

**BEFORE THE HEARING EXAMINER for the
CITY of MERCER ISLAND**

INTERLOCUTORY ORDER DENYING MOTION

File No.: APL23-002

Appellant: Cushman & Wakefield
C/o Andor Law
ATTN: William J. Edgar
P.O. Box 8441
Portland, OR 97207
william.edgar@andor-law.com

Respondent: City of Mercer Island
Don Cole, Building Official
C/o Madrona Law Group, PLLC
ATTN: Eileen M. Keiffer
14205 SE 36th Street
Suite 100, PMB 440
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and

Bio Park, City Attorney
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bio.park@mercerisland.gov

WHEREAS, on March 17, 2023, the City of Mercer Island Hearing Examiner (“Examiner”) received an appeal filed on March 14, 2023, by Misty Cozzitorto, Managing Director, Asset Services-Multifamily, Americas (“Cozzitorto”), on behalf of Cushman & Wakefield (“Cushman & Wakefield”) with the City of Mercer Island *in re* the Revised Notice of Violation (“Revised NOV”) issued by Don Cole (“Cole”), the Community Planning & Development Building Official, on March 3, 2023¹; and

WHEREAS, the Examiner currently has in his possession the following documents which are assigned exhibit numbers for eventual entry into the hearing record:

Exhibit 9001: Revised Notice of Violation, CE23-0005, issued March 3, 2023
Exhibit 9002: Appeal, filed March 14, 2023, by Cozzitorto
Exhibit 9002.1: Email, Cole to Cozzitorto, March 16, 2023, at 4:57 p.m.

¹ Cole had issued an initial NOV against Cushman & Wakefield *et al.* on February 28, 2023, a copy of which Cozzitorto had attached to her Appeal. On March 3, 2023, Cole replaced the February 28, 2023, NOV with a Revised NOV. On March 16, 2023, Cole and Cozzitorto exchanged emails in which Cole asked if Cozzitorto intended to appeal the Revised NOV and Cozzitorto replied in the affirmative. Therefore, the initial NOV is moot and will be ignored in this proceeding.

- Exhibit 9002.2: Email, Cozzitorto to Cole, March 16, 2023, at 4:59 p.m.
- Exhibit 9003: Letter, Examiner to Principal Parties, March 22, 2023 (Scheduling guidance)
- Exhibit 9003.1: Email, Examiner to Principal Parties, March 22, 2023, at 9:44 a.m. (Transmittal of Exhibit 9003)
- Exhibit 9004: Notice of Appearance for Respondent, Madrona Law Group, PLLC (“Keiffer”) and City Attorney (“Park”), March 22, 2023
- Exhibit 9004.1: Email, Harris to Examiner, March 22, 2023, at 1:31 p.m. (Transmittal of Exhibit 9004)
- Exhibit 9005: Email, Keiffer to Examiner, March 23, 2023, at 10:45 a.m. (Scheduling)
- Exhibit 9006: Email, Examiner to Cozzitorto, March 28, 2023, at 9:46 a.m. (Scheduling)
- Exhibit 9007: Email, Cozzitorto to Examiner, March 28, 2023, at 10:02 a.m. (Scheduling)
- Exhibit 9008: Email, Examiner to Cozzitorto, March 29, 2023, at 9:04 a.m. (Procedural guidance)
- Exhibit 9009: Email, Examiner to Principal Parties, March 29, 2023, at 6:55 p.m. (Setting hearing date)
- Exhibit 9010: Email, Estrada to Examiner, March 30, 2023, at 7:54 a.m. (Respondent’s acknowledgment of hearing date)
- Exhibit 9011: Email, Cozzitorto to Examiner and Principal Parties, March 31, 2023, at 9:23 a.m. (Appellant’s acknowledgment of hearing date)
- Exhibit 9012: Email, Wood to Estrada, April 6, 2023, at 11:48 a.m. (Submittal of Notice of Appearance and Motion for Continuance)
- Exhibit 9012.1: Notice of Appearance for Appellant, Andor Law (“Edgar”), April 6, 2023
- Exhibit 9012.2: Motion for Continuance by Appellant, April 6, 2023
- Exhibit 9013: Email, Keiffer to Examiner, April 6, 2023, at 2:12 p.m. (Response to Motion for Continuance)
- Exhibit 9014: Email, Edgar to Examiner and Keiffer, April 6, 2023, at 4:09 p.m. (Reply to Response)
- Exhibit 9015: Interlocutory Order Denying Motion for Continuance, April 7, 2023 (This document)

; and

WHEREAS, Cushman & Wakefield’s Motion for Continuance (“Motion”) is based on the assertion that when Cozzitorto agreed to an April 26, 2023, hearing date she “did so without consulting counsel, without adequate understanding of the necessary preparation for the hearing and without a knowledge of the appeal process.” (Exhibit 9012.2, p. 2, ll. 16 – 18) The Motion seeks a 30-day continuance; and

WHEREAS, Respondent opposes the requested continuance on four grounds: 1) Appellant has not presented sufficient grounds to change the hearing date; 2) Changing the hearing date would confuse the public; 3) Changing the hearing date would necessitate additional expenditures by the City; and 4) The code violations alleged in the NOV “have been occurring since at least November of last year without resolution.” (Exhibit 9013, ¶ 5); and

WHEREAS, the Examiner’s scheduling letter of March 22, 2023, was sent to the Principal Parties by email on that date. There were three attachments to that transmittal email: The letter itself; a copy of an Emergency Rule for E-filing documents; and a copy of the Rules of Procedure (“RoP”) for the Mercer Island Hearing Examiner. (Exhibit 9003.1) Cushman & Wakefield, in the person of Cozzitorto, has had access to the RoP since on or about March 22, 2023; and

WHEREAS, on March 28, 2023, Cozzitorto assured the Examiner that April 26, 2023, was an acceptable hearing date: “Our legal counsel has not yet confirmed but I will confirm and ensure that this works.” (Exhibit 9007) Based on that assurance from Cozzitorto, The Examiner set the hearing for April 26, 2023, and the City began the public notice process. (Exhibit 9009); and

WHEREAS, in the Reply, Edgar states that Cushman & Wakefield “had no knowledge of any of procedures. Including, the requirement to submit the hearing memoranda and all exhibits and documents by April 12, 14 days in advance of the hearing.” (Exhibit 9014, ¶ 2, *sic*) The statement that “hearing memoranda and all exhibits and documents [must be submitted] 14 days in advance of the hearing” is an incorrect reading of the RoP. Respondent City, not the Appellant, is required to pre-file its exhibits not less than 14 days before the hearing. [RoP 224(d)] The Appellant is required to pre-file its exhibits and prehearing memorandum, if any, not less than 7 days before the hearing. [RoP 224(e)] Rebuttal documents are not subject to any pre-filing requirements. [RoP 224(i)] Therefore, the deadline for Cushman & Wakefield to pre-file its exhibits and memorandum is April 19, 2023, seven days after the City pre-files its materials; and

WHEREAS, postponement (referred to by some as “continuance”) requests in open record appeal cases are addressed in RoP 412. Of the five subsections in that RoP, only subsections (a) and (d) apply in the present case. Cushman & Wakefield have met the filing requirement in subsection (a). Subsection (d) provides that “The Examiner will not grant *ex parte* postponement requests filed other than jointly except in extraordinary circumstances.” (Italics in original) In the context of RoP 412, the term *ex parte* refers to a postponement request filed by a single party as opposed to a jointly filed request (which is covered by RoP 412(c)). The question, then, is: Are “extraordinary circumstances” present?; and

WHEREAS, the Examiner concludes that extraordinary circumstances are not present. Cushman & Wakefield has had the RoP available to it since on or about March 22, 2023. Cozzitorto had plenty of time to familiarize herself with the RoP before committing Cushman & Wakefield to the April 26 hearing date on March 28. Cushman & Wakefield has 12 days remaining (seven of which will be after the Respondent has pre-filed its exhibits) in which to assemble and pre-file its exhibits. The Examiner believes that to be ample time.

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Interlocutory Order Denying Motion for Continuance
APL23-002: Cushman & Wakefield v. Building Official
April 7, 2023

NOW, THEREFORE, the Hearing Examiner issues the following:

INTERLOCUTORY ORDER

Appellant's April 6, 2023, Motion for Continuance is **DENIED**.

ORDER issued April 7, 2023.

John E. Galt

JOHN E. GALT
Hearing Examiner

Distribution:

Principal Parties (by email to above-listed addresses and their associates)