BEFORE THE HEARING EXAMINER
FOR THE CITY OF SEATTLE

In the Matter of the Appeal of: Livable Phinney, a Washington non-profit corporation From a Department of Construction and Inspections decision.	No. MUP 17-009 (DR, W) SDCI Reference: 3020114 RESPONSE IN OPPOSITION TO APPELLANT'S MOTION TO REOPEN RECORD

I. INTRODUCTION

In an attempt to further delay the resolution of this matter, Appellant now seeks to reopen the record to include information that will not assist the Hearing Examiner in his decision. The applicant Johnson & Carr, Inc. ("Applicant") requests that the Hearing Examiner deny this late motion to reopen the record made by appellant Livable Phinney ("Appellant"). Appellant fails to establish the prerequisite showing of a "good cause" necessary to reopen the record, and instead misconstrues the City's position in its Interpretation to support its request to include new and immaterial information. *See* Hearing Examiner Rules ("HER") 2.20(c).

Moreover, Appellant did not request the new information on the bus arrival times until after the close of the hearing, failed to inform the Hearing Examiner of his intention to seek to

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reopen the record at the conclusion of the hearing, and failed to note that Appellant sought this additional information from King County in its closing brief, filed after Appellant filed a request for the information with King County. This request is contrary to the Hearing Examiner's stated goal to conduct an expeditious hearing where all parties are required to "make every effort to avoid delay." HER 2.06.

The appeal was filed over four months ago. It would greatly prejudice the Applicant to further delay the resolution of this matter by reopening the record to include information for which Appellant failed to show good cause to include at this late date and that is not relevant to the Hearing Examiner's determination. The Hearing Examiner should deny Appellant's motion.

II. FACTS

Appellant filed its appeal on February 6, 2017. The Hearing Examiner held an open record hearing from May 2-5, 2017. Sometime after the hearing, Dr. Roberto Altschul requested data from King County Metro for the bus arrival and departure times from March 13, 2017 to April 28, 2017.[1] Only now, two days prior to the scheduled due date of the Hearing Examiner's decision under SMC 23.76.023.C.10,[2] does Appellant seek to reopen the record.

III. ISSUE

Should the Hearing Examiner deny Appellant's motion to reopen the record where the Appellant has failed to establish any "good cause," further delay would prejudice the Applicant, the motion does not comply with HER 2.06 and 2.20(c), and the evidence Appellant seeks to admit is not relevant to the Hearing Examiner's determination?

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[1] Appellant's motion states that Mr. Altschul waited more than 2 months for the information from King County Metro. According to Mr. Altschul's statements, this is untrue. Mr. Altschul requested the information after the hearing, which ended on May 5, 2017. Mr. Altschul received the data on June 15, 2017. This is not a span of more than two months.

[2] The Hearing Examiner has asked for oral argument on the motion, scheduled for June 27, 2017.

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IV. EVIDENCE RELIED UPON

This Response relies on the pleadings and papers on file in this matter.

V. ARGUMENT

The Hearing Examiner may reopen the record and/or hearing for good cause shown under HER 2.20(a). Here, good cause does not exist, and any additional delay of the resolution of this matter would greatly prejudice the Applicant. The Hearing Examiner Rules require that hearings are conducted "expeditiously" and that parties "make every effort to avoid delay." HER 2.06. Contrary to this mandate, Appellant seeks to reopen the record to include information regarding the bus arrival and departure times in March 2017. This attempt to supplement the record at this late date must fail.

Appellant's explanations of "good cause" are insufficient. First, to support its argument of good cause, Appellant attempts to reargue the merits and points to testimony of David Graves. However, it is unclear from the cited passages what testimony Appellant is relying upon, as the first passage cited discusses exhibits and the second passage discusses a view analysis. There is accordingly nothing to which Applicant can reasonably respond to. Even if there were, however, data from arrival times of buses in March 2017 is a red herring. The question in the interpretation was whether the City should require a statistical analysis of actual headway data, in addition to or in lieu of relying upon King County Metro bus schedules. *See* Interpretation Request, p. 13. The City's Interpretation clearly concludes that only schedules should be used in determining frequent transit, even if there are occasions where a bus does not meet its schedule stop. *See* Exh. 6 at 10. If the City Council had wanted to require an analysis of actual headway data, it would have adopted legislation requiring it.

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Second, Appellant argues that "SDCI's code interpretation was based on mere conjecture that adding two more morning buses would bring actual headways up to the minimum 15 minutes." Motion, at p. 2. This is not true. *See* Exh. 6, p. 10. Indeed, the Code interpretation simply concludes that schedules, and not actual data, should be used to determine whether a project site meets the definition of Frequent Transit Service. *Id.* The Code interpretation also states that the March 2017 schedule shows that the project site meets this definition of frequent transit. *Id.* Nowhere does the City state that the addition of two buses on Route 5 was a key determinant for the City in concluding that the project site meets the definition of frequent transit, nor does it conclude that it should rely upon, or plans to rely upon, actual data. Exh. 6; *see generally* Testimony of David Graves. Indeed, the Interpretation very clearly states that actual data should not be used. Exh. 6. The inclusion of this new information is accordingly irrelevant.

Third, Appellant misconstrues the Hearing Examiner's decision in *Fremont Neighbors* to argue that evidence as to actual headways would be admissible. *Fremont Neighbors* did not hold that the results of actual service should be used to determine frequent transit. Indeed, the Hearing Examiner declined to entertain this argument because the appellants in that case did not request an interpretation under SMC 23.88.020. *In Re Fremont Neighborhood Council,* MUP-14-022, Conclusion ¶10.

Because the City's Interpretation focused on the question asked—whether published bus schedules or actual data from several months prior to the analysis should be used—Appellant seeks to reopen the record to introduce information that is immaterial to the issue that the Hearing Examiner is deciding under the Appellant's request for interpretation. As the overwhelming evidence at the hearing showed, the City's determination in its Interpretation that

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it should rely upon the bus schedules is reasonable and not in clear error.

Finally, any additional delay to the resolution of this appeal greatly prejudices the Applicant. Under the Hearing Examiner's Rules of Practice and Procedure, hearings must be conducted expeditiously, and all parties must seek to avoid delay. *See* HE Rules 2.06, 2.20(a). Appellant failed at the hearing to either request that the hearing should be continued until it receives the data from King County Metro or at least notify the parties and the Hearing Examiner that it intended to request said data from the county. Appellant did not even request the data until sometime after the conclusion of the hearing. Importantly, in its closing brief, Appellant did not notify the Hearing Examiner and the parties that it had requested additional data from King County. SMC 23.76.023.C.10 requires the Hearing Examiner to issue his decision with 15 days after the close of the hearing, which was calculated to be June 21, 2017. The Applicant would be greatly prejudiced by the inclusion of this information, as it does not have an ability to cross examine the witness and opening the hearing to allow for such cross examination would further delay a matter that has been under appeal for over four months. Further delay is unacceptable.

There is no good cause shown that supports reopening the record to include the new testimony and information. Applicant accordingly requests that Appellant's motion be denied.

VI. CONCLUSION

Applicant requests that the Hearing Examiner deny Appellant's motion to reopen the record.

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DATED this 26th day of June, 2017.

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