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BEFORE THE HEARING EXAMINER
FOR THE CITY OF SEATTLE

SAVE MADISON VALLEY, <div style="text-align: center;">Petitioner,</div> v. CITY OF SEATTLE and VELMEIR MADISON CO. LLC, <div style="text-align: center;">Respondents.</div>		Hearing Examiner File: MUP 18-020 (DR, W) & S-18-011 RESPONDENT VELMEIR MADISON COMPANY LLC’S MOTION TO ESTABLISH HER 2.23 REMAND PROCEDURES
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I. RELIEF REQUESTED

On July 9, 2019, King County Superior Court Judge John Ruhl determined that the City of Seattle Hearing Examiner’s (“Examiner’s”) February 26, 2019 Decision in this matter was not a final decision for purposes of the Land Use Petition Act (Ch. 36.70C RCW (“LUPA”)) because the Examiner had remanded two issues for further review by SDCl. As such, Judge Ruhl dismissed Petitioner Save Madison Valley’s (“SMV’s”) LUPA Petition without prejudice for lack of subject matter jurisdiction. A copy of Judge Ruhl’s Order is attached as Ex. 1 to the Declaration of Patrick J. Mullaney.

In light of Judge Ruhl’s Order, Respondent, Velmeir Madison Co. LLC (“Velmeir”) asks that the Examiner follow the procedures established in Hearing Examiner Rule (“HER”) 2.23 (c-e) (Remand) and establish a schedule for the parties to file materials addressing the remanded

1 issues so that the Examiner can complete her further evaluation of those issues and conclude the
2 administrative process through issuance of a LUPA-appealable final decision.

3 II. LEGAL ANALYSIS

4 In his Order, Judge Ruhl determined that the Examiner's partial remand to SDCI made
5 the Examiner's Decision an interlocutory decision, not a final decision for purposes of LUPA,
6 despite the fact that the Decision stated that it was a final decision. Order, p. 5, lns. 11-13.
7 Because the Examiner's Decision was interlocutory, it was not final for purposes of relinquishing
8 the Examiner's jurisdiction. Thus, HER 2.23 should apply.

9 In relevant part, HER 2.23(c) provides that:

10 *"If the Hearing Examiner remands a matter for additional information,*
11 *analysis, or other material, the Hearing Examiner shall retain jurisdiction in*
12 *order to review the adequacy of the information, analysis, or other material*
13 *submitted in response to the remand."*

14 HER 2.23 (emphasis added).

15 HER 2.23(c) further provides that the Examiner may establish a date for submission of
16 the remand materials. HER 2.23(d) requires that the remand materials be filed with the
17 Examiner and served on other parties, and provides that the other parties shall then have the
18 opportunity to review and respond to the remand materials. Finally, after reviewing the
19 information provided in response to remand, HER 2.23(e) gives the Examiner discretion to issue
20 a decision on the adequacy of the information submitted or reopen the hearing.¹

21 ¹ The complete text of the cited provisions of HER 2.23 is as follows:

22 (c) If the Hearing Examiner remands a matter for additional information, analysis, or other material, the Hearing
23 Examiner shall retain jurisdiction in order to review the adequacy of the information, analysis, or other material
24 submitted in response to the remand. The decision shall expressly state that jurisdiction is retained and what
25 information, analysis, or other material is to be provided, and may indicate when it is to be submitted.

26 (d) A copy of the information, analysis, or other material filed with the Hearing Examiner in response to a remand
shall also be served on all parties to the proceeding. If the size or condition of the required materials makes copying
impractical, notifying the other parties of the filing is sufficient. The parties shall have an opportunity to review and
file rebuttal to the information, analysis, or other material filed in response to a remand.

(e) After receiving information, analysis or other material in response to a remand, and any rebuttal, the Examiner
may reopen the hearing.

1 The procedure established by HER 2.23 is also consistent with the requirements of Ch.
2 43.21C RCW. RCW 43.21C.075(3)(a) provides that “[i]f an agency has a procedure for appeals
3 of SEPA procedural determinations..., such procedure... shall allow no more than one agency
4 appeal proceeding on each procedural determination (the adequacy of a determination of
5 significance or of a final environmental impact statement”); WAC 197-11-680(3)(a)(iii)-(iv)
6 (“An agency shall provide for only one administrative appeal of a threshold determination . . .
7 successive administrative appeals on these issues within the same agency are not allowed”); *see*
8 *also Wells v. Whatcom County Water District No. 10*, 105 Wn. App 143, 151, 19 P.3d 453
9 (2001) (appellant could not undertake two appeals of FEIS adequacy).

10 Here, in order to prevent successive administrative appeals of the DNS, which is
11 prohibited by SEPA, and in order to provide an expeditious resolution of the City’s
12 administrative process (HER 2.06), Velmeir asks the Examiner to follow HER 2.23(c)-(e) and to
13 establish a schedule for the filing of the remand material and any responses thereto. Velmeir
14 suggests that a schedule based on a CR 56 summary motion would be appropriate and equitable.
15 Under such a schedule, assuming the Examiner grants Velmeir’s Motion, remand materials
16 would be filed within two weeks of issuance of the Examiner’s order, response materials would
17 be due two weeks later, and any rebuttal materials would be due a week after the response
18 materials are filed. The Examiner would then issue a decision on whether to accept the materials
19 as resolving the remanded issues or to reopen the hearing. A proposed order accompanies this
20 Motion.


21 III. CONCLUSION

22 The Superior Court has ruled that the Examiner’s February 26, 2019 Decision was not a
23 final decision that terminated the Examiner’s jurisdiction. Because the Examiner remanded two
24 issues to SDCl, the Decision is interlocutory, and future proceedings are governed by HER
25 2.23(c-e). HER 2.23 requires that Examiner retain jurisdiction for evaluation of the remanded
26

1 issues and allows the Examiner to establish when the remand and response materials should be
2 submitted (HER 2.23 (c) and (d)). Velmeir respectfully requests that the Examiner grant this
3 Motion and establish a schedule for addressing the remanded issues.

4
5 DATED: July 16, 2019.

6 STOEL RIVES LLP

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9 patrick.mullaney@stoel.com

10 Attorney for Respondent Velmeir Madison Co. LLC
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1 **CERTIFICATE OF SERVICE**

2 I, Sharman D. Loomis, certify and declare:

3 I am over the age of 18 years, make this declaration based upon personal knowledge, and
4 am competent to testify regarding the facts contained herein.

5 On July 16, 2019, I electronically filed a copy of *Velmeir Madison Company, LLC's*
6 *Motion to Establish HER 2.23 Remand Procedures and Proposed Order Granting Motion to*
7 *Establish HER 2.23 Remand Procedures* with the Seattle Hearing Examiner using its e-filing
8 system.
9

10 I also certify that on this date, a copy of this document was sent via email and First Class
11 U.S. mail to the following parties listed below:

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

9
10 DATED: July 16, 2019 July 16, 2019, at Seattle, Washington.

11 STOEL RIVES, LLP

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13 
14 Sharman D. Loomis, Practice Assistant