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6 BEFORE THE HEARING EXAMINER
7 CITY OF SEATTLE

8 In the Matter of the Appeal of:) Hearing Examiner File:
9)
10) **HC-18-001**
11 **FOUR SEASONS HOTEL SEATTLE, et al.,**)
12) AMENDED CITY'S AND WSDOT'S
13) RESPONSE TO MOTION FOR
14) SUMMARY JUDGMENT
15 from a decision issued by the Director, Seattle)
16 Department of Construction and Inspections)
17 regarding a Major Public Project Construction)
18 Variance.)
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21 **I. INTRODUCTION**

22 The Washington State Department of Transportation ("WSDOT") presented evidence to
23 the Department of Construction and Inspections ("Department") that the Major Public Project
Construction Noise Variance ("noise variance") application for demolishing the Alaskan Way
Viaduct ("viaduct") met the Noise Control Code ("Noise Code") requirement that complying
with the Noise Code's noise limits renders the viaduct demolition project economically or
functionally unreasonable.

Construed in the light most favorable to the City and WSDOT, the evidence in this
response demonstrates that: complying with the Noise Code noise limits renders the demolition

1 project economically and functionally unreasonable; raises a material fact in dispute; and
2 precludes granting summary judgment.

3 II. FACTS

4 WSDOT plans to demolish the viaduct. In October 2017, WSDOT submitted a noise
5 variance application to the Department for the proposed demolition work. WSDOT requested a
6 one-year noise variance to allow construction work activities during nighttime hours and
7 extended hours for impact demolition work.¹

8 In its application, WSDOT stated the “[c]ompletion of all construction activities during
9 only daytime hours would extend the construction period and increase the economic cost to
10 taxpayers.”² WSDOT also stated at a March 8, 2018 public meeting: “If you can get 40 percent
11 more hours . . . in a day to do the impact work [with a noise variance] . . . you’ll get done at least
12 40 percent sooner.”³ WSDOT added that completing the project quickly was essential to
13 minimize the inevitable impacts associated with the project and that nighttime construction
14 would allow faster project completion, which would minimize traffic impacts, “general
15 interruption to the local businesses,” and impacts on “private property immediately adjacent to
16 the viaduct.”⁴

17 WSDOT presented additional evidence to the City during the noise variance review
18 process that complying with the Noise Code would render the project economically and
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20 ¹ Declaration of Dave Cordaro in Support of the City’s Response to Motion for Summary Judgment
21 (Cordaro Declaration), Attachment 1 (WSDOT, Major Public Project Construction Noise Variance
Application Viaduct Demolition (Oct. 9, 2017)) (the “Application”) page 1.

22 ² *Id.* page 9.

23 ³ Cordaro Declaration, Attachment 2 (Partial transcript from the March 8, 2018 public meeting for the
noise variance) (the “March 8, 2018 Public Meeting”) at 35.

⁴ *Id.* at 46–47.

1 functionally unreasonable when it told Dave Cordaro and other Department representatives at
2 August 2017 and January 2018 WSDOT-Department meetings that the viaduct demolition
3 project timeline would increase time and cost by 40 percent without the noise variance.⁵

4 During the noise variance review process, the Department also considered how
5 complying with the Noise Code noise limitations would extend the project by 40 percent and
6 cause the project to be functionally unreasonable by extending the project's impact duration to
7 the pedestrian and vehicular transportation system, and use and access to buildings caused by the
8 demolition.⁶ For example, viaduct demolition will occur two blocks at a time, closing three
9 intersections in a row. This entire work zone must be closed to the public with no pedestrian or
10 vehicular crossings. As a second example, if no nighttime work is allowed by a noise variance it
11 is impossible to demolish the portion of the viaduct next to the BNSF portal that can only occur
12 at night.⁷

13 WSDOT has further established evidence that complying with the Noise Code noise
14 limits renders the project economically and functionally unreasonable through the declaration of
15 Brian Nielsen. The declaration provides that WSDOT has calculated the economic cost based on
16 traffic impacts caused by the demolition work to be about \$10 million if the work is delayed
17 because of the lack of a noise variance.⁸ WSDOT has approached the demolition work with the
18 goal of having the contractor complete the work before the Memorial Day weekend in 2019,
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21 ⁵ Cordaro Declaration at 2.

22 ⁶ *Id.* at 3.

23 ⁷ *Id.* at 3.

⁸ Declaration of Brian D. Nielsen, P.E. (Nielsen Declaration) at 2.

1 thereby avoiding impacts to Seattle’s summer tourist season.⁹ Protracted demolition stands to
2 negatively impact Seattle waterfront businesses during the busy summer months.

3 In addition, it is likely that the cost of the demolition work itself would be higher without
4 the noise variance. A construction period that is 40 percent longer will necessarily result in
5 higher costs to rent specialized demolition equipment.¹⁰

6 In short, SDCI reviewed WSDOT’s application with assistance from its consulting
7 acoustics expert;¹¹ discussed with WSDOT in August 2017 and January 2018 about how
8 complying with the Noise Code would render the demolition project economically and
9 functionally unreasonable;¹² and heard relevant public comments and responses at the November
10 14, 2017 and March 8, 2018 public meetings.¹³

11 The Department granted WSDOT’s noise variance application, allowing sound levels to
12 exceed those prescribed in the Noise Code for one year.¹⁴ The Department determined that
13 “[a]llowing nighttime construction will shorten the overall construction period, which will serve
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17 ⁹ *Id.* at 2.

18 ¹⁰ *Id.* at 2.

19 ¹¹ Seattle Department of Construction & Inspections, Analysis and Decision on Alaskan Way Viaduct
20 Demolition Major Public Project Construction Noise Variance Noise Variance Decision 1 (Mar. 19,
21 2018) (the “Decision”) at 4.

22 ¹² Cordaro Declaration at 2.

23 ¹³ Decision at 4; Cordaro Declaration, Attachment 2 (Partial transcript from the March 8, 2018 public
meeting for the noise variance) (the “March 8, 2018 Public Meeting”) at 35.

¹⁴ Decision at 11. The Decision allows: noise levels to exceed code levels for non-impact equipment on
weekdays from 10:00 p.m. to 7:00 a.m. and on weekends and legal holidays from 10:00 p.m. to 9:00
a.m.; and impact work from 7:00 am to 8:00 pm on weekdays, 9:00 a.m. to 8:00 p.m. on Saturdays, and
9:00 a.m. to 5:00 p.m. on Sundays and legal holidays. *Id.*

1 the general public with completing this project earlier. A shortened construction schedule will
2 also result in cost savings and in reduced construction-related impacts.”¹⁵

3 The Department further determined that “[r]equiring WSDOT to comply with the
4 nighttime noise limits . . . would be unreasonable considering the delay and substantial estimated
5 cost that would result from compliance . . . , which would render the Viaduct demolition
6 economically and functionally unreasonable.”¹⁶

7 III. ISSUE

8 A motion for summary judgment may only be granted if there are no material facts in
9 dispute. Before issuing the noise variance Decision, the Department considered evidence
10 demonstrating that complying with Noise Code noise limits renders the project economically and
11 functionally unreasonable. Should summary judgment be granted?

12 IV. EVIDENCE RELIED ON

13 The City’s response is based on the declaration of Dave Cordaro, the declaration of Brian
14 D. Nielsen, P.E., and the pleadings and documents on file with the Hearing Examiner
15 (“Examiner”).

16 V. ARGUMENT

17 A. A material fact in dispute exists whether complying with the Noise Code renders the 18 viaduct’s demolition economically or functionally unreasonable.

19 The Examiner may decide an issue on summary judgment when there is no genuine issue
20 of material fact.¹⁷ The Hearing Examiner Rules of Practice and Procedure do not address

21 ¹⁵ *Id.* at 9.

22 ¹⁶ *Id.* at 10–11.

23 ¹⁷ *In the Matter of the Appeal of Michael Schmautz from an Interpretation issued by the Director, Department of Construction and Inspections*, Hearing Examiner File: S-16-005, (2016), citing *ASARCO Inc. v. Air Quality Coalition*, 92 Wn.2d 685, 695–98, 601 P.2d 501 (1979).

1 summary judgment, but the Examiner “may look to the Superior Court Civil Rules for guidance”
2 for questions of practice and procedure not covered by the rules.¹⁸

3 Under the Washington Superior Court Civil Rules, summary judgment is appropriate
4 when there is no genuine issue on any material fact and the moving party is entitled to judgment
5 as a matter of law.¹⁹ A material fact is “one that affects the outcome of the litigation.”²⁰ The
6 Examiner may grant a motion for summary judgment only if, after considering all the evidence,
7 reasonable minds could reach only one conclusion.²¹ In considering a summary judgment
8 motion, all facts and reasonable inferences will be construed for the nonmoving party.²²

9 The Department may grant a noise variance if it determines that compliance with the
10 Noise Code noise limits would “[r]ender the project economically or functionally unreasonable
11 due to factors such as the financial cost of compliance or the impact of complying for the
12 duration of the construction . . . of the major public project.”²³ The code is drafted in the
13 alternative: “render the project economically *or* functionally unreasonable.”

14 Not defined by the Noise Code, “functionally” is defined by the dictionary definition.²⁴
15 “Functional” means “existing or used to contribute to the development or maintenance of a larger
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18 ¹⁸ Hearing Examiner Rules of Practice and Procedure (HER) Rule 1.03.

19 ¹⁹ Civil Rule 56(c) (Summary judgment may be granted if there is no genuine issue as to any material
19 fact and the moving party is entitled to judgment as a matter of law.).

20 ²⁰ *Elcon Const., Inc. v. E. Washington Univ.*, 174 Wn.2d 157, 164, 273 P.3d 965 (2012).

21 ²¹ *Vallandigham v. Clover Park School Dist. No. 400*, 154 Wn.2d 16, 26, 109 P.3d 805 (2005), citing
21 *Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982).

22 ²² *Id.* at 26, citing *Atherton Condo. Apartment–Owners Ass’n Bd. of Directors v. Blume Dev. Co.*, 115
22 Wn.2d 506, 515–16, 799 P.2d 250 (1990).

23 ²³ SMC 25.08.655.A.1.

24 ²⁴ *HomeStreet, Inc. v. State, Dep’t of Revenue*, 166 Wn.2d 444, 451, 210 P.3d 297 (2009).

1 whole.”²⁵ The definition extends to impacts that make a project unreasonably difficult to
2 complete including impacts on traffic, public services, and private property access caused by
3 extended project delays.

4 WSDOT’s application,²⁶ responses at public meetings,²⁷ WSDOT statements in WSDOT-
5 Department application review meetings,²⁸ and the declarations of Dave Cordaro and Brian
6 Nielsen establish a genuine issue of material fact on whether complying with the Noise Code
7 noise limits renders the project economically or functionally unreasonable.

8 Further, this evidence supports the Department’s determination that: the noise variance
9 would “result in cost savings and . . . reduced construction-related impacts;”²⁹ and “[r]equiring
10 WSDOT to comply with the nighttime noise limits . . . would be unreasonable considering the
11 delay and substantial estimated cost that would result from compliance . . . , which would render
12 the Viaduct demolition economically and functionally unreasonable.”³⁰

13 Construed in the light most favorable to the City, this evidence establishes a genuine
14 issue of material fact on whether a 40 percent increase in project time and associated cost
15 increases and the functional impacts of not granting a noise variance renders the project
16 economically or functionally unreasonable.

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20 ²⁵ *Functional*, Webster’s Third New Int’l Dictionary (1986).

21 ²⁶ Application at 9.

22 ²⁷ March 8, 2018 Public Meeting.

23 ²⁸ Cordaro Declaration at.

²⁹ Decision at 9.

³⁰ *Id.* at 10–11.

1 This evidence goes beyond Mr. Konstantaras' incorrect "mere conclusory allegations"
2 assertion,³¹ and instead provides "specific identified facts" that defeat summary judgment.³² In
3 *Keck*, the court determined that summary judgment was not warranted where the nonmoving
4 party submitted an affidavit connecting his opinions about the standard of care and causation to
5 the records.³³ Similarly, the City and WSDOT have connected the determination that the Noise
6 Code noise limit requirements would render the demolition project economically or functionally
7 unreasonable with factual statements in the record and in the declarations of Dave Cordaro and
8 Brian Nielsen.

9 Mr. Konstantaras claims there is insufficient support for the Decision's determination that
10 complying with the Noise Code renders the project economically or functionally unreasonable.³⁴
11 Mr. Konstantaras is incorrect: The application, public hearing testimony, and the declarations of
12 Dave Cordaro and Brian Nielsen support the Department's Decision and raise specific material
13 facts in dispute that preclude granting summary judgment.

14 The evidence the City and WSDOT demonstrate in this response is unlike the lack of
15 evidence Mr. Konstantaras relies on in *Overton*,³⁵ where the court determined that "lack of recall
16 is not sufficient to controvert clear opposing evidence on a summary judgment motion."³⁶ And
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19 ³¹ Konstantaras' Motion for Summary Judgment at 4:21–23 (the "Motion"), citing *Overton v. Consol.*
20 *Ins. Co.*, 145 Wn.2d 417, 430, 38 P.3d 322 (2002).

21 ³² *Keck v. Collins*, 184 Wn.2d 358, 367, 357 P.3d 1080 (2015).

22 ³³ *Id.* at 373.

23 ³⁴ Motion at 4:26–27 ("The relevant record in this case is the Decision and the Application and both fail
to provide the necessary evidence to support the applicant's case.").

³⁵ Motion at 4:21–23, citing *Overton*, 145 Wn.2d at 430.

³⁶ *Overton*, 145 Wn.2d at 431.

1 although Mr. Konstantaras incorrectly asserts an absence of evidence and cites to *Young*,³⁷ the
2 City can defeat summary judgment by countering his incorrect assertion with additional
3 evidentiary materials.³⁸

4 Finally, Mr. Konstantaras acknowledges that “[i]f WSDOT had provided *any evidence* or
5 detail, regardless of how fanciful it might have been, then the veracity of those alleged facts
6 would *not* be ripe for summary judgment.”³⁹ Mr. Konstantaras is correct: summary judgment
7 should not be granted based on the evidence established by this response.

8 **B. The Examiner may consider any relevant, reliable, and probative evidence in**
9 **the de novo review of the Decision.**

10 The Examiner reviews noise variance appeals de novo,⁴⁰ and may consider any evidence,
11 including hearsay, that the Examiner determines is “relevant to the issue on appeal, comes from a
12 reliable source, and has probative (proving) value.”⁴¹ The Examiner “shall admit and give
13 probative effect to evidence which possess probative value commonly accepted by reasonably
14 prudent men in the conduct of their affairs.”⁴² The Examiner is not limited to considering only
15 the variance decision or even the Director’s record.

16 In the Examiner’s decision for the University District Link Light Rail extension, the
17 Examiner affirmed the Department’s determination that the project would be economically or

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19 ³⁷ Motion at 4:24–25, citing *Young v. Key Pharm., Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989).

20 ³⁸ *Young*, 112 Wn.2d at 225 (burden shifts to the nonmoving party after the moving party has met its
burden to show an absence of evidence).

21 ³⁹ Motion at 6:24–26 (emphasis added).

22 ⁴⁰ SMC 25.08.610.D.

23 ⁴¹ HER 2.17(a); *see also* HER 3.19(a) (listing the record on appeal as including “evidence received or
considered.”).

⁴² SMC 3.02.090.J.

1 functionally unreasonable based on hearing testimony, input from an outside consultant, and
2 information about increased risk to the public and worker safety in the application.⁴³

3 Mr. Konstantaras asserts that if summary judgment is denied, the Examiner “should not
4 consider any new evidence relating to the demonstration of WSDOT’s compliance with the
5 MPPC Variance as such information should have been in the original Application”⁴⁴

6 Contrary to his view, as occurred in the University District Link Light Rail extension hearing, the
7 Examiner reviews the Department’s Decision de novo and may consider any evidence—including
8 new evidence—that is relevant, reliable, and probative.⁴⁵

9 VI. CONCLUSION

10 Granting summary judgment motion is only be appropriate if after considering all the
11 evidence, the Examiner determines that reasonable minds could only reach the conclusion: that
12 no evidence supports the City’s determination that complying with the Noise Code renders the
13 project economically or functionally unreasonable.

14 As demonstrated by the supporting declarations and other evidence cited in this response,
15 the City considered a variety of evidence when determining that complying with the Noise Code
16 noise limits renders the viaduct demolition project economically or functionally unreasonable.
17 This evidence supports the Decision and precludes granting summary judgment.

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20 ⁴³ *In the Matter of the Appeal of Carl Schaber and Gene Casal from Decisions by the Director,*
Department of Planning and Development on a Master Use Permit and Noise Variance, HE MUP-12-
027, HC-12-002 (2013).

21 ⁴⁴ Motion at 7:3–6.

22 ⁴⁵ HER 2.17(a); *see also* HER 3.19(a) (listing the record on appeal as including “evidence received or
23 considered.”); *In the Matter of the Appeal of Carl Schaber and Gene Casal*, HE MUP-12-027, HC-12-
002 (considering public hearing testimony, input from outside consultants, and application in evaluating
noise variance decision).

1 The City and WSDOT request that the Examiner deny Mr. Konstantaras' motion for
2 summary judgment.

3 DATED this 14th day of May 2018.

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CERTIFICATE OF SERVICE

I certify that on this date, I electronically filed a copy of the AMENDED CITY'S AND
WSDOT'S RESPONSE TO MOTION FOR SUMMARY JUDGMENT AND THE
DECLARATIONS OF DAVE CORDARO AND BRIAN NEILSEN with the Seattle Hearing
Examiner using its e-filing system.

I also certify that on this date, I sent a copy of the same documents by email to the
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AMENDED CITY'S AND WSDOT'S RESPONSE TO
MOTION FOR SUMMARY JUDGMENT

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3 DATED this 14TH day of May 2018.

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5 ALICIA REISE, Legal Assistant
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