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8 BEFORE THE HEARING EXAMINER
9 FOR THE CITY OF SEATTLE

10 In the Matter of the Appeal of:

11 Livable Phinney, a Washington non-profit
12 corporation

13 From a Department of Construction and
14 Inspections decision.

No. MUP 17-009 (DR, W)

SDCI Reference: 3020114

RESPONSE IN OPPOSITION TO
APPELLANT’S MOTION FOR
CONTINUANCE

15
16 **I. INTRODUCTION**

17 The applicant Johnson & Carr, Inc. (“Applicant”) requests that the Hearing Examiner
18 deny the motion for continuance made by appellant Livable Phinney (“Appellant”). Appellant
19 fails to establish the prerequisite showing of a “good cause” necessary for a continuance. *See*
20 Hearing Examiner Rules (“HER”) 2.20(a). In fact, the circumstances that prompted Appellant
21 to file the motion are of its own making. At the prehearing conference, where parties discussed
22 discovery and scheduling and agreed to a hearing date, Appellant failed to inform the Hearing
23 Examiner or the parties that it intended to seek a delayed Public Records Act (“PRA”) request
24 regarding Appellant’s February 7, 2017 Request for Interpretation, on March 30, 2017—the date
25 the City issued its Interpretation. This is not good cause and is contrary to the Hearing
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1 Examiner's stated goal to conduct an expeditious hearing where all parties are required to "make
2 every effort to avoid delay." HER 2.06. Moreover, Applicant's lead counsel, Jessica M.
3 Clawson, is unavailable starting in mid-May due to maternity leave. It would greatly prejudice
4 the Applicant if Ms. Clawson was unable to represent the Applicant at hearing. The Hearing
5 Examiner should deny Appellant's motion.
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7 **II. FACTS**

8 To accommodate Appellant's counsel's long-planned vacation on April 9, 2017 – April
9 23, 2017, the parties agreed to hold the hearing on May 1-3, 2017, a full three months after the
10 appeal was filed. In mid-March, the Hearing Examiner requested that the hearing be moved to
11 May 2-4, 2017, so as to not conflict with any potential May Day protests. Amended Prehearing
12 Conference Order, dated March 14, 2017. Appellant did not mention in mid-March that it
13 intended to submit a PRA request on March 30, 2017. Only now, less than a month before the
14 scheduled hearing date, does the Appellant seek a continuance of the hearing.
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16 Appellant filed two Public Records Act requests with the City of Seattle. The first
17 request was submitted on February 14, 2017, a week after Appellants filed their appeal and three
18 weeks after the MUP decision was published. The second request was not submitted until March
19 30, 2017. At the pre-hearing conference dated February 27, 2017, Appellant noted it submitted a
20 PRA request for several documents relating to the project, and that it was anticipated that the
21 documents would be provided by March 15, 2017. Appellant requested that the Hearing
22 Examiner consider, when scheduling the hearing, the potential likelihood that the City may not
23 fully meet this deadline. The Hearing Examiner complied and scheduled the hearing for May 1,
24 2017 (now May 2, 2017). On March 31, 2017, the City informed Appellant that the remaining
25 responsive documents related to Appellant's February 14, 2017 PRA request were available for
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1 review. All parties agreed to this date and did not raise concerns regarding ability to complete
2 discovery in the next two months prior to the scheduled hearing date. At no time during the
3 prehearing conference did Appellant inform the Hearing Examiner or the parties that it planned
4 to submit another PRA request on the Interpretation on March 30, 2017, even though the City of
5 Seattle committed at the pre-hearing conference to publication of its Interpretation on that date.
6 Appellant sought limited discovery of specific files in the Applicant's possession, but did not
7 seek discovery of files in the possession of the City.
8

9 III. ISSUE

10 Should the Hearing Examiner deny Appellant's motion to continue the hearing for an
11 additional month where the Appellant has failed to establish any "good cause," such delay would
12 prejudice the Applicant, and the motion does not comply with HER 2.06 and 2.20(a)?
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14 IV. EVIDENCE RELIED UPON

15 This Response relies on declaration of Kelsie Clemons and the pleadings and papers on
16 file in this matter.
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18 V. ARGUMENT

19 The schedule set by the Pre-Hearing Order controls the subsequent proceedings, unless a
20 party moves to continue the hearing for good cause shown. HER 2.20(a). Here, good cause does
21 not exist, and any delay of the hearing would greatly prejudice the Applicant. The Hearing
22 Examiner Rules require that hearings are conducted "expeditiously" and that parties "make every
23 effort to avoid delay." HER 2.06. Contrary to this mandate, Appellant seeks a continuance to
24 accommodate a delay of its own making. Appellant's request to delay the hearing until mid-
25 June, in part to accommodate Appellant's unavailability due to being out of the country from
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1 May 11 to 22, 2017, does not comply with Rule 2.06 or Rule 2.20(a) and does not meet the
2 standards for the continuance. Its motion must be denied.

3 Appellant argues a continuance is appropriate because the City will not be able to
4 produce documents related to Appellant's PRA request for records relating to the Interpretation
5 until May 3, 2017. Appellant's Motion, pp. 2-3. This is unavailing. The Interpretation issued
6 on March 30, 2017 as a result of Appellant's February 7, 2017, request for interpretation, speaks
7 for itself. If Appellant is interested in determining how the City wrote its Interpretation, it will
8 have a full opportunity to flesh out this information at hearing.

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10 Moreover, Appellant did not submit its second PRA request until March 30, 2017,
11 approximately one month prior to the scheduled hearing. Indeed, despite knowing that the City's
12 Interpretation would be issued on March 30, 2017, and despite agreeing to schedule the hearing
13 on the Interpretation and other issues raised in the appeal approximately one month later,
14 Appellant failed to inform the Hearing Examiner at the prehearing conference that it would seek
15 a delayed PRA request regarding the Interpretation on March 30, 2017. *See* Declaration of
16 Kelsie Clemons ("Clemons Decl."), pp. 2-4.

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18 Nothing precluded Appellant from either submitting a PRA request prior to issuance of
19 the Interpretation or seeking targeted discovery of the City's records. The Hearing Examiner
20 provided the Appellant more than ample time to prepare for the hearing, and offered Appellant
21 the opportunity to seek discovery. Other than requesting limited discovery of the Applicant, the
22 Appellant chose to instead seek a two broad PRA requests to the City—one on February 14,
23 2017, to which Appellant has received all responsive documents, and a second request dated
24 March 30, 2017.

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27 Waiting to file a PRA request 33 days before the hearing and then requesting that the

1 Hearing Examiner continue the hearing until the City provides responsive documents is not good
2 cause. Indeed, if Appellant was permitted to continue a hearing on this basis alone, all future
3 appellants would be motivated to seek a PRA request at the last minute merely to secure delay.
4 Having chosen not to conduct any discovery, timely seek a PRA request on documents related to
5 the Interpretation, or timely inform the Hearing Examiner at the time of the prehearing
6 conference that Appellant would seek a delayed PRA request, Appellant cannot now complain he
7 lacks documents necessary to his case. *See* Clemons Decl., pp. 2-4.

9 Finally, any additional delay to the resolution of this appeal greatly prejudices the
10 Applicant. Under the Hearing Examiner's Rules of Practice and Procedure, hearings must be
11 conducted expeditiously, and all parties must seek to avoid delay. See HE Rules 2.06, 2.20(a).
12 To accommodate the Appellant's schedule, Applicant has already agreed to a hearing date in
13 May, three months after publication of the City's decision. Lead counsel for the Applicant, Ms.
14 Clawson, will be going on maternity leave starting in mid-May. Ms. Clawson has been
15 representing the Applicant since the beginning of the Project's entitlements process, and is
16 intimately familiar with the issues on appeal as well as the development of the Project.
17 Applicant would be prejudiced to not have the benefit of her institutional knowledge of the
18 project. Applicant accordingly requests that Appellant's motion be denied.

21 VI. CONCLUSION


22 Applicant requests that the Hearing Examiner deny Appellant's motion for continuance.

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DATED this 11th day of April, 2017.

MCCULLOUGH HILL LEARY, P.S.

By: 
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Attorneys for Applicant