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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,
13 DEPARTMENT OF CONSTRUCTION
14 AND INSPECTIONS

KONSTANTARAS' REPLY IN SUPPORT
OF MOTION FOR SUMMARY
JUDGMENT

15
16 **I. INTRODUCTION**

17 The Washington State Department of Transportation ("WSDOT") and the City of Seattle
18 ("City") improperly argue that the decision ("Decision") of the Department of Construction and
19 Inspections ("SDCI") meets the standard required by SMC 25.08 ("Noise Code") because the
20 Decision makes no reference to any evidence supporting this conclusion and the additional
21 evidence supplied was either not part of its application for the Noise Variance ("Application") or
22 it cannot construed to stand for the propositions asserted by WSDOT and the City.

23 **II. ARGUMENT**

24 WSDOT argues that statements were made at public hearings and in non-public meetings
25 that "if you can get 40 percent more hours ...in a day to do the impact work [with a noise
26 variance]... you'll get done at least 40 percent sooner." Declaration of Dave Cordaro in Support
27 of the City's Response to Motion for Summary Judgment ("Cordaro Declaration"), Attachment 2
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1 (partial transcript from the March 8, 2018 public meeting for the noise variance) at 35. This
2 statement is not enough to meet the requirements for a Major Public Project Construction noise
3 variance (“MPPC Variance”) because it provides no context or data for the statement and thereby
4 renders it merely another unfounded conclusion. Making an assertion does not create a fact.
5 Appellant is not requiring a lengthy analysis of all possible options, that would make any
6 variance almost impossible to obtain. However, applicants for noise variance must make some
7 attempt to weigh the options and it is clear that WSDOT thought only about time savings that
8 might occur with a noise variance but made no consideration of the costs of night time work
9 (e.g., lights, extra pay, additional noise mitigation efforts, etc.). Nor did WSDOT consider the
10 cost savings of doubling or tripling the number of workers during the day. Had WSDOT made
11 even a cursory reference to such a consideration, this motion for summary judgment would not
12 be appropriate. Unfortunately, they did not.

13 It is clear from the declaration of policy of the Noise Code that the City Council sought to
14 balance the needs of commerce with “the use, value and enjoyment of property; sleep and
15 repose; and the quality of the environment. SMC 25.08.010. The MPPC Variance limits the
16 granting of this type of variance “only to the extent the applicant demonstrates that the
17 compliance with the [Noise Code] levels would ... [r]ender the project economically or
18 functionally unreasonable.” SMC 25.08.655.A. WSDOT’s failure to consider any other option
19 (including hiring more day workers or ending impact work earlier and/or conducting no work at
20 all on some nights) or the additional costs (both hard costs like those mentioned above, e.g.,
21 lighting, extra mitigation measures, etc. and the costs to residents exposed to the noise) a blatant
22 disregard of spirit of the Noise Code. This failure renders any such one-sided assertions to be
23 nothing more than conclusory statements that do not provide a bar to a motion for summary
24 judgment.

25 WSDOT offers up a partial transcript from one of the public meetings as evidence that
26 the WSDOT met the requirements of MPPC Variance. Cordaro Declaration, Attachment 2. If
27 the rest of the public transcripts and public comments were shared, it would be evident that
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1 residents have great concerns about the Application and, despite explicit requirement for all
2 variances. Once again, the Decision makes a conclusory statement that the public comments
3 were considered as required by the Noise Code. SMC 25.08.590.A. No summary of the
4 comments are made, none of the concerns raised are discussed in the Decision, just a statement
5 that they were considered. Surely the City Council expected more than conclusory statements.
6 If this practice were extended to the extreme, any citizen could submit a letter to the City tax
7 authority asserting “I have reviewed the applicable laws and regulations and I do not owe any
8 taxes.”

9 WSDOT and the City also submit new evidence about the estimated financial impact due
10 to traffic impact if the work is delayed because of a lack of a noise variance. Amended City’s
11 and WSDOT’s Response to Motion for Summary Judgment at 3 and Declaration of Brian D.
12 Nielsen, P.E, Exhibit 1. This evidence consists of a WSDOT memo dated 30 Apr 2018,
13 superseding a previous memo dated 24 Apr 2018. The Decision granting the Application was
14 made on 19 Mar 2018. This evidence was not before the Director when considering the
15 Application and should therefore not be considered in these proceedings. WSDOT had a duty to
16 consider the options and costs before a decision was made. In fact, WSDOT should have
17 included such information in its Application. To allow WSDOT to supplement the record with
18 new evidence or evidence that was not in (or referenced by the Application would be giving
19 WSDOT a second bite at the apple and that is fundamentally not fair. It is undisputed that noise
20 can have serious impacts on the health and well-being of those subjected to it and any Applicant
21 seeking to work through the night in a residential neighborhood should fulfill its obligations in
22 its application and this information should be made available to the public so that these time-
23 consuming appeals can be avoided.

24 WSDOT correctly states that the Hearing Examiner Rules of Practice and Procedure do
25 not address summary judgment and therefore relies on Rule 1.03 that parties may look to the
26 Superior Court Civil Rules for guidance. For many issues, this is logical, but in the case of
27 motions for summary judgment, the applicability of trial court rules breaks down. In a trial
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1 court, there is a pleading and a poorly drafted pleading can result in a summary judgment if there
2 are not material fact (which WSDOT correctly defines as “one that affects the outcome of the
3 litigation.”). However, there is no pleading in an appeal such as the one brought by the
4 Appellants. There is the decision that is being appealed and, in this case, the application for the
5 variance. These two documents should constitute the equivalent to a pleading in a trial court. In
6 a trial court, one cannot avoid summary judgment by amending the pleading. If a ‘material fact’
7 is given the broad definition asserted by WSDOT, then a wholly incomplete and inaccurate
8 application and a corresponding decision that merely states “Application is granted” could be
9 cured by submitting a brand-new application if there is an appeal. This cannot be what is
10 intended by the City Council or the Office of the Hearing Examiner. Until the Office of Hearing
11 Examiner provides clarification on this point, WSDOT’s application of Washington Superior
12 Court Civil Rules should be rejected.

13 WSDOT correctly states that the Hearing Examiner reviews noise variance decisions de
14 novo (SMC 25.08.610D), which includes hearing evidence submitted by the parties, but
15 WSDOT’s reading is again too broad and would vitiate any applicant’s obligation to comply
16 with the law. The decision making process is not one that includes a great deal of public
17 collaboration, which is imminently reasonable. The appeal process allows aggrieved citizens to
18 bring their issues to light and to provide evidence that may not have been considered by Director
19 of SDCI. Of course, applicants can respond with evidence to counter the issues and facts made
20 by appellants, but they should not be allowed to use the latitude that is given to citizens and non-
21 attorneys in this forum to cure fatal mistakes in their application.

22 For example, evidence can be submitted by WSDOT and the City to contest facts such as
23 the health impact of noise proposed under the variance or environmental impact of the variance.
24 WSDOT and the City cannot be allowed to supplement its flawed application by appending new
25 material that should have been provided before the variance is granted and, ideally, before the
26 Application is presented to the public.
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III. CONCLUSION

For the foregoing reasons, Appellant requests that the Hearing Examiner grant its motion for summary judgment and reverse the decision granting the noise variance.

Dated this 21st day of May 2018



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**BEFORE THE HEARING EXAMINER
CITY OF SEATTLE**

CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on this date I sent true and correct copies of the attached **Konstantaras' Reply in Support of Motion for Summary Judgment** to each person listed below, or on the attached mailing list, in the matter of **Four Seasons Hotel Seattle et al.**, Hearing Examiner Files: **HC-18-001 through HC-18-007** in the manner indicated.

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Dated this 21st day of May 2018



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