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BEFORE THE HEARING EXAMINER
CITY OF SEATTLE

<p>In the Matter of the Appeal of:</p> <p>WALLINGFORD COMMUNITY COUNCIL, ET AL.,</p> <p>of the adequacy of the FEIS issued by the Director, Office of Planning and Community Development.</p>	<p>Hearing Examiner File</p> <p>W-17-006 through W-17-014</p> <p>CITY OF SEATTLE’S MOTION TO COMPEL</p>
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I. INTRODUCTION AND RELIEF REQUESTED

Respondent City of Seattle (“City”) requests that the Hearing Examiner compel the Appellants listed below (collectively, “Named Appellants”) to immediately and completely respond to the City’s First Set of Interrogatories and Requests for Production, propounded upon the Appellants on January 5, 2018 (“City’s Discovery”). The City’s Discovery was narrowly tailored to obtain information pertaining to the identity of, facts known to, and opinions held by the Appellants’ expert witnesses. The City needs this information to prepare for depositions and hearings and is entitled to the Appellants’ responses under the rules of discovery.

As of the filing of this motion, the following Appellants have failed to substantively respond to the City’s Discovery, offering only meritless objections:

- Fremont Neighborhood Council;
- Seniors United for Neighbors and

1 • Morgan Community Association,
2 Additionally, the following Appellants have only partially responded to the City's
3 discovery, providing substantive responses for some, but not all, of their expert witnesses
4 that are listed in their witness lists:

- 5 • West Seattle Junction Neighborhood Organization;
6 • Seattle Coalition for Affordability, Livability, and Equity; and,
7 • Friends of North Rainier Neighborhood Plan.

8 None of the Named Appellants have completely responded to the City's
9 Discovery. They do not offer any legitimate objections that excuse their failure to
10 respond. Further delay will frustrate the City's discovery efforts and impede its ability to
11 prepare for depositions and for hearing.

12 **II. STATEMENT OF FACTS**

13 On January 5, 2018, the City served the City's Discovery on the Appellants in this
14 case. With the exception of one Appellant, Wallingford Community Council, the City's
15 Discovery to each Appellant consisted of three interrogatories and four requests for
16 production narrowly tailored to obtain information and documents pertaining to the
17 identify of, facts known to, and opinions held by the Appellants' expert witnesses
18 pursuant to Hearing Examiner Rules of Procedure ("HER") 3.11 and CR 26, 33, and 34.
19 The City's Discovery also included additional interrogatories and requests for production
20 tailored to each Appellant's Notice of Appeal, intended to clarify each Appellant's
21 specific allegations.¹

22 In their initial written responses, the Named Appellants simply asserted that they
23 had not yet identified their experts and responded only with boilerplate placeholder
24

25 ¹ Declaration of Jeffrey S. Weber ("Weber Dec."), Exhs. A-F.

1 language and objections.² On April 10, 2018, after Appellants had filed their preliminary
2 witness lists in which the Appellants designated expert witnesses, the City's counsel wrote
3 to Appellants and requested that they supplement their responses to the City's Discovery.
4 The City requested the supplemental responses by April 16 to prepare for depositions.³
5 The Named Appellants failed to provide supplemental responses by April 16 as
6 requested.⁴

7 At the request of the City's counsel, on April 23, 2018, counsel and Appellants'
8 representatives held a discovery conference to address Appellants' failure to adequately
9 respond to the City's Discovery.⁵ During the discovery conference counsel for several
10 Named Appellants stated that supplemental responses to the City's discovery requests
11 were forthcoming and requested additional time to provide those responses. The City's
12 counsel responded that the City would withhold filing the instant motion until close of
13 business on April 24, 2018. In the absence of adequate supplemental responses, the City
14 would, however, be compelled to file this motion.

15 As of 2:30 p.m. on April 25, 2018, the City has received the following
16 supplemental responses:

- 17 • JuNO's disclosures pertaining to one of its experts, Janine Rees;
- 18 • SCALE's disclosures pertaining to one of its experts, Eugenia Woo, upon
19 which FNR also intends to rely;
- 20 • Friends of Ravenna-Cowen's disclosures pertaining to one expert jointly
21 named with SCALE, Lawrence Kreisman, upon which SCALE intends to rely;

22 ² *Id.*, ¶ 2-7; Exhs. A-F.

23 ³ *Id.*, Exh. G.

24 ⁴ *Id.*, ¶ 8.

25 ⁵ *Id.*, ¶ 9. The City scheduled the discovery conference on that day to accommodate several Appellant requests for additional time to respond to the City's letter dated April 10, 2018. Despite their requests for additional time to respond, none of the Named Appellants supplemented their discovery responses within that extension as was suggested.

- 1 • Friends of North Rainier’s disclosures pertaining to one of its experts, Spencer
2 Howard, upon which SCALE also intends to rely; and
- 3 • Friends of North Rainier’s disclosures pertaining to one of its experts, Jennifer
4 Ott.⁶

5 All of the Named Appellants, including the Appellants who have provided
6 supplemental disclosures, have additional experts for whom no supplemental disclosures
7 have been provided. Except as described above, the Named Appellants have not provided
8 a response beyond their initial response, which consisted of boilerplate placeholder
9 language and objections.

10 III. STATEMENT OF ISSUE

11 Whether Appellants are entitled to withhold information and documents relevant
12 to the subject matter of this appeal.

13 IV. AUTHORITY AND ARGUMENT

14 HER 3.11 authorizes appropriate discovery, as well as motions to compel when a
15 party fails to comply with its discovery obligations.⁷ In addition, HER 1.03 provides that:

16 When questions of practice or procedure arise that are not addressed by these
17 Rules, the Hearing Examiner shall determine the practice or procedure most
18 appropriate and consistent with providing fair treatment and due process. The
19 Hearing Examiner may look to the Superior Court Civil Rules for guidance.

20 CR 26(b)(5), which governs the discovery of facts known and opinions held by
21 experts, provides that:

22 A party may through interrogatories require any other party to identify each
23 person whom the other party expects to call as an expert witness at trial, to state
24 the subject matter on which the expert is expected to testify, to state the
25 substance of the facts and opinions to which the expert is expected to testify and

⁶ *Id.*, ¶ 10.

⁷ HER 3.11 (stating, “Appropriate prehearing discovery, including written interrogatories, and depositions upon oral and written examination, is permitted. In response to a motion, or on the Hearing Examiner’s own initiative, the Examiner may compel discovery . . .”).

1 a summary of the grounds for each opinion, and to state such other information
2 about the expert as may be discoverable under these rules.⁸

3 The City's Discovery requests information allowed to be discovered under CR
4 26(b)(5)(A)(1). Appellants have not provided any legitimate reason for their failure to
5 adequately respond to the City's requests. In this EIS adequacy appeal, the Appellants'
6 experts bear the burden of reviewing the FEIS, preparing their testimony, and formulating
7 their opinions. The subject FEIS was published nearly six months ago, on November 9,
8 2017. The adequacy of an EIS is based on the facts, data, and analysis contained in the
9 EIS document.⁹ Thus, since November 2017, Appellants and their experts have had all of
10 the necessary analysis and data needed to prepare their case and produce at least some
11 documents relating to their numerous experts' analysis of the FEIS. The details of their
12 experts' analyses and their opinions, including the bases for those expert opinions, are
13 discoverable and must be disclosed when requested to facilitate the City's hearing
14 preparation. Similarly, any reports, studies, notes, or other documents associated with
15 their experts' evaluation of the FEIS must be produced in response to the City's
16 Discovery.

17 Nevertheless, on the eve of the deposition deadline, the Named Appellants have
18 produced almost no documents in response to the City's request.¹⁰ This deprives the City
19 of insight into the experts' opinions regarding the Appellants' criticism of the FEIS that is
20 crucial to effective deposition examination and hearing preparation.

21
22 ⁸ CR 26(b)(5)(A)(1).

23 ¹⁰ To the extent that any Appellant intends to rely on their descriptions in the Witness and Exhibit lists, they
24 are in error. The bare and minimal summaries of expert testimony in the Appellants' preliminary witness
25 lists serve only to identify the general legal issue each expert will address and, in some instances, a summary
of the witnesses' educational background and professional training. Those descriptions are inadequate and
do not provide the information required under CR 26(b)(5)(A)(1).

1 There is simply no reason why Appellants should be unable to produce adequate
2 responses to the City's Discovery. Most of the Appellants had initially objected on the
3 grounds that the City's discovery requests were allegedly premature because they were in
4 advance of the deadline for designating expert witnesses. Even if that were a legally
5 legitimate objection (it is not),¹¹ at this point, the Appellants responses are overdue by any
6 measure. The Named Appellants have had notice of the City's requests for information
7 about their expert witnesses for over three months, and were aware that such information
8 would reasonably be expected at least by the time preliminary witness lists were due on
9 April 2, 2018. Additionally, they should have been aware that the information would be
10 required to conduct depositions between April 12 and April 30, 2018, as anticipated by the
11 original hearing schedule. To the extent there was any confusion about the need to
12 supplement responses, the City sent a letter on April 10, requesting supplemental
13 responses needed to prepare for depositions by April 16. Yet, five days before the original
14 deposition deadline of April 30, 2018, they have failed to provide complete substantive
15 responses to the City's requests. Moreover, although the Examiner recently granted the
16 City's filed Motion to Extend Deadlines for Depositions and Pre-Hearing Motions, the
17 City now has just over a month to prepare for and depose any expert witnesses. Appellants
18 should not be allowed to delay their responses any further.

19 The Examiner should also grant the City's request for relief to prevent ambush at
20 hearing by allowing minimal preparation by experts before their depositions and more
21 thorough preparation thereafter. This would defeat the purpose of discovery. As stated in
22 the Washington State Bar Association Civil Procedure Deskbook,

23 The rules of discovery are instruments intended to 'make a trial less a game of
24 blind man's bluff and more a fair contest with the basic issues and facts

25 ¹¹ Appellants' suggestion that they have no obligation to provide the requested information in advance of the date for designating witnesses is without legal support and unfounded.

1 disclosed to the fullest practicable extent.¹² “The purpose of discovery is to
2 allow production of all relevant facts and thereby narrow the issues, and
promote efficient and early resolution of claims.”¹³

3 WASHINGTON CIVIL PROCEDURE DESKBOOK § 26.5 (Wash. St. Bar Assoc. 3d ed.
4 2014).¹⁴ Appellants should not be allowed to circumvent the discovery rules and subvert
5 their purpose by withholding discoverable information related to their experts to which the
6 City is entitled.

7 V. CONCLUSION

8 The Named Appellants’ response to the City’s written discovery is overdue. To
9 allow the City to continue its hearing preparations consistent with the hearing schedule,
10 the City requests that the Examiner order Appellants to immediately and completely
11 supplement their evasive and incomplete responses to the City’s Discovery.

12 DATED this 25th day of April, 2018.

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24 ¹² *United States v. Proctor & Gamble Co.*, 356 U.S. 677, 682, 78 S.Ct. 983, 2 L. Ed. 2d 1077 (1958); *see also Lowy v. PeaceHealth*, 114 Wn.2d 769, 777, 280 P.3d 1078 (2012).

25 ¹³ *Cedell v. Farmers Inc. Co. of Wash.* 176 Wn.2d 686, 698, 295 P.3d 239 (2013).

¹⁴ *See also Barfield v. City of Seattle*, 100 Wn.2d 878, 886, 676 P.2d 438 (1984)

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