

1  
2  
3  
4  
5  
6 **OFFICE OF THE HEARING EXAMINER**  
7 **FOR THE CITY OF SEATTLE**

8 In the Matter of the Appeal of

Hearing Examiner File:  
HC-18-001 through HC-18-007

9  
10 FOUR SEASONS HOTEL, SEATTLE, et al.,  
11

12 from a decision issued by the Director,

KONSTANTARAS' MOTION FOR  
SUMMARY JUDGMENT

13 DEPARTMENT OF CONSTRUCTION  
14 AND INSPECTIONS  
15

16 **I. RELIEF REQUESTED**  
17

18 Appellant Andrew Konstantaras ("Konstantaras" or "Appellant") moves for an order of  
19 summary judgment reversing the decision ("Decision") of the director of the Seattle Department  
20 of Construction and Inspection ("SDCI") and rescinding the grant of a Major Public Project  
21 Construction noise variance ("MPPC Variance"), as defined in SMC 25.08 ("Noise Code"), to  
22 Washington State Department of Transportation ("WSDOT" or "applicant") for the demolition  
23 of the Alaskan Way Viaduct ("AWV"), Project Number 3029782.

24 SDCI improperly granted the MPPC Variance because the Decision failed to comply with the  
25 criteria set forth for such a variance, namely that it may only be granted "to the extent the  
26 applicant demonstrates that the compliance with [sound level limits established by the Noise  
27 Code]" would be unreasonable from a safety perspective, "render the project economically or  
28 functionally unreasonable" or cause "applicant to violate other applicable regulations." SMC

25.08.655.A The applicant failed to demonstrate any of these conditions and therefore the variance should never have been granted.

Neither WSDOT nor SDCI can cure this fatal error by providing new evidence at this hearing therefore this issue is ripe for summary judgment.

## II. STATEMENT OF FACTS

WSDOT filed its Major Public Project Construction Noise Variance Application Viaduct Demolition (“Application”) on October 9, 2017 (attached as Exhibit A). The Decision granting the variance was issued on March 19, 2018. The Decision properly cites the requirements of SMC 205.08.655.A but only asserts that the requirements are met without reference to any supporting evidence. In the last sentence of Section III of the Decision, SDCI states that “WSDOT has demonstrated that delay in demolishing the Alaskan Way Viaduct and associated increased costs will result without nighttime construction.”

SDCI then restates this assertion as a conclusion writing: “Requiring WSDOT to comply with the nighttime noise limits in SMC 25.08.410 and .420 would be unreasonable considering the delay and substantial estimated increased cost that would result from compliance with SMC 25.08.410 and .420, which would render the Viaduct demolition economically and functionally unreasonable.” Decision, §IV, paragraph 4. The word ‘cost’ appears four (4) times in the Decision and none of those references point to any evidence or analysis that provides any information on the cost associated with not working at night. Nor is there any other part of the Decision that refers to any analysis or supporting evidence for its conclusion that working through the night (every night) would be less expensive than limiting work to daytime hours..

The Decision does, however, reference costs that the project would incur if it chose to work through the night. In the section on mitigation, the Decision recognizes that WSDOT may be required to “install[] sound dampening drapes and provid[e] hotel rooms for residents during high-impact or extremely noisy operations.” Other costs exclusively associated with nighttime

work that are not mentioned include but are not limited to cost of lighting the demolition areas, increased wages that may be associated with night shifts and the increased costs associated with managing and responding to customer complaints.

The Decision could not reference any supporting evidence or analysis for its conclusion because the Application also lacks any such data, analysis or modelling. The section of the Application dedicated to showing WSDOT's compliance with the criteria for a MPPC Variance is disturbingly brief. It reads, in its entirety, as follows:

#### 4.3.1 SMC 25.088.655.A: The Criteria for an MPPCNV

The criteria for an MPPCNV are stated in SMC 25.08.655.A as follows:

*A. The Administrator may grant a major public project construction variance to provide relief from the exterior sound level limits established by this chapter during the construction periods of major public projects. A major public project construction variance shall provide relief from the exterior sound level limits during the construction or reconstruction of a major public project only to the extent the applicant demonstrates that compliance with the levels would:*

- 1. Be unreasonable in light of public or worker safety or cause the applicant to violate other applicable regulations, including but not limited to regulations that reduce impacts on transportation infrastructure or natural resources; or*
- 2. Render the project economically or functionally unreasonable due to factors such as the financial cost of compliance or the impact of complying for the duration of the construction or reconstruction of the major public project.*

Completion of all construction activities during only daytime hours would extend the construction period and increase the economic cost to taxpayers.

1 It is shocking to find that the section intended to demonstrate WSDOT's compliance with the  
2 law consists of merely 174 words, 141 of which are a restatement of the law and 12 of which  
3 introduce said law. That leaves 21 words to demonstrate compliance.

4 While the Application is over 100 pages long, the word 'cost' only appears 11 times and  
5 none of these references provide any estimates or analysis (or references to other documents  
6 containing such information). Similarly, there are no references to any other options that may  
7 have reduced the length of the project if work was limited to daytime hours, e.g., hiring more  
8 daytime workers and starting the demolition from both ends of the viaduct and moving toward  
9 the center.

### 10 11 **III. ISSUE PRESENTED**

12 Since WSDOT did not provide any supporting evidence or analysis regarding the financial or  
13 practical impact of working only during the day, it failed to meet the standard set forth in SMC  
14 25.08.655.A. Therefore, should the Hearing Examiner overturn the Decision and rescind the  
15 MPPC Variance?

### 16 17 **IV. ARGUMENT**

18 To obtain a motion for summary judgment, there must be no unresolved issues of material  
19 fact. CR 56(c); Lybbert v. Grant County, 141 Wn.2d 29, 34, 1 P.3d 1124 (2000). All facts and  
20 inferences must be viewed in the light most favorable to the non-moving party. O'Neill v.  
21 Farmers Ins. Co., 124 Wn.App. 516, 522, 125 P.3d 134 (2004). Furthermore, mere conclusory  
22 allegations or general denials or assertions are insufficient to avoid summary judgment. Overton  
23 v. Consol. Ins. Co., 145 Wn.2d 417, 430, 38 P.3d 322 (2002). A moving party can satisfy its  
24 initial burden under CR 56 by demonstrating the absence of evidence supporting the nonmoving  
25 party's case. Young v. Key Pharms., Inc., 112 Wn.2d 216, 225 n.1, 770 P.2d 182 (1989)

26 The relevant record in this case is the Decision and the Application and both fail to provide  
27 the necessary evidence to support the applicant's case. While the provides several criteria  
28

1 justifying an MPPC Variance, WSDOT only attempted to address the criteria set forth in SMC  
2 25.08.655.A.2, which requires the applicant to demonstrate that compliance with the noise levels  
3 set forth in SMC 25.08 would “[r]ender the project economically or functionally unreasonable.”  
4 Though this assertion is repeated several times in both documents, repetition does not lead to  
5 veracity

6 In WSDOT’s attempt to demonstrate its compliance with the requirements of a MPPC  
7 Variance, it asserts that limiting the work to daytime hours would result in two outcomes, first,  
8 the construction period would be longer; and second, there would be an increased cost. Neither  
9 of these assertions are backed by facts and neither of them can be held to be obviously true.

10 On the length of the construction period, it is wrong to assume that working only during the  
11 day will unavoidably result in an extended project length. There are more variables involved in  
12 determine how long a project takes to complete. For example, increasing the number of workers  
13 during the daytime might easily result in an all-daytime project being as quick as a project that  
14 works through the night. Furthermore, working through the night adds additional challenges that  
15 could increase the length of time it takes to complete a project. For example, visibility is poorer  
16 in the night, which may cause delays in the work. More mistakes may be made during the night  
17 because of this limited visibility or other factors such as workers being tired because their body  
18 clocks are out of synch.

19 Similarly, the additional costs of working at night might make a round-the-clock option more  
20 expensive than one that is limited to daytime hours. It is impossible to say whether either of  
21 WSDOT’s assertions are true because WSDOT did not provide any data or analysis supporting  
22 them. The absence of such evidence or analysis is an undisputed material fact.

23 Furthermore, even if one assumes that WSDOT’s magic 21 words are true, WSDOT still fails  
24 to meet the burden of SMC 25.08.655.A. To paraphrase WSDOT’s only sentence in support of  
25 its compliance with the law, WSDOT asserts if we only work during the day, it is going to take  
26 longer and cost more. WSDOT does not indicate in any way how much longer it would take nor  
27 how much more might it cost. Is it a day? A week? A month? A year? Is the increase in cost  
28

1 \$1, \$1,000 or \$1M? In fact, WSDOT does not even characterize either increase as unreasonable,  
2 which is the standard they were supposed to meet. Even their unbacked conclusion is  
3 insufficient to meet its burden.

4 While it is true that later in the Application WSDOT inserts the word “unreasonable” into its  
5 restatement of this faulty assertion, but it provides no additional evidence or analysis to justify  
6 this characterization and so it is still nothing but a “conclusory allegation” which does not protect  
7 it from summary judgment.

8 The requirement to show a real burden on the applicant is not a mere technicality, but it goes  
9 to the heart of the underlying principal of the Noise Code succinctly set forth in SMC 25.08.010,  
10 Declaration of Policy:

11  
12 It is the policy of the City to minimize the exposure of citizens to the  
13 physiological and psychological dangers of excessive noise and to protect,  
14 promote and preserve the public health, safety and welfare. It is the express  
15 intent of the City Council to control the level of noise in a manner which  
16 promotes commerce; the use, value and enjoyment of property; sleep and  
17 repose; and the quality of the environment.” It is clear that in creating the  
18 variances, the City Council recognized the balance of interests between the  
19 needs of individuals while promoting commerce. By failing to provide any  
20 evidence, analysis or support to its conclusions, WSDOT made it impossible  
21 for any type of balance to occur.

22  
23 It may seem that the question of whether WSDOT’s burden was met is a question of fact, but  
24 that is not the case. If WSDOT had provided any evidence or detail, regardless of how fanciful it  
25 might have been, then the veracity of those alleged facts would not be ripe for summary  
26 judgment. The lack of any such content is an undisputed fact and given that, all that remains are  
27 unfounded conclusions. Therefore, as a matter of law, there is no way WSDOT’s burden could  
28

1 have been met and consequently there was no way that SDCI could have legally granted the  
2 MPPC Variance.

3 If the Hearing Examiner decides not to grant this summary judgment, it should not consider  
4 any new evidence relating to the demonstration of WSDOT's compliance with the MPPC  
5 Variance criteria as such information should have been in the original Application which was the  
6 subject of the public meetings and at the heart of their outreach.

7  
8 **V. CONCLUSION**

9 The MPPC Variance granted by SDCI should be rescinded and if WSDOT still desires a  
10 MPPC Variance, it should be required to begin the process all over again.

11  
12 Dated this 7<sup>th</sup> day of May 2018

13  
14 

15 \_\_\_\_\_  
16 Andrew Konstantaras  
17 [akonsta@me.com](mailto:akonsta@me.com)  
18 2440 Western Avenue, Suite 709  
19 Seattle, WA 98121  
20 206.618.2252