the “fruits of the action” if successful.  
26  
27  
28

1           Moreover, because he has no independent interest in this appeal, Mr. Donnelly has no  
2 standing to defend the City’s decision. Standing refers to the demonstrated existence of an injury  
3 to a legally protected right. *Peyton Bldg., LLC v. Niko’s Gourmet, Inc.*, 180 Wn. App. at 680.  
4 Standing generally prohibits a party from asserting another’s legal right. *West v. Thurston*  
5 *County*, 144 Wn. App. 573, 578, 183 P.3d 246 (2008). For these reasons, Mr. Donnelly would  
6 have been barred from intervening in this action even if he had sought it.<sup>1</sup>  
7

8           A litigant may have third party standing if “(1) the litigant has suffered an injury-in-fact,  
9 giving him a sufficiently concrete interest in the outcome of the disputed issue; (2) the litigant  
10 has a close relationship to the third party; and (3) there exists some hindrance to the third party’s  
11 ability to protect his or her interests.” *Ludwig v. Dep’t of Ret. Sys.*, 131 Wn. App. 379, 385, 127  
12 P.3d 781 (2006).  
13

14           As detailed above, Mr. Donnelly lacks any legitimate, non-derivative interest in this  
15 appeal. He has not suffered an injury in fact to a legally protected right. Furthermore, King  
16 County is fully able to defend its own interests. Indeed, during the pre-hearing conference, King  
17 County’s attorney indicated that King County would bring dispositive motions on the same  
18 subjects as Mr. Donnelly’s forthcoming dispositive motions.  
19

20 //

21  
22  
23  
24 <sup>1</sup> HER 3.09 allows for intervention and provides that:

25           A person, organization or other entity who has not filed an appeal may request by motion to  
26 participate in the appeal...The request must...demonstrate a substantial interest that is not  
otherwise adequately represented.

27 As detailed above, Mr. Donnelly has no actual interest in the property or transaction at issue here. King County is  
28 the owner, applicant and party. Mr. Donnelly is not. King County will represent any limited, derivative interest he  
may have.

1  
2 **C. Allowing Mr. Donnelly to appear as a party in this action will unnecessarily burden**  
3 **the Hearing Examiner and unduly prejudice the Appellants.**

4 Mr. Donnelly's participation in this appeal is unnecessary, duplicative, and prejudicial.

5 Unlike the over seventy Appellants who have pursued a common litigation strategy and present a  
6 unified appeal, Mr. Donnelly seeks to participate in this action solely to make arguments and  
7 present evidence that support the County's position, a position that the County is very able to  
8 present on its own.

9  
10 Allowing the County to present the same arguments and evidence from two different  
11 litigants, unnecessarily complicates this matter, prejudices the Appellants' ability to present their  
12 case, and provides the hearing examiner with nothing additional that she would not have if the  
13 County alone were litigating this action.

14  
15 For example, as discussed at the pre-hearing conference, Mr. Donnelly seeks to introduce  
16 evidence from three to five experts in addition to the four to six experts that the County will  
17 present. Requiring the Appellants to conduct seven to eleven depositions and review documents  
18 and reports related to each expert that will be undoubtedly duplicative, since the only case that  
19 Mr. Donnelly will be putting on will be in favor of King County's permit. As the real party in  
20 interest in this appeal, the County has the means and wherewithal to present all relevant  
21 arguments and evidence. Mr. Donnelly will simply reiterate the County's position, significantly  
22 increasing the burden and expense of the litigation, while presenting nothing new or relevant that  
23 the County could not also present.

24  
25  
26 Another example is the dispositive motions. Appellants have less than two weeks to  
27 respond to dispositive motions on behalf of around seventy groups. Yet, King County admits



1 that its dispositive motions will cover the same subjects as Mr. Donnelly's – and the County  
2 made this representation even though audio problems prevented the County attorneys from  
3 hearing the description of Mr. Donnelly's dispositive motions. The County knows that its issues  
4 will be the same because Mr. Donnelly is simply an agent for the County.

5  
6 Mr. Donnelly is not a party to this appeal; has no independent, cognizable interest in its  
7 outcome; and will provide the Hearing Examiner with nothing additional beyond which the  
8 County can introduce. Accordingly, he should be dismissed from this appeal and any motion or  
9 other papers that he has filed should be stricken.

10 **D. Allowing an architect to litigate for a project alongside his employer sets a**  
11 **dangerous precedent.**

12 It is clear from the prehearing conference that the attempted appearance of Mr. Donnelly  
13 is nothing more than an artifice to drive up the costs and burden of this land use appeal. Both  
14 King County and Mr. Donnelly stated an intent to bring overlapping dispositive motions and  
15 present duplicative expert witnesses. Allowing one party of interest to litigate as two parties – as  
16 itself and through an agent – increases the cost and burden of a land use appeal process that is  
17 already out of reach for the public. If this is allowed, then most well-heeled developers can be  
18 expected to follow suit, undermining the stated goal of the Office of the Hearing Examiner to  
19 make land use appeals efficient and accessible to the public.  
20

21  
22 Indeed, while King County designated an architect as the agent and contact person for  
23 this project, another applicant could have just as easily designate a land use attorney for that task.  
24 Then, following Mr. Donnelly's theory, the applicant's attorney could retain his own attorneys to  
25 defend the permit before the hearing examiner. The Hearing Examiner rules and the caselaw  
26

1 limiting party status to the real parties in interest are intended to prevent such unnecessary  
2 inefficiencies.

3 **E. Granting party status to Mr. Donnelly undermines transparency.**

4 Finally, apart from the legal authority requiring Mr. Donnelly's dismissal, it should be  
5 noted that allowing Mr. Donnelly to hire counsel for the proceeding also undermines the  
6 transparency of this appeal process and good government interests. The public has a right to  
7 understand the role of their local governments in this appeal process, and it appears that one of  
8 the purposes of Mr. Donnelly's participation is to obfuscate the County's role in this litigation.  
9 If King County wishes to make an argument, it should put it on its pleading paper and not  
10 pretend that the argument is coming from a third party. Allowing a government to litigate  
11 through an agent has the potential to expand and degrade the litigation, since political  
12 accountability leads to efficiency and a higher level of decorum.

13 This is especially true here. As the Hearing Examiner is undoubtedly aware this project  
14 has generated tremendous opposition from many quarters. The opposition includes not only the  
15 numerous organizations and individual that have joined this appeal, but also Mayor Murray,  
16 many members of the Seattle City Council, and at least one King County Councilperson. *See*  
17 Exhibits 6 (letter from Mayor Murray) and 7 (Editorial by Seattle City Councilmember Bruce  
18 Harrell and King County Councilmember Rod Dembowski opposing youth jail). Mr. Donnelly's  
19 efforts to bar the Hearing Examiner from addressing the poor planning and terrible social costs  
20 associated with this project is a bold effort to protect the County from having to present  
21 politically inexpedient arguments. Mr. Donnelly brings nothing to this case except for political  
22 cover for the County.

1 Similarly, this project is already \$15 million over budget, Exhibit 7, and there would  
2 typically be accountability for a government's decision to use two law firms to put on a single  
3 case, filing duplicative motions, hiring duplicative experts, etc. Allowing Mr. Donnelly to hire  
4 outside counsel allows the County to appear frugal (by using county attorneys), while the  
5 taxpayers' costs to hire outside counsel is hidden in the details of project budgets. The Hearing  
6 Examiner should not endorse the fiction that the County's agent is somehow a separate party in  
7 interest, entitled to put on its own duplicative case at taxpayer's expense.  
8

9 **IV. MOTION TO STRIKE**


10 Because Mr. Donnelly is not a proper party, his pleadings, including any dispositive  
11 motions he may file, should be stricken.  
12

13 **V. CONCLUSION**

14 For the reasons stated above, Appellant respectfully requests that the Hearing Examiner  
15 remove Patrick Donnelly as a party to this appeal and strike all motions filed by Mr. Donnelly.  
16

17 RESPECTFULLY SUBMITTED this 3rd day of February, 2017.  
18

19 SMITH & LOWNEY, PLLC  
20

21 By:   
22 Knoll Lowney, WSBA No. 23457  
23 Claire E. Tonry, WSBA No. 44497  
24 Meredith Crafton, WSBA No. 46558  
25 Katherine Brennan, WSBA No. 51247  
26 Attorneys for Plaintiffs  
27 2317 E. John St.  
28 Seattle, WA 98112  
29 Tel: (206) 860-1394  
Fax: (206) 860-4187  
E-mail: knoll@igc.org, claret@igc.org, meredithc@igc.org,  
katherineb@igc.org