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BEFORE THE HEARING EXAMINER
CITY OF SEATTLE

In the Matter of the Appeal of:

**WALLINGFORD COMMUNITY
COUNCIL, ET AL.,**

of the adequacy of the FEIS issued by the
Director, Office of Planning and
Community Development.

Hearing Examiner File

W-17-006 through W-17-014

CITY OF SEATTLE’S RESPONSE TO
FRIENDS OF RAVENNA-COWEN
MOTION FOR CONTINUANCE

I. INTRODUCTION

Friends of Ravenna-Cowen (“FORC”) seeks a continuance to supplement its Response to the City’s Motion to Dismiss (“City’s Motion”). The motion for continuance is unnecessary, disregards the briefing deadlines, and should be denied. First, it is based on a proffer of evidence irrelevant to the issues the City seeks to dismiss. Second, those portions of the City’s Motion to Dismiss pertaining to the issues raised in FORC’s Motion for Continuance (“FORC’s Motion”) are governed by HER 3.02 and, as needed, with reference to the standards governing CR 12(b)(6). FORC’s characterization of the City’s Motion to dismiss reflects its misunderstanding of the City’s Motion. Finally, FORC’s Motion is untimely and any delay in obtaining the evidence it seeks to submit is due to no fault of the City.

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II. ARGUMENT

A. FORC's Motion is based upon a proffer of evidence unrelated to the relief sought in the City's Motion to Dismiss.

FORC characterizes its motion as one for a “continuance”. It is in fact a request for additional time to supplement its Response to the City’s Motion to Dismiss in the form of “declarations and submission of relevant parts of the deposition [of Ms. Sarah Sodt] that support the averments in the Appellant’s response to the City’s motion to dismiss.”

FORC’s Motion at 3. FORC asserts that:

Ms. Sodt’s testimony supports the averments in [FORC’s] Response to the City’s Motion to Dismiss regarding Issues 3 and 4 that the MHA FEIS does not in the first instance adequately identify buildings of historic significance, did not provide an adequate study of the impact on buildings and areas of historic significance, and the proposed mitigation was inadequate.

Id. at 2–3.

Once again, FORC miscomprehends the relief the City seeks through its Motion to Dismiss. As noted in the City’s Reply in Support of its Motion to Dismiss (“City’s Reply”):

FORC dedicates a substantial portion of its Response . . . asserting that the FEIS failed to adequately discuss historic resources and potential impacts to those resources, based on the City’s alleged failure to consider existing historic inventories and surveys. *See* FORC’s Response at p. 12-18. This argument is not responsive to the City’s motion, which sought dismissal of issues relating to the adequacy and efficacy of mitigation measures, including mitigation measures for impacts to historic resources. The City’s motion did not seek to dismiss the entirety of the Appellants’ challenge to the adequacy of the FEIS’s analysis of potential historic resource impacts. The purely legal question before the Examiner pertains to the extent to which the City must prove the adequacy of mitigation identified in the EIS. FORC’s response is not presented as a cross-motion, and therefore arguments that are not responsive to the City’s Motion need not be addressed.

1 City's Reply at 21, n.36.

2 Through its Motion for Continuance, FORC seeks to supplement its response to
3 the City's Motion to Dismiss with the deposition testimony of Ms. Sodt pertaining to the
4 adequacy of the EIS's discussion of historic resources and potential impacts to those
5 resources—issues the City has not sought to dismiss. The City's challenge to the
6 mitigation issues associated with historic resources are purely legal in nature and
7 unaffected by the evidence, including Ms. Sodt's testimony. This alone is a sufficient
8 basis to deny FORC's Motion.¹

9 **B. FORC's characterization of the City's Motion to Dismiss reflects its**
10 **misunderstanding of the City's Motion.**

11 FORC engages in a tortured and contradictory attempt to characterize the City's
12 Motion to Dismiss as analogous to a motion for summary judgment under CR 56. This
13 would allow FORC to support its Response to the City's Motion to Dismiss and
14 supporting documentation with timely filed opposing affidavits and other relevant
15 documentation. CR 56(c). As noted in the City's Reply, however, the only argument for
16 which the City offered supporting and uncontested facts relate to the City's choice of
17 alternatives, an issue unaddressed in FORC's response. City's Reply at 2–3. The City
18 seeks to dismiss the remaining issues addressed in its motion, including FORC's
19 challenge to mitigation measures related to historic resources, based on purely legal
20 arguments about the scope of the Examiner's review and authority to address the claims
21 raised in Appellants' issues that can be decided as a matter of law. For those issues, there
22 are no conceivable facts in the notices of appeal or elsewhere that would entitle

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25 ¹ As noted in the City's Reply in support of its Motion to Dismiss, FORC is also precluded from offering
evidence in support of arguments that are not responsive to the City's motion. City's Reply at 21, n.36.

1 Appellants to relief. *Id.* These issues (or parts of issues) can be decided pursuant to HER
2 3.02 and, as needed, with reference to the standards governing CR 12(b)(6).

3 As noted in the City’s Reply, FORC’s assertion that the City’s Motion is akin to a
4 summary judgment motion under CR 56 and, therefore dependent on development of facts
5 through discovery, is irrelevant because the City’s arguments related to FORC’s appeal do
6 not depend on supporting facts beyond FORC’s notice of appeal. *Id.* at 3, n.7. Ms. Sodt’s
7 testimony is not responsive to evidence offered in support of the City’s Motion to Dismiss
8 and simply has no bearing on the outcome of that motion.

9 C. **FORC’s Motion is untimely and any delay in obtaining evidence is due**
10 **to no fault of the City.**

11 The case schedule governing briefing in this matter, requires parties to file pre-
12 hearing motions (except those motions concerning discovery and/or motions in limine) no
13 later than May 11, 2018. Responses to such motions are due on the date fourteen calendar
14 days from the date the motion was filed, and replies are due seven calendar days from the
15 date the response is filed. The City filed its Motion to Dismiss on April 17, 2018; FORC
16 filed its Response on May 1, 2018; and the City’s Reply followed on May 8 2018. At that
17 point the briefing was closed. FORC cites no authority for supplementing its briefing
18 after the deadline for its response or the deadline for all pre-hearing motions have passed.

19 Where CR 56 applies (and it does not here), CR 56(f) does provide an opportunity
20 for responding parties to seek a “continuance to permit affidavits to be obtained or
21 depositions to be taken or discovery to be had . . .” FORC is well aware of this provision
22 and noted it in its response to the City’s Motion to Dismiss. FORC Response at 4, n.3.
23 Yet, it made no effort to seek relief in the form of a continuance before filing its response.

24 Nor did FORC approach the scheduling of depositions, including the deposition of
25 Ms. Sodt, with the sense of urgency it now feigns. FORC’s counsel contacted Assistant

1 City Attorney Jeff Weber on April 16, 2018, to request depositions of Ms. Sodt and
2 another city witness as soon as possible. Decl. of Jeffrey Weber (“Weber Decl.”) ¶ 2.
3 Mr. Weber consulted with the witnesses regarding their availability, and on April 20,
4 2018, responded to FORC’s counsel with the potential deposition dates. The parties
5 subsequently agreed to schedule the depositions on May 10, 2018. *Id.* at ¶ 3. FORC did
6 not request that the City agree to further expedite Ms. Sodt’s deposition or seek relief
7 from the hearing examiner. *Id.*²

8 Under the circumstances, there is no excuse for FORC’s failure to seek relief to
9 allow it to submit additional evidence in support of its response to the City’s Motion
10 before the relevant deadlines had passed. More importantly, as noted above the evidence
11 it seeks to submit is irrelevant to the issues the City seeks to dismiss.

12 III. CONCLUSION

13 For the foregoing reasons, the City requests that the Examiner deny FORC’s
14 Motion for Continuance.

15 DATED this 15th day of May, 2018.

16 PETER S. HOLMES
17 Seattle City Attorney

18 /s/Jeff Weber, WSBA No. 24496
19 Daniel B. Mitchell, WSBA #38341
20 Assistant City Attorneys
Seattle City Attorney’s Office

21 ² FORC states that City “refused to agree to a brief continuance” to submit “relevant parts of the [Sodt]
22 deposition that support averments in the Appellant’s response to the City’s motion to dismiss.” FORC’s
23 Motion at 3. Mr. Weber did not attend Ms. Sodt’s deposition. Rather, he attended the deposition of another
24 City witness, Nicholas Welch, later the same day. When it became clear that it would not be possible to
25 finish that deposition on May 10, FORC’s counsel asked Mr. Weber if the City would consent to a
continuance as to a case schedule deadline. Mr. Weber understood this to be a request for a continuance
stemming from the inability to complete Mr. Welch’s deposition that day. On that basis Mr. Weber
responded that he would not agree to a continuance. Weber Decl. at ¶ 4.

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