

**BEFORE THE HEARING EXAMINER
CITY OF SEATTLE**

In the Matter of the Appeal of

EPIC, ET AL.

from a decision by the Director,
Department of Construction and
Inspections

Hearing Examiner File:
**MUP-17-001
(W, MOD. STDS.)**

Department Reference:
3020845

**ORDER ON APPELLANTS'
MOTION FOR
RECONSIDERATION**

On March 1, 2017, the Hearing Examiner entered an order in this case dismissing EPIC's ("Appellants'") appeal for lack of jurisdiction. On March 3, 2017, the Appellants filed a motion for reconsideration of the order, and on March 14, 2017, filed their memorandum in support of the motion. The Applicant, Patrick Donnelly, and King County ("Respondents") responded to the motion on March 20, 2016, as did the Seattle Department of Construction and Inspections ("Department"). The Department had joined in the portion of the Respondents' motion to dismiss that was granted by the Examiner but now supports the Appellant's motion for reconsideration of the Examiner's order on that motion. This led the Respondents to file a reply to the Department's response to the motion for reconsideration. The Appellants then filed a reply in support of their motion for reconsideration on March 24, 2017.

Motions for reconsideration are governed by HER 3.20(a), which reads as follows:

3.20 RECONSIDERATION

(a) The Hearing Examiner may grant a party's motion for reconsideration of a Hearing Examiner decision if one or more of the following is shown:

- (1) Irregularity in the proceedings by which the moving party was prevented from having a fair hearing;
- (2) Newly discovered evidence of a material nature which could not, with reasonable diligence, have been produced at hearing;
- (3) Error in the computation of the amount of damages or other monetary element of the decision;
- (4) Clear mistake as to a material fact.

The Appellants did not address this rule in their motion and supporting memorandum, which were devoted entirely to an expanded response to the legal merits of the Respondents' motion to dismiss

and argument that the Examiner's order granting the motion was based on an error of law. In their reply memorandum, the Appellants continue to argue that the Examiner's decision resulted from an error of law, but that is not one of the bases for reconsideration under HER 3.20(a).

In their reply, the Appellants also assert that the order of dismissal "was erroneous and prevented a fair hearing" and therefore constitutes an "irregularity in the proceedings by which the moving party was prevented from having a fair hearing" under HER 3.20(a)(1). The Department also cites this ground for reconsideration in its response to the motion for reconsideration, arguing that it would be "unfair to ignore the more complete review of the relevant code provisions presented by Appellant [in briefing on the motion for reconsideration]." However, under Superior Court Civil Rule 59(a)(1), on which HER 3.20(a)(1) is loosely based,¹ irregularities in the proceedings that could warrant a new trial are generally actual irregularities "in the proceedings," such as instances of a trial court's lack of impartiality,² or juror misconduct.³ The HERs do not include a requirement for a hearing on a motion to dismiss, and such hearings are rare. The Appellants were given a full opportunity to respond to the motion to dismiss and did so. They did not request argument on the motion. An order granting a motion to dismiss an appeal eliminates the need for a hearing on the appeal. It does not constitute an "irregularity in the proceedings" that prevents a party from having a fair hearing. There is no evidence of irregularity in the proceedings in this case.

The Appellants also argue in reply that new evidence warrants granting the motion for reconsideration. They offer documents from City and King County records relating to the legislative history of code amendments addressing the King County Children and Family Justice Center project,⁴ as well as a declaration from one member of the City Council.⁵ Nonetheless, like CR 59(a)(4), the basis for reconsideration under HER 3.20(2) is "[n]ewly discovered evidence of a material nature *which could not, with reasonable diligence, have been produced at hearing.*"⁶ In this case, the inquiry is whether the evidence offered as new in the motion for reconsideration could, with reasonable diligence, have been produced in the Appellant's response to the motion to dismiss. As noted, the new evidence consists of documents readily available in the public record and a declaration from a city councilmember. As a general rule, a motion for a new trial, or in this case, a motion for reconsideration, will not be granted on the ground of newly discovered evidence where the moving party did not use due diligence to discover that evidence.⁷ Further, "[e]vidence which is a matter of public record is not a sufficient ground for the granting of a new trial."⁸ The Appellants made no showing of why the evidence they offer in their motion for reconsideration

¹ HER 1.03(c) provides that the Examiner may look to the Superior Court Civil Rules for guidance when questions of practice or procedure arise that are not addressed by the HERs.

² See *Edwards v. Le Duc*, 157 Wn. App. 455, 459–60, 238 P.3d 1187 (2010).

³ See *Marvik v. Winkelman*, 126 Wn. App. 655, 663–64, 109 P.3d 47 (2005).

⁴ See Declaration of Knoll Lowney In Support of Motion for Reconsideration.

⁵ See Declaration of Seattle City Councilmember Michael O'Brien in Support of Appellants' Motion for Reconsideration. This declaration was filed with the Appellants' memorandum in support of their motion for reconsideration. The Respondents have asked that the declaration be stricken as irrelevant and immaterial, but that is unnecessary in light of the basis for the Examiner's ruling on the motion for reconsideration.

⁶ Emphasis added.

⁷ See *Wick v. Irwin*, 66 Wn.2d 9, 12, 400 P.2d 786 (1965).

⁸ *Anderson v. Bauer*, 121 Wash. 112, 114, 208 P. 259, 260 (1922) (citation omitted).

could not, with reasonable diligence, have been produced with their response to the motion to dismiss. A realization that a response to a motion to dismiss may have been insufficient does not mean that information presented with a motion for consideration is newly discovered evidence.⁹

The motion for reconsideration does not meet any of the criteria for reconsideration in HER 3.20 and is therefore **DENIED**.

Entered this 28th day of March, 2017.



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Concerning Further Review

NOTE: It is the responsibility of the person seeking to appeal a Hearing Examiner decision to consult Code sections and other appropriate sources, to determine applicable rights and responsibilities.

The decision of the Hearing Examiner in this case is the final decision for the City of Seattle. In accordance with RCW 36.70C.040, a request for judicial review of the decision must be commenced within twenty-one (21) days of the date the the order on the motion for reconsideration is issued.

The person seeking review must arrange for and initially bear the cost of preparing the record. Please direct all mail to: PO Box 94729, Seattle, Washington 98124-4729. Office address: 700 Fifth Avenue, Suite 4000. Telephone: (206) 684-0521.

⁹ Cf. *Adams v. Western Host, Inc.*, 55 Wn.App. 601, 608, 779 P.2d 281 (1989)(The realization that a first declaration was insufficient did not qualify the second declaration as newly discovered evidence.).

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CITY OF SEATTLE**

CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on this date I sent true and correct copies of the attached **Order on Appellant's Motion for Reconsideration** to each person listed below, or on the attached mailing list, in the matter of **EPIC et al.** Hearing Examiner File: **MUP-17-001 (W)** in the manner indicated.

Party	Method of Service
<p>Epic et al. c/o Knoll Lowney, Claire Tonry, Meredith Crafton, Katherine Brennan Smith & Lowney PLLC</p> <p>knoll@igc.org clairet@igc.org meredithc@igc.org katherineb@igc.org</p> <p>Nick Allen, Rhona Taylor, and Nick Straley Columbia Legal Services</p> <p>nick.allen@columbialegal.org rhona.taylor@columbialegal.org nick.straley@columbialegal.org</p> <p>Maureen Janega maureen.janega@columbialegal.org</p> <p>Odile Valenzuela odile.valenzuela@columbialega.org</p>	<p><input type="checkbox"/> U.S. First Class Mail, postage prepaid</p> <p><input type="checkbox"/> Inter-office Mail</p> <p><input checked="" type="checkbox"/> E-mail</p> <p><input type="checkbox"/> Fax</p> <p><input type="checkbox"/> Hand Delivery</p> <p><input type="checkbox"/> Legal Messenger</p>
<p>Patrick Donnelly c/o Courtney Kaylor and Jack McCullough McCullough Hill Leary, P.S.</p> <p>courtney@mhseattle.com jack@mhseattle.com</p> <p>Laura Counley lcounley@mhseattle.com</p>	<p><input type="checkbox"/> U.S. First Class Mail, postage prepaid</p> <p><input type="checkbox"/> Inter-office Mail</p> <p><input checked="" type="checkbox"/> E-mail</p> <p><input type="checkbox"/> Fax</p> <p><input type="checkbox"/> Hand Delivery</p> <p><input type="checkbox"/> Legal Messenger</p>

SDCI c/o Liza Anderson Assistant City Attorney Liza.Anderson@seattle.gov Alicia Reise Alicia.Reise@seattle.gov	<input type="checkbox"/> U.S. First Class Mail, postage prepaid <input type="checkbox"/> Inter-office Mail <input checked="" type="checkbox"/> E-mail <input type="checkbox"/> Fax <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Legal Messenger
King County c/o Cristy Craig King County Prosecutor Cristy.Craig@kingcounty.gov Monica Erickson Monica.Erickson@kingcounty.gov	<input type="checkbox"/> U.S. First Class Mail, postage prepaid <input type="checkbox"/> Inter-office Mail <input checked="" type="checkbox"/> E-mail <input type="checkbox"/> Fax <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Legal Messenger

Dated: March 28, 2017

TK

Tiffany Ku
Legal Assistant