

**BEFORE THE HEARING EXAMINER
CITY OF SEATTLE**

In the Matter of the Appeal of

ELIZABETH CAMPBELL, ET AL.

from adequacy of an FEIS issued by the
the Director, Seattle Office of Housing

Hearing Examiner File:
W-18-002

**ORDER ON APPELLANTS':
MOTION FOR
RECONSIDERATION; MOTION
FOR RECUSAL; and MOTION
FOR STAY; and ORDER ON
CITY'S: MOTION TO EXCLUDE
EXHIBITS AND WITNESSES; and
MOTION TO DISMISS**

The Appellants Elizabeth Campbell et. al., (“Appellants”) timely submitted a Motion for Reconsideration concerning the Hearing Examiner’s Order on Motion for Continuance issued in this matter on September 12, 2018. The Hearing Examiner issued an oral ruling dismissing the Motion for Reconsideration at a prehearing conference attended by all party representatives on September 19, 2018. The parties are referred to that prehearing conference recording for the order’s findings and conclusions. The Appellants’ representative, Elizabeth Campbell, objected to the oral ruling. The motion for reconsideration concerned an original request by motion by the Appellants for extensions of time for discovery, and of the hearing date in this matter. HER 2.16 provides “For motions made at hearing, and **motions made for the extension of time** or to expedite the hearing, the Hearing Examiner may waive the requirements of this section and **may also rule upon such motions orally.**” The Hearing Examiner’s issuance of an oral ruling on the motion for reconsideration complied with HER 2.16, therefore the Appellants’ objection was overruled.

At the September 19, 2018 prehearing conference Elizabeth Campbell orally moved to disqualify the Hearing Examiner. Ms. Campbell argued that the basis of that motion was that the Hearing Examiner had not disclosed “past conflicts,” which she identified as the Hearing Examiner having been “a board member, an officer, and is still a member of Futurewise which opposes anything related to Fort Lawton that does not net it affordable housing,” and the Hearing Examiner’s past representation of the Seattle Displacement Coalition. HER 2.12 controls disqualification of an examiner, and provides in relevant part:

In the event of personal bias, prejudice, financial interest, or other reason substantially affecting the examiner's objectivity, an Examiner should recuse himself/herself from hearing a matter.

Prior to hearing, a party who reasonably believes that the Examiner assigned to a matter cannot remain objective in hearing it due to personal bias, prejudice, financial interest,

or other substantial reason, may request by written motion that a different Examiner be assigned to the matter. The request should be made at the earliest possible time, preferably no later than 7 business days prior to the day the hearing is to begin. The request must set forth the reasons for the belief that the assigned Examiner cannot remain objective in hearing the matter.

The fact that an Examiner has considered the same or a similar issue or proposal in another matter, or has made a ruling adverse to the interests of the party in the same or another matter, is not a basis for disqualification.

As explained at the prehearing conference the Hearing Examiner has not been a board member or officer of Futurewise for two years, and is not currently a member as alleged by Ms. Campbell. Ms. Campbell identified no specific interest in this appeal by either Futurewise, or the Seattle Displacement Coalition. The motion did not raise any basis to demonstrate “personal bias, prejudice, financial interest, or other reason substantially affecting the examiner's objectivity.” Finally, Ms. Campbell was clearly aware of these facts ahead of the timing of her motion which was raised immediately after the oral order denying Appellants’ motion for reconsideration. Instead of raising this issue at the earliest possible time (e.g. at the first prehearing conference on May 5, 2018), Ms. Campbell raised it in the context of a response to the Hearing Examiner’s unfavorable order as a form of retaliation. Therefore, in accordance with HER 2.16 the Hearing Examiner orally denied the oral motion made at the prehearing conference.

On September 14, 2018 the City filed a Motion to Exclude Exhibits and Witnesses and to Dismiss. The City’s motion indicated that the Appellants had failed to file the required witness and exhibit lists due August 31, 2018. That motion argued that, because the Appellants had failed to file the required witness and exhibit lists, the City was unable to prepare for the hearing set for September 25, 2018, and that any of Appellants’ proposed exhibits or witness should be excluded from the hearing. The motion went on to argue that because Appellants would have no exhibits or witnesses at the hearing by virtue of their exclusion, the Appellants’ case should be dismissed. The Appellants have still not filed an exhibit or witness list. The Office of Hearing Examiner consistently does not allow exhibits or witnesses to be introduced at hearing that have not been disclosed in an exhibit or witness list when such lists are required in advance of a hearing. If a party attempts to introduce a witness or exhibit as part of its case in chief that was not included on a required witness or exhibit list, then such evidence is excluded at hearing. The Pre-hearing Order for this matter issued on May 23, 2018 required that Appellants file their exhibit and witness lists by August 31, 2018. The Pre-hearing Order states: “Except for purposes of impeachment or rebuttal, only those witnesses and exhibits listed by the parties may be offered at the hearing.” The reason for this restriction is that a party should not be able to submit evidence and testimony by surprise, and thereby put the opposing party at a disadvantage. The Appellant has authored and filed a Motion to Extend Deadlines on September 4, 2018,¹ a reply brief in support of that same

¹ Appellants dispute the date of filing. However, filing with the Office of Hearing Examiner is not completed until a document has been included in the e-file system. Appellants’ motion was filed in the e-file system on September 4, 2018. Notably if the Appellants date of August 24, 2018 were correct then Appellants demonstrate by that activity that they had capacity to draft and file exhibit and witness lists, and/or to bring to the Hearing Examiner’s attention their lack of capacity to do so at a date even earlier than September 4, 2018 and

motion on September 12, 2018, a Motion for Reconsideration of the Examiner's Decision Denying Appellants Motion for Continuance on September 19, 2018, a Response to the City's Motion to Exclude and Dismiss on September 20, 2018, and a Motion for Stay on September 20, 2018, all of which demonstrate Appellants' capacity to draft documents and work on this case, and/or the ability to have communicated at an earlier date that Appellants did not have the capacity to identify exhibits and witnesses within the time required. By failing to identify exhibits and witnesses in advance of the hearing the Appellants have failed to comply with a Hearing Examiner Order, and put the opposing party at a disadvantage to prepare for the hearing. Therefore, the City's motion to exclude exhibits and witnesses is **GRANTED**.

As indicated above, the City's motion also included a request to dismiss the Appellants' case, based on the argument that without the ability to introduce evidence in the form exhibits or witnesses Appellants cannot meet their burden of proof. However, the motion to dismiss does not argue or purport to demonstrate that the appeal should be dismissed as a matter of law. As Appellants argue, even without witnesses or exhibits they have a right to proceed with their case. Where the possibility remains that Appellants may proceed with their case based on legal argument, the Appellants have a right to proceed. Contrary to Appellants' characterization of the Seattle Municipal Code ("SMC"), there is no record in this case at this time; therefore Appellants do not have the right to present rebuttal evidence. Rebuttal evidence is presented against evidence in the record, and with no record there is no opportunity for rebuttal unless the City introduces evidence. The opportunity to present evidence identified in SMC 3.02.090.D has been provided, and the Appellants failed to avail themselves of that opportunity by not identifying any exhibits or witnesses within the time provided. The City's motion to dismiss is **DENIED**.

The Appellants have filed a motion for stay in this matter in order to seek counsel. The Appellants' motion for stay is **GRANTED**. A new hearing date for this matter is set for Monday October, 29, 2018 at 9 AM. The parties should be clear that the granting of the stay is not an opportunity for Appellants to engage in additional discovery, or to seek additional reconsideration of orders on motions already issued in this matter, including, but not limited to the order concerning exhibit and witness lists. No additional motions or materials may be submitted in advance of the hearing date.

Entered this 29th day of September, 2018.

Ryan Vancil, Hearing Examiner
Office of Hearing Examiner
P.O. Box 94729
Seattle, Washington 98124-4729
Phone: (206) 684-0521
FAX: (206) 684-0536


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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 **Order on Motions** to each person listed below, or on the attached mailing list, in the matter of **Elizabeth Campbell, et al.**, Hearing Examiner File: **W-18-002**, in the manner indicated.

| Party | Method of Service |
|--|---|
| Appellant Elizabeth Campbell neighborhoodwarrior@gmail.com | <input type="checkbox"/> U.S. First Class Mail, postage prepaid <input type="checkbox"/> Inter-office Mail <input checked="" type="checkbox"/> E-mail <input type="checkbox"/> Fax <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Legal Messenger |
| Department Patrick Downs Assistant City Attorney patrick.downs@seattle.gov Alicia Reise Alicia.reise@seattle.gov | <input type="checkbox"/> U.S. First Class Mail, postage prepaid <input type="checkbox"/> Inter-office Mail <input checked="" type="checkbox"/> E-mail <input type="checkbox"/> Fax <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Legal Messenger |

Dated: September 28, 2018



Alayna Johnson
Legal Assistant