

FILED

18 OCT 04 AM 10:49

The Honorable Mary E. Roberts  
Noted for Hearing: October 8, 2018  
Without Oral Argument  
Opposition Papers  
CASE NUMBER: 18-2-21872-1 SEA

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SUPERIOR COURT OF WASHINGTON IN AND FOR KING COUNTY

1426 FIRST AVENUE LLC,  
  
Plaintiff,  
  
v.  
  
CITY OF SEATTLE,  
  
Defendant.

No. 18-2-21872-1 SEA

DECLARATION OF JOHN A. TONDINI  
IN SUPPORT OF 1426 FIRST AVENUE  
LLC'S OPPOSITION TO CITY OF  
SEATTLE'S MOTION TO CHANGE  
HEARING DATE AND ADJUST  
BRIEFING SCHEDULE

John A. Tondini declares as follows:

1. I am an attorney of record for plaintiff 1426 First Avenue LLC ("1426") in this action. The following is true and correct and based upon my own personal knowledge.

2. I am a partner with the law firm Byrnes Keller Cromwell. Along with my partner Brad Keller, I am the attorney principally responsible for representing 1426 in this case. I will be responsible for preparing the opening and reply briefs for 1426 on its land use claims in advance of the upcoming LUPA hearing, currently set for January 28, 2019.

3. On September 18, 2018, Roger Wynne of the Seattle City Attorney's Office contacted me about potentially moving the hearing date and the related briefing deadlines. From September 19 through September 26, 2018, I exchanged numerous emails with Mr. Wynne in an effort to coordinate a briefing schedule that would be convenient for everyone during the holiday season. I offered to extend all the current dates by two weeks. Under this proposal, 1426's initial brief would have been due January 7 (avoiding the holidays); the City's response would follow on January 28; 1426's reply would be due February 5; and the

1 hearing date would have been moved to February 11. The City rejected this proposal saying  
2 that its private lawyers would be starting on vacation on February 11, 2019 and that they  
3 would be out essentially for the rest of the month of February. *See Exhibit A.*

4           4.       The City’s counter proposal was to stick 1426 and its counsel with a major  
5 merits motion due on New Year’s Eve. Because that day this year is a Monday and Tuesday  
6 is a state and national holiday, our office will likely be closed on December 31. Moreover,  
7 the City’s proposal would have me and my office working over the Christmas Holiday as  
8 opposed to filing on December 24. Monday (December 24) is Christmas Eve, and Tuesday is  
9 Christmas. Our office is closed on Christmas, and many of our staff and attorneys will be  
10 taking the entire week off. Additionally, my kids are away from school for winter break  
11 during this period, and I am often out of office and out of town after the 24th. I like spending  
12 the holidays and my time with my kids.

13           5.       It should be borne in mind that the status quo affecting the property at issue  
14 was an “emergency” ordinance passed by the City. LUPA has a tight 21-day filing deadline  
15 and by statute is to be expedited. The party that should bear the burden of being prepared to  
16 respond is the City that began this alteration to the land use status quo for the property.

17           6.       Further, the case schedule was issued on August 31, 2018, and the City had a  
18 choice of lawyers with which to staff its defense case. These schedule dates preexisted their  
19 choice.

20           7.       The City has now moved to push all the current dates by one week, making  
21 1426’s initial brief due on December 31; the City’s response would follow on January 21;  
22 1426’s reply would be due January 29; and the hearing date would be moved to February 4.

23           8.       Given the difficulties associated with the City’s proposal, 1426 would strongly  
24 prefer to keep the current schedule set by this Court.  
25  
26

1 I declare under penalty of perjury under the laws of the State of Washington that this  
2 declaration is true and correct.

3 DATED in Seattle, Washington, this 4th day of October, 2018.  
4

5 /s/ John A. Tondini  
6 John A. Tondini  
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**CERTIFICATE OF SERVICE**

The undersigned attorney certifies that on the 4th day of October, 2018, a true copy of the foregoing was served on each and every attorney of record herein via email:

Roger Wynne  
Daniel B. Mitchell  
Assistant City Attorneys  
Seattle City Attorney's Office  
701 Fifth Avenue, Suite 2050  
Seattle, WA 98104  
roger.wynne@seattle.gov  
daniel.mitchell@seattle.gov  
*Attorneys for Def. City of Seattle*

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dbruce@sbwillp.com  
dgraham@sbwillp.com  
*Attorneys for Def. City of Seattle*

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED in Seattle, Washington, this 4th day of October, 2018.

/s/ John A. Tondini \_\_\_\_\_  
John A. Tondini  
Byrnes Keller Cromwell LLP  
1000 Second Avenue, 38th Floor  
Seattle, WA 98104  
Telephone: (206) 622-2000  
Facsimile: (206) 622-2522

# **EXHIBIT A**

**From:** John Tondini  
**Sent:** Wednesday, September 26, 2018 5:17 PM  
**To:** 'Wynne, Roger' <Roger.Wynne@seattle.gov>  
**Cc:** Brad Keller <bkeller@byrneskeller.com>  
**Subject:** RE: calendar for December/January 1426 Frist Ave. v. City of Seattle

Roger, I always try to work on scheduling matters cooperatively but sometimes there are just not good options for one side or the other. So it is best just to leave things as they are and proceed as planned. 12/31 is not workable.

John

**From:** Wynne, Roger [<mailto:Roger.Wynne@seattle.gov>]  
**Sent:** Wednesday, September 26, 2018 4:47 PM  
**To:** John Tondini <[jtondini@byrneskeller.com](mailto:jtondini@byrneskeller.com)>  
**Cc:** Brad Keller <[bkeller@byrneskeller.com](mailto:bkeller@byrneskeller.com)>  
**Subject:** RE: calendar for December/January 1426 Frist Ave. v. City of Seattle

I somehow thought the record due date was 12/5. It's 12/3. So moving it up a week would be Nov. 26, which we could do. Sorry for the bad math . . .

**From:** Wynne, Roger  
**Sent:** Wednesday, September 26, 2018 4:38 PM  
**To:** John Tondini <[jtondini@byrneskeller.com](mailto:jtondini@byrneskeller.com)>  
**Cc:** Brad Keller <[bkeller@byrneskeller.com](mailto:bkeller@byrneskeller.com)>  
**Subject:** RE: calendar for December/January 1426 Frist Ave. v. City of Seattle

How about this? The schedule currently gives you three weeks with the record (although you could start briefing before the record). What if we moved up the date for the record by a week or two? Nov. 28? Earlier? That way you could get at least three weeks with the record for your opening brief, which you could finalize before Christmas and wait until New Year's Eve to have someone file and serve it?

Thanks,  
- Roger

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**From:** John Tondini <[jtondini@byrneskeller.com](mailto:jtondini@byrneskeller.com)>  
**Sent:** Wednesday, September 26, 2018 4:21 PM  
**To:** Wynne, Roger <[Roger.Wynne@seattle.gov](mailto:Roger.Wynne@seattle.gov)>  
**Cc:** Brad Keller <[bkeller@byrneskeller.com](mailto:bkeller@byrneskeller.com)>  
**Subject:** RE: calendar for December/January 1426 Frist Ave. v. City of Seattle  
**Importance:** High

Roger,

12/31 is not workable for the same reason it didn't work last week. Its new year's eve-- it's in the same week you have concerns with and my kids are out of school. We need to stick with what we have.

I've been out today interviewing witnesses for an upcoming trial in another case, so I hadn't returned your message earlier.

John

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**From:** Wynne, Roger [<mailto:Roger.Wynne@seattle.gov>]  
**Sent:** Wednesday, September 26, 2018 3:49 PM  
**To:** John Tondini <[jtondini@byrneskeller.com](mailto:jtondini@byrneskeller.com)>  
**Cc:** Brad Keller <[bkeller@byrneskeller.com](mailto:bkeller@byrneskeller.com)>  
**Subject:** RE: calendar for December/January 1426 Frist Ave. v. City of Seattle

And sorry, John, I forgot to add the reminder that Friday is the deadline to move or stipulate to change the hearing date and schedule. I would appreciate knowing whether you think we can agree to the Feb. 4 proposal by midday tomorrow so we can prepare a stipulation or motion.

I'm looping in Brad in case you're unavailable to respond.

Thanks again,  
- Roger



**Roger Wynne**  
Assistant City Attorney  
Land Use Section Director

Seattle City Attorney's Office  
701 Fifth Avenue, Suite 2050  
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Phone: 206-233-2177  
FAX: 206-684-8284  
[roger.wynne@seattle.gov](mailto:roger.wynne@seattle.gov)

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**From:** Wynne, Roger  
**Sent:** Wednesday, September 26, 2018 3:36 PM  
**To:** 'John Tondini' <[jtondini@byrneskeller.com](mailto:jtondini@byrneskeller.com)>  
**Subject:** RE: calendar for December/January 1426 Frist Ave. v. City of Seattle

Hey, John.

Sorry we seem unable to link up by phone in real time.

I understand your concern with February 8, although given that LUPA is an appellate proceeding and my prediction (which you are entitled not to share) that the judge will likely bifurcate damages, I don't share it.

But what about our other option that moves things ahead by one week, with a hearing on Monday, Feb. 4?

Deadline for Brief of Petitioner – December 31  
Deadline for Brief of Respondent -- January 21  
Deadline for Reply Brief – Jan. 29,  
Hearing/Trial date – Feb 4.

Does that not work for you? Again, we're just trying to get our three weeks for a response without losing a week to the holidays when I will be away.

Thanks very much,  
- Roger



**Roger Wynne**  
Assistant City Attorney  
Land Use Section Director

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**From:** John Tondini <[jtondini@byrneskeller.com](mailto:jtondini@byrneskeller.com)>

**Sent:** Friday, September 21, 2018 9:06 AM

**To:** Wynne, Roger <[Roger.Wynne@seattle.gov](mailto:Roger.Wynne@seattle.gov)>; Duffy Graham ([dgraham@sbwillp.com](mailto:dgraham@sbwillp.com)) <[dgraham@sbwillp.com](mailto:dgraham@sbwillp.com)>; David N. Bruce - Savitt Bruce & Willey LLP ([dbruce@sbwillp.com](mailto:dbruce@sbwillp.com)) <[dbruce@sbwillp.com](mailto:dbruce@sbwillp.com)>; Mitchell, Daniel B <[Daniel.Mitchell@seattle.gov](mailto:Daniel.Mitchell@seattle.gov)>

**Cc:** Brad Keller <[bkeller@byrneskeller.com](mailto:bkeller@byrneskeller.com)>

**Subject:** RE: calendar for December/January 1426 Frist Ave. v. City of Seattle

Roger, and others,

I think the Court sets the trial/hearing on Mondays because their Fridays are booked with other motions and matters, whereas on Mondays they can have a whole day/week to conduct the hearing. I think your idea of February 8 and only February 8 is not workable.

I was under the impression from our meeting on Tuesday that your group wanted a couple weeks set-out on the briefing schedule for the end of the year. So I came up with a good proposal to accommodate what I thought was your request.

We can't agree to move things into March.



When I read your reference to the court order about heavy preference to not moving dates, it seems we are best to simply leave things as is.

Regarding bifurcation, that is best addressed after we get confirmation that we are moving forward under LUPA.

Regards,

John

---

**From:** Wynne, Roger [<mailto:Roger.Wynne@seattle.gov>]

**Sent:** Thursday, September 20, 2018 2:27 PM

**To:** John Tondini <[jtondini@byrneskeller.com](mailto:jtondini@byrneskeller.com)>; Duffy Graham ([dgraham@sbwllp.com](mailto:dgraham@sbwllp.com)) <[dgraham@sbwllp.com](mailto:dgraham@sbwllp.com)>; David N. Bruce - Savitt Bruce & Willey LLP ([dbruce@sbwllp.com](mailto:dbruce@sbwllp.com)) <[dbruce@sbwllp.com](mailto:dbruce@sbwllp.com)>; Mitchell, Daniel B <[Daniel.Mitchell@seattle.gov](mailto:Daniel.Mitchell@seattle.gov)>

**Cc:** Brad Keller <[bkeller@byrneskeller.com](mailto:bkeller@byrneskeller.com)>

**Subject:** RE: calendar for December/January 1426 Frist Ave. v. City of Seattle

Hello, John.

First off, yes, we can keep a record production date of Dec. 3. We welcome input from you about what you would like to see in it and what facts we can resolve by stipulation. I've put a note on my calendar for the end of October (after a flurry of briefing through then) to see if we could start to jointly think through facts and documents we can just agree to, whether for a LUPA hearing or to resolve the DJA claims.

A Feb. 11 LUPA hearing/trial won't work for us. Dave and Duffy are on board to focus on discovery, trial prep, and trial work should we wind up with a court proceeding not limited to a record or dealing with damages. Unless we can agree now that the LUPA proceeding will be on the record and will not involve damages, we need to plan a time when Dave's available. He will be out of the country Feb. 10-24. And for what it's worth, Feb. 11 might not work for the judge because the order setting the case schedule warns: "Stipulated change of hearing dates must be within +1-7 days of the original date and must be approved by the assigned judge."

Our other interest is in having three weeks to formulate a response brief, not shortened by planned holiday vacations.

One way to approach this would be to keep your proposal, but see if the Court could do a LUPA hearing/trial on Friday, Feb. 8.

If that is not feasible, we would propose adjusting the schedule by one week rather than two:

Deadline for Brief of Petitioner – December 31

Deadline for Brief of Respondent -- January 21

Deadline for Reply Brief – Jan. 29,

Hearing/Trial date – Feb 4.

We understand and appreciate that moving your opening brief from Christmas Eve to New Year's Eve is not much different, but we trust you'll be able to start working on your opening brief in early November if not sooner (and that you are unlikely to work on the brief much between Christmas and New Year's regardless).

Should the judge grant our motion to dismiss the LUPA claim and bifurcate the monetary claims, we'll need to rethink scheduling for resolving the remaining claims.

We welcome your thoughts.

Cheers,  
- Roger



**Roger Wynne**  
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**From:** John Tondini <[jtondini@byrneskeller.com](mailto:jtondini@byrneskeller.com)>  
**Sent:** Wednesday, September 19, 2018 3:03 PM  
**To:** Duffy Graham ([dgraham@sbwllp.com](mailto:dgraham@sbwllp.com)) <[dgraham@sbwllp.com](mailto:dgraham@sbwllp.com)>; David N. Bruce - Savitt Bruce & Willey LLP ([dbruce@sbwllp.com](mailto:dbruce@sbwllp.com)) <[dbruce@sbwllp.com](mailto:dbruce@sbwllp.com)>; Wynne, Roger <[Roger.Wynne@seattle.gov](mailto:Roger.Wynne@seattle.gov)>; Mitchell, Daniel B <[Daniel.Mitchell@seattle.gov](mailto:Daniel.Mitchell@seattle.gov)>  
**Cc:** Brad Keller <[bkeller@byrneskeller.com](mailto:bkeller@byrneskeller.com)>  
**Subject:** calendar for December/January 1426 Frist Ave. v. City of Seattle

Following up on the calendaring request from your group yesterday to move things at the end of the year from over the holidays, if everything regarding briefing for December moves out two weeks we would have:

Deadline for Brief of Petitioner – January 7  
Deadline for Brief of Respondent January 28  
Deadline for Reply Brief February 5,  
Hearing/Trial date February 11.

We'd like to keep the deadline for filing the Record as December 3. And if there were going to be cross motions for that hearing, the opening briefs would be Jan 7, response January 28 and Reply Feb 5.

That program would be acceptable for us.

**John A. Tondini**  
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