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BEFORE THE HEARING EXAMINER  
FOR THE CITY OF SEATTLE

SAVE MADISON VALLEY,  
  
Petitioner,  
  
v.  
  
CITY OF SEATTLE and VELMEIR  
MADISON CO. LLC,  
  
Respondents.

Hearing Examiner File:  
**MUP 18-020 (DR, W) &  
S-18-011**

DECLARATION OF PATRICK J.  
MULLANEY IN SUPPORT OF  
MOTION TO ESTABLISH HER 2.23  
REMAND PROCEDURES

I, Patrick Mullaney, declare under penalty of perjury and laws of the State of Washington that the following is true and correct and based on my personal knowledge.


1. I am over eighteen years of age and competent to testify in this matter;
2. I am one of the attorneys representing the Applicant/Respondent Velmeir Madison Co. , LLC (“Velmeir”) in the land use permitting and administrative process before the City of Seattle and in this LUPA proceeding;
3. Attached as Exhibit 1 is a true and correct copy of the *Order Granting Petitioner’s Motion For Reconsideration And Dismissing LUPA Petition* by Judge Ruhl dated July 9, 2019.

DECLARATION OF PATRICK J. MULLANEY - 1

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DATED: July 16, 2019.

STOEL RIVES LLP



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Patrick J. Mullaney, WSBA No. 21982  
[patrick.mullaney@stoel.com](mailto:patrick.mullaney@stoel.com)

Attorney for Respondent  
Velmeir Madison Co. LLC

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 *Declaration of Patrick J. Mullaney in*  
6 *Support of Motion to Establish HER 2.23 Remand Procedures* with the Seattle Hearing  
7 Examiner using its e-filing system.

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

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DECLARATION OF PATRICK J. MULLANEY - 3

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

DATED: July 16, 2019 at Seattle, WA.

STOEL RIVES, LLP

  
Sharman D. Loomis, Practice Assistant

# **EXHIBIT 1**

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SUPERIOR COURT OF WASHINGTON  
FOR KING COUNTY

SAVE MADISON VALLEY,

Petitioner,

v.

CITY OF SEATTLE; VELMEIR MADISON  
CO. LLC; and BROE HARLEY,

Respondents.

NO. 19-2-10001-0 SEA

ORDER GRANTING PETITIONER'S  
MOTION FOR RECONSIDERATION AND  
DISMISSING LUPA PETITION

(Clerk's Action Required)

This matter has come before the court for consideration of Petitioner Save Madison Valley's Motion for Reconsideration (Dkt. 32). The Petitioner requests the court to vacate the court's Order of Dismissal Without Prejudice (Dkt. 30) and issue a new order of dismissal, but upon different grounds.

The Court has considered the pleadings and other documents filed by the parties, and in particular the following items:

<u>Pleading</u>	<u>Dkt. No.</u>
Save Madison Valley's Motion to Dismiss	18
Velmeir Madison Co., LLC's Response in Opposition to Motion to Dismiss	22
Declaration of Patrick Mullaney in Opposition to Motion to Dismiss	23

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<u>Pleading</u>	<u>Dkt. No.</u>
Petitioner’s Reply in Support of Motion to Dismiss	27
Order of Dismissal Without Prejudice	30
Save Madison Valley’s Motion for Reconsideration	32
City’s Response to Petitioner’s Motion for Reconsideration	38
Velmeir’s Response to Save Madison Valley’s Motion for Reconsideration	40
Save Madison Valley’s Reply in Support of Motion for Reconsideration	42
Declaration of Claudia M. Newman in Support of Reply in Support of Motion for Reconsideration	43

**Procedural Background**

The Petitioner, Save Madison Valley (“**Petitioner**”), opposes a construction proposal (“**Proposal**”) that is being pursued by Respondent Velmeir Madison Co. (“**Velmeir**”).

On July 23, 2018, the Director of the Seattle Department of Construction and Inspections (“**SDCI**”) issued a Determination of Non-Significance (“**Determination**”), in which it approved Velmeir’s Proposal. Land Use Petition at ¶ 4.11 (Dkt. 1).

On August 6, 2018, the Petitioner appealed from the SDCI’s Determination to the City of Seattle Hearing Examiner. *Id.* at ¶ 4.12.

On February 26, 2019, a City of Seattle Deputy Hearing Examiner (“**Hearing Examiner**”) issued a 45-page “Findings and Decision” (“**Decision**”) reversing the SDCI’s Determination. Findings and Decision of the Hearing Examiner for the City of Seattle, Exhibit A to Land Use Petition (Dkt. 1).

In her Decision, the Hearing Examiner reversed the SDCI’s Determination, in part, and ruled in the Petitioner’s favor, in part. *See* Decision, Conclusion Nos. 22 and 26 (Dkt. 1). The

1 Hearing Examiner’s Decision states that it is “the final decision for the City of Seattle.” *Id.* at  
2 44. But the Decision also states that the matter is remanded to the SDCI for further review and  
3 action “consistent with Conclusions 15-27 and 39-43,” with respect to certain issues. *Ibid.*

4 On April 10, 2019, the Petitioner filed its Land Use Petition (“**Petition**”) in this court,  
5 pursuant to the Land Use Petition Act, Chap. 36.70C RCW (“**LUPA**”).

6 On May 23, 2019, the Petitioner filed a Motion to Dismiss its own Petition (“**Motion**”).  
7 Dkt. 18. The Petitioner argued that its Petition “challenges an interlocutory administrative  
8 decision that is not ripe for judicial review and should be dismissed without prejudice.” Motion  
9 at 1 (Dkt. 18). The Petitioner argued that it had filed the Petition even though it did not believe  
10 the Hearing Examiner’s Decision was a final, appealable order. The Petitioner explained:

11 While [Petitioner] does not believe that there was a final land use decision that  
12 could be challenged under LUPA, [the Petitioner] filed its petition to preserve  
13 its rights to appeal the Examiner’s conclusions on [issues other than the  
14 drainage and shadow issues] under LUPA.

15 Motion at 3-4 (Dkt. 18).

16 Respondent Velmeir opposed the Petitioner’s Motion on multiple grounds, including the  
17 ground that “it is clear that Seattle’s Hearing Examiner intentionally made a final land use  
18 decision that was subject to appeal under [LUPA].” Velmeir’s Response in Opposition to Motion  
19 to Dismiss at 1 (Dkt. 22). The City of Seattle did not respond to the Motion.

20 On June 4, 2019, the court granted the Petitioner’s Motion, and filed and served an Order  
21 of Dismissal Without Prejudice (Dkt. 30), based upon CR 41(a)(1)(B), which allows a plaintiff  
22 to dismiss its own claims for any reason “at any time before plaintiff rests at the conclusion of  
23 plaintiff’s opening case.” The court stated that CR 41(a)(1)(B) made it unnecessary to address  
24 the issue of whether the court lacked subject matter jurisdiction.  
25



1 **Petitioner’s Motion for Reconsideration**

2 On June 13, 2019, the Petitioner filed its Motion for Reconsideration. Dkt. 32. The  
3 Petitioner requests the court to withdraw its Order of Dismissal; and urges the court to replace it  
4 with an order of dismissal, without prejudice, that states specifically that the court lacks subject  
5 matter jurisdiction. *Id.* at 2. The Petitioner states that it filed its Motion to Dismiss “for the very  
6 purpose of having the Court establish, as a matter of law, whether the Petition was premature ...  
7 [that is,] that the Hearing Examiner’s decision wasn’t final.” *Id.* at 5-6. The Petitioner argues  
8 that if the current Order of Dismissal is allowed to stand, the Petitioner will be

9 in the same position that it would have been if it hadn’t filed the Petition at all  
10 ... If a future court concludes that the 21-day clock for a LUPA appeal ...  
11 started running on March 22, 2019, then [the Petitioner] will be permanently  
12 barred from challenging any of the conclusions in the Hearing Examiner’s  
13 decision because it “voluntarily” dismissed its LUPA Petition.

14 *Id.* at 6.

15 The City of Seattle joins in the Petitioner’s Motion for Reconsideration. Dkt. 38.

16 Velmeir apparently agrees that it is appropriate to vacate the Order of Dismissal, but  
17 argues that the court should stay the case rather than dismiss it on jurisdictional grounds.  
18 Velmeir’s Response at 1, 3-4, Dkt. 40. Velmeir concurs with the Petitioner’s argument that “the  
19 practical effect of a CR 41 voluntary dismissal would be to preclude further review of [the  
20 Petitioner’s] Petition.” *Id.* at 1. But Velmeir continues to argue that Hearing Examiner’s  
21 Decision is a final decision that is ripe for review, and that the court therefore does have subject-  
22 matter jurisdiction over the issues raised in the Petition (*Id.* at 2; see also Dkt. 22 at 1). Velmeir  
23 argues that the court therefore should vacate the Order of Dismissal and “retain jurisdiction over  
24 this case, but ... stay the proceedings pending the outcome of the City’s remand process.” *Id.* at  
25 3-4. Velmeir argues that this approach “minimizes further delay and ensures that by the time the  
court hears the merits of the case, any jurisdictional uncertainties [will] have been conclusively  
resolved.” *Ibid.*

1 **Discussion**

2 The initial question is whether the CR 41 Order of Dismissal Without Prejudice should  
3 be vacated. All three parties appear to agree that it should (although for different reasons). Based  
4 upon the parties' apparent lack of disagreement on this issue, the court will vacate the Order of  
5 Dismissal.

6 Once the Order of Dismissal is vacated, the second question is whether the superior court  
7 has subject-matter jurisdiction pursuant to LUPA to adjudicate the Petitioner's appeal, when the  
8 Hearing Examiner's Decision not only states that it is a "final decision," but also remands the  
9 matter to SDCI for further review and action in compliance with the Hearing Examiner's  
10 Decision. In essence, the Petitioner's Motion seeks a declaratory ruling on this issue.

11 The court agrees with the Petitioner and the City that the Hearing Examiner's remand of  
12 the matter to SDCI makes the Decision an interlocutory decision, and not a final decision, for  
13 purposes of a LUPA appeal, despite the fact that the Decision states that it is a final decision.  
14 The reason is that the Decision did not settle entire the controversy between the parties.

15 In a case that is factually similar to this case, the Supreme Court held that the superior  
16 court lacked authority to conduct a LUPA review of a county board of commissioners' decision.  
17 *Stientjes Family Trust v. Thurston County*, 152 Wn.App. 616, 217 P.3d 379 (2009). The  
18 Supreme Court explained:

19 The finality requirement was not satisfied herein. Although the BOCC [Board  
20 of County Commissioners] is the highest level of authority in the county to  
21 make land use decisions and had the authority to hear [the Petitioner's] appeal  
22 from the hearing examiner's decision, its decision was not final for purposes of  
23 review under LUPA. In reversing the hearing examiner's ruling and **remanding**  
24 **the cause** for consideration of whether DSD had properly applied the CAO to  
25 **Stientjes' site plan, the BOCC ... did not settle the controversy between the**  
**parties.] [T]he BOCC's decision was akin to a court order denying a**  
**dispositive pretrial motion from which an appeal may not be taken. The**  
**decision was, by definition, interlocutory, rather than final.** [Emphasis added]

*Stientjes Family Trust v. Thurston County*, 152 Wn.App. at 623-624, 217 P.3d 379.

1 Like the Board of County Commissioners in the *Stientjes* case, the Hearing Examiner  
2 remanded Velmeir's Proposal for further administrative action by the administrative agency. Her  
3 Decision was, by definition, interlocutory, rather than final, because it did not settle the entire  
4 controversy between the parties. *Id.* at 618, 217 P.3d 379.

5 In sum, this court lacks authority to conduct a LUPA review of the interlocutory  
6 Decision. A necessary corollary is that the court lacks authority to stay the action while  
7 Velmeir's Proposal wends its way through its second administrative process at the SDCI, and  
8 possibly through another appeal to the Hearing Examiner. The Petition therefore will be  
9 dismissed, without prejudice.

10 **Order**

11 For the reasons stated above, the court rules as follows:

- 12 (1) The Order of Dismissal Without Prejudice (Dkt. 30) is vacated.  
13 (2) The court grants Petitioner Save Madison Valley's Motion to Dismiss  
14 (Dkt. 18).  
15 (3) The court dismisses the Petitioner's Land Use Petition (Dkt.1), without  
16 prejudice, on grounds that the court lacks authority to conduct a LUPA  
17 review at this time.

18 Date: July 9, 2019.

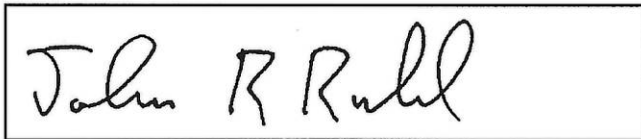
19 s/ John R. Ruhl  
20 John R. Ruhl, Judge  
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King County Superior Court  
Judicial Electronic Signature Page

Case Number: 19-2-10001-0  
Case Title: SAVE MADISON VALLEY vs SEATTLE CITY OF ET AL

Document Title: ORDER GRTG P'S MFR + DSMSG PETITION

Signed by: John Ruhl  
Date: 7/9/2019 11:01:45 AM



Judge/Commissioner: John Ruhl

This document is signed in accordance with the provisions in GR 30.

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