

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,  
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  
28

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  
28

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  
28

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.

1 **III. CONCLUSION**

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

4 Dated this 21<sup>st</sup> day of May 2018

5  
6 

7 \_\_\_\_\_  
8 Andrew Konstantaras  
9 [akonsta@me.com](mailto:akonsta@me.com)  
10 2440 Western Avenue, Suite 709  
11 Seattle, WA 98121  
12 206.618.2252

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

1 **BEFORE THE HEARING EXAMINER**  
2 **CITY OF SEATTLE**

3 **CERTIFICATE OF SERVICE**

4  
5 I certify under penalty of perjury under the laws of the State of Washington that on this date I  
6 sent true and correct copies of the attached **Konstantaras' Reply in Support of Motion for**  
7 **Summary Judgment** to each person listed below, or on the attached mailing list, in the matter of  
8 **Four Seasons Hotel Seattle et al.**, Hearing Examiner Files: **HC-18-001 through HC-18-007** in  
9 the manner indicated.

10

Party	Method of Service
<p>11 <b>Appellants</b></p> <p>12 Four Seasons Hotel Seattle</p> <p>13 Michael Pedder</p> <p>14 <a href="mailto:michael.pedder@fourseasons.com">michael.pedder@fourseasons.com</a></p> <p>15 98 Union Homeowners Association</p> <p>16 John Gleason</p> <p>17 <a href="mailto:johng@secprop.com">johng@secprop.com</a></p> <p>18 Kay Smith-Blum</p> <p>19 <a href="mailto:kay@butchblum.com">kay@butchblum.com</a></p> <p>20 Jackie Swarts</p> <p>21 <a href="mailto:jackie1.home@yahoo.com">jackie1.home@yahoo.com</a></p> <p>22 Andrew Konstantaras</p> <p>23 <a href="mailto:akonsta@me.com">akonsta@me.com</a></p> <p>24 Michael Roberts</p> <p>25 <a href="mailto:msjroberts@icloud.com">msjroberts@icloud.com</a></p>	<p><input type="checkbox"/> U.S. First Class Mail, postage prepaid</p> <p><input type="checkbox"/> Inter-office Mail</p> <p><input checked="" type="checkbox"/> E-mail</p> <p><input type="checkbox"/> Fax</p> <p><input type="checkbox"/> Hand Delivery</p> <p><input type="checkbox"/> Legal Messenger</p>

26  
27  
28

Party	Method of Service
<p><b>Applicant/Appellant Legal Counsel</b></p> <p>Deborah Cade Assistant Attorney General <a href="mailto:deborahc@atg.wa.gov">deborahc@atg.wa.gov</a></p> <p>Daniel Oliver <a href="mailto:daniello@atg.wa.gov">daniello@atg.wa.gov</a></p> <p>Melissa Calahan <a href="mailto:melissael@atg.wa.gov">melissael@atg.wa.gov</a></p> <p>E-Service Mailbox <a href="mailto:tpcef@atg.wa.gov">tpcef@atg.wa.gov</a></p>	<p><input type="checkbox"/> U.S. First Class Mail, postage prepaid</p> <p><input type="checkbox"/> Inter-office Mail</p> <p><input checked="" type="checkbox"/> E-mail</p> <p><input type="checkbox"/> Fax</p> <p><input type="checkbox"/> Hand Delivery</p> <p><input type="checkbox"/> Legal Messenger</p>
<p><b>Department of Legal Counsel</b></p> <p>Patrick Downs Assistant City Attorney <a href="mailto:patrick.downs@seattle.gov">patrick.downs@seattle.gov</a></p> <p>James Dasher <a href="mailto:james.dasher@seattle.gov">james.dasher@seattle.gov</a></p> <p>Dan Goodman <a href="mailto:dan.goodman@seattle.gov">dan.goodman@seattle.gov</a></p> <p>Dave Cordaro <a href="mailto:dave.cordaro@seattle.gov">dave.cordaro@seattle.gov</a></p> <p>Alicia Reise <a href="mailto:Alicia.reise@seattle.gov">Alicia.reise@seattle.gov</a></p>	<p><input type="checkbox"/> U.S. First Class Mail, postage prepaid</p> <p><input type="checkbox"/> Inter-office Mail</p> <p><input checked="" type="checkbox"/> E-mail</p> <p><input type="checkbox"/> Fax</p> <p><input type="checkbox"/> Hand Delivery</p> <p><input type="checkbox"/> Legal Messenger</p>

Dated this 21<sup>st</sup> day of May 2018




---

Andrew Konstantaras  
[akonsta@me.com](mailto:akonsta@me.com)  
2440 Western Avenue, Suite 709  
Seattle, WA 98121  
206.618.2252