BEFORE THE HEARING EXAMINER
FOR THE CITY OF SEATTLE

In Re: Appeal by SAVE MADISON VALLEY of Decisions Re Land Use Application, Design Review, and Code Interpretation for 2925 East Madison Street, Project 3020338-LU and 3028345	HEARING EXAMINER FILE: MUP 18-020 (DR, W) & S-18-011 PETITIONER'S RESPONSE TO APPLICANT'S MOTION TO ESTABLISH REMAND PROCEDURES

I. RELIEF REQUESTED

Save Madison Valley requests that the Hearing Examiner deny Velmeir's Motion to Establish HER 2.23 Remand Procedures on the grounds that the Hearing Examiner does not have jurisdiction or authority to grant the motion. Per HER 2.24, the Hearing Examiner's February 26, 2019 Findings and Decision for MUP 18-020 (and the Order on Reconsideration following that Decision) terminated the Examiner's jurisdiction over the MUP 18-020 appeal. Velmeir cannot belatedly resurrect the Hearing Examiner's February Decision and call for new litigation over issues that haven't even been appealed to the Examiner yet.

Velmeir's motion should be dismissed also because the process proposed by Velmeir in its motion violates SEPA process requirements for issuance of a new threshold determination on the shadow and drainage impacts. Velmeir is essentially asking the Examiner to act as the SEPA

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responsible official (instead of SDCI) following an ad-hoc litigation process that flips the burden of proof and jettisons the threshold determination and appeal process. The Examiner cannot take on the role of SDCI and compel a SEPA threshold determination process that leapfrogs the requirements of local and state law.

II. ARGUMENT

A. The Hearing Examiner Does Not Have Jurisdiction or Authority to Rule on Velmeir's Motion

The Hearing Examiner does not have jurisdiction to consider and/or rule upon Velmeir's motion because there is no formal appeal currently pending before the Examiner.

The Hearing Examiner's Rules of Practice and Procedure (Rules) supplement the Seattle Municipal Code for matters within the Hearing Examiner's jurisdiction. HER 1.01. The Rules apply only to matters that are properly before the Examiner. HER 1.02. The Rules expressly state that the jurisdiction of the Hearing Examiner is terminated on the date a decision or recommendation is issued unless the Hearing Examiner expressly retains jurisdiction, or the law or Hearing Examiner rules provide otherwise. HER 2.24.

The hearing on appeal MUP-18-020 was closed on February 6, 2019 and the Examiner's Findings and Decision was issued pursuant to HER 3.18 on February 26, 2019.[1] Declaration of Claudia M. Newman (Jul. 24, 2019), Ex. 1. The Hearing Examiner's Findings and Decision stated: "The Determination of Non-Significance is REVERSED and REMANDED consistent with Conclusions 15-27 and 39-43." *Id.* at 44. Conclusion 27 stated: "The threshold determination decision with respect to drainage should be REVERSED, and the matter REMANDED to the Department for further actions in compliance with this decision." *Id*. at 40. Conclusion 43 stated: "the SEPA threshold determination

[1] The matter technically ended on March 22nd, 2019 with the Examiner's Order on Reconsideration.

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decision with respect to shadow impacts should be REVERSED, and the matter REMANDED to the Department for further actions in compliance with this decision. *Id*. at 43.

With this, the Hearing Examiner terminated the appeal and formally remanded the matter to the City of Seattle Department of Construction and Inspections (SDCI) without expressly retaining jurisdiction over the remand. *Id*. at 44. *See* Newman Dec, Ex. 2 (email from Hearing Examiner's office stating "we typically do not retain jurisdiction over remands and if we were retaining jurisdiction the decision would expressly say so."). The jurisdiction of the Hearing Examiner was terminated per HER 2.24 when the Findings and Decision (and the following Order on Reconsideration) was issued without an explicit statement that the Examiner was retaining jurisdiction.

With the remand, the ball is now fully in SDCI's court to issue a new threshold determination for the drainage and shadow impacts pursuant to SEPA. SDCI is "the agency with the main responsibility for complying with SEPA's requirements" and "shall be" the only agency responsible for issuing the threshold determination and preparation and content of environmental impact statements. SMC 25.05.050.

B. The Hearing Examiner Cannot Invoke HER 2.23 After a Decision Has Been Issued

The Hearing Examiner Rules apply only to matters that are properly before the Examiner. HER 1.02. Because this matter is not properly before the Hearing Examiner as demonstrated above, HER 2.23 does not apply.

In addition, the Hearing Examiner cannot invoke HER 2.23 because the Examiner already issued a decision and did not retain jurisdiction in her decision. HER 2.23(c)-(e) states:

> (b) ***Prior to issuing a decision on an appeal***…, if the Hearing Examiner determines that information, analysis, or other material needed to satisfy the provisions of relevant law has not been provided,

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

Under this Rule, the Examiner may remand a matter for additional information, analysis, or material, but this only applies to remands made "prior to issuing a decision on appeal." HER 2.23(b). It only applies when the decision "expressly state[s] that jurisdiction is retained and what information, analysis, or other material is to be provided." HER 2.23(c). Indeed, no part of HER 2.23 expressly applies to remands *following* a determination on the merits — here, that the MDNS was "REVERSED" — only to interlocutory remands *prior* to a final determination to aid the Examiner in her decision. Velmeir could have asked for such a remand at the hearing (or in a motion for reconsideration), but once the Examiner reversed the MDNS, the decision was final for purposes of the Examiner's jurisdiction within the city. From there, jurisdiction returned to SDCI.

As demonstrated above, the Examiner's decision was issued five months ago and, in that decision, the Hearing Examiner did not expressly state that jurisdiction would be retained and did not identify any information, analysis, or materials to be provided.

C. Velmeir's Motion is an Untimely Motion for Reconsideration.

With its motion, Velmeir is essentially requesting that the Hearing Examiner modify her February 26, 2019 Findings and Decision to invoke HER 2.23. A request to modify the Hearing Examiner's decision can only be made via a motion for reconsideration. Motions for reconsideration must be filed no later than 10 days after the date of the Hearing Examiner's decision. HER 3.20(b).

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It's important to note that immediately after the Hearing Examiner's Decision was issued, SDCI representative Bill Mills asked if the Hearing Examiner was retaining jurisdiction over the Save Madison Valley Matter. Newman Dec., Ex. 2. Ms. Alayna Johnson, the legal assistant to the Examiner sent an email to Mr. Mills and Velmeir's attorney (inappropriately excluding Save Madison Valley's counsel from the email) indicating that the Examiner was not retaining jurisdiction. Therefore, Velmeir was aware that the Examiner had not invoked HER 2.23 within the time limit for filing a motion for reconsideration and was required to address this issue at that time if they wanted the Examiner to modify her Decision.

As SMC 23.76.022.C.10 provides, "[t]he Director and all parties of record shall be bound by the terms and conditions of the Hearing Examiner's decision." It is too late for Velmeir to ask the Examiner to change her decision and Velmeir's disguised motion for reconsideration should be dismissed as untimely.

D. The Superior Court Did Not Conclude that the Hearing Examiner Retained Jurisdiction Over the Matter.

Velmeir's motion leaves the false impression that Superior Court Judge Ruhl's Order concluded that the Seattle Hearing Examiner retained jurisdiction over the remand. *See* Velmeir's Motion at 2 ("The Superior Court has ruled that the Examiner's February 26, 2019 Decision was not a final decision that terminated the Examiner's jurisdiction."). That is simply not true.

The issue presented to the Superior Court was whether the City of Seattle had completed its review of the Velmeir Proposal. *See* Newman Dec., Ex. 3. In other words, the question before the court was: Is the MUP Decision for the Velmeir Proposal final for purposes of judicial review? Ultimately, the court ruled that, because the MUP Decision for the Velmeir Proposal was not yet final

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for that purpose, the Land Use Petition was premature and the court did not have jurisdiction to review the appeal. *Id*.

The court's conclusion that the MUP decision was not final did not constitute a conclusion that the Hearing Examiner retained jurisdiction over the remand. The evidence before the Superior Court demonstrated clearly that the Hearing Examiner had not retained jurisdiction over the remand and the court explicitly recognized that fact. The court ultimately concluded that the land use decision for the Velmeir Proposal was not final because SDCI (not the Hearing Examiner) still had jurisdiction over the MUP Decision. In his Order, Judge Ruhl stated that "the Hearing Examiner remanded Velmeir's Proposal for further administrative action by the administrative agency." Newman Dec., Ex. 3 at 6. Judge Ruhl stated that the court lacked authority to review the LUPA Petition while the Proposal "wends its way through its second administrative process at the SDCI, and possibly through another appeal to the Hearing Examiner." *Id***.**

Finally, Judge Ruhl was clear that his ruling was about whether the decision was final for purposes of judicial review under Washington's Land Use Petition Act ("LUPA") — under which it is the City of Seattle as a whole that is the named respondent, not the Examiner — not about what department within the City had or has current authority to take further action. *Id*. at 5 (decision not final "for purposes of a LUPA appeal"). *See also* RCW 36.70C.040.(1)(a) (requiring LUPA petition to name the "[t]he local jurisdiction" as the named respondent, "not an individual decision maker or department"). As noted above in Section II.B, SDCI currently has jurisdiction within the City, not the Examiner. But for the court's purposes, all that mattered was that Velmeir's application was still pending within the city as a whole — that *somebody* within the City still had jurisdiction.

In sum, Superior Court Judge Ruhl's Order did not conclude or imply that the Seattle Hearing Examiner retained jurisdiction over the remand, only that the city as a whole did.

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E. The Hearing Examiner Does Not Have Authority to Alter the SEPA Process and Issue a Threshold Determination for the Velmeir Proposal

With its motion, Velmeir asks the Hearing Examiner to act as a staff member of SDCI by taking on the role of collecting information about shadow and drainage impacts, reviewing and assessing that information, and issuing a determination under SEPA on whether the proposal will have significant adverse impacts. There are so many levels of illegality here that it's hard to know where to begin.

Because the previous DNS was reversed by the Examiner with respect to shadow and drainage impacts, it is no longer in effect and no longer applies to the Velmeir Proposal. SMC 25.05.390 (A threshold determination "shall not apply" when reversed on appeal). The next step in the process is, therefore, the issuance of a new threshold determination for those impacts.

SDCI is "the agency with the main responsibility for complying with SEPA's requirements" and "shall be" ***the only agency*** responsible for issuing the threshold determination and preparation and content of environmental impact statements. SMC 25.05.050 (emphasis supplied). *See also* SMC 3.06.030 (SDCI's powers and duties include conducting reviews of SEPA impacts as prescribed by SEPA). The responsible official at SDCI "shall" make the threshold determination after reviewing information on the impacts provided by the applicant. SMC 25.05.310 and 330.

In addition, a specific public process must be followed for a threshold determination. The code provides detailed mandates about the content of environmental review, the process for obtaining information, how supporting documents are to be treated, what information is required of applicants, and more. *See generally* ch. 25.05 SMC. If the responsible official determines that the impacts of a proposal are not significant, SDCI shall prepare and issue a DNS and hold a 14 day public comment period. SMC 25.05.340. If the responsible official determines that there will be significant adverse

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impacts, SDCI can issue an MDNS (with a 14 day comment period) or require an EIS. SMC 25.05.350. SDCI's decision may be appealed to the City of Seattle Hearing Examiner for an open record hearing and review. SMC 25.05.680; SMC 23.76.022. The Hearing Examiner's authority here is limited to appellate review of a decision that is originally made by SDCI staff. *Id.* After an open record hearing on the merits, the Hearing Examiner must issue a written decision, including written findings and conclusions supporting the decision. The Hearing Examiner may affirm, reverse, remand, or modify the Director's decision. SMC 23.76.022C.6 and .10.

In its motion, Velmeir requests that the Examiner establish a remand schedule whereby the remand materials would be filed within two weeks of issuance of the Examiner's order, response materials would be due two weeks later, and any rebuttal materials would be due a week after the response materials are filed. Velmeir's Motion at 3. Velmeir suggests that the Examiner "would then issue a decision on whether to accept the materials as resolving the remanded issues or to reopen the hearing." Applicant Motion at 3.

With this request, Velmeir is asking the Examiner to step into the shoes of a planner to do the job that SDCI is supposed to be doing. SDCI has not made a decision, no appeal has been filed, and there are no outstanding "issues" to resolve currently before the Examiner. The only next step in the process is issuance of a new threshold determination. Velmeir's reference to "resolving the remanded issues" essentially means that the Examiner would be issuing the new threshold determination on drainage and shadow impacts. Velmeir's motion should be denied because the Hearing Examiner does not have legal authority to issue the new threshold determination. The Hearing Examiner's jurisdiction is appellate only.

Velmeir also suggests that the Examiner compel an expedited process that looks nothing like the public process that is required by law. If the Examiner grants Velmeir's motion, the Examiner

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would be creating an ad-hoc threshold determination process that eliminates the responsible official, eliminates the public comment period, and eliminates the hearing examiner appeal process entirely. The parties would be submitting evidence without witness testimony, without any adherence to rules of evidence, without opportunity for cross examination, and without opportunity for discovery. The Examiner would be reviewing materials and issuing a decision as if she were a planner at SDCI, not as a judge sitting over an appeal.

Velmeir's accelerated litigation schedule for review of information and preparation of analysis also flips the burden of proof from the previous hearing with Velmeir submitting materials first, Save Madison Valley responding, and Velmeir getting the last word on the significance of the shadow and drainage impacts. Velmeir's proposed schedule suggests that Velmeir would have the burden of proof. That would be true only if (1) the Examiner has original jurisdiction or (2) Velmeir is the appellant. To have original jurisdiction in a SEPA matter, the Examiner would be stepping into the shoes of SDCI, which is not allowed by law. At this stage in the process, there is no basis to conclude that Velmeir is an appellant. Overall, none of this makes sense because it's an ad-hoc process that Velmeir has created on its own with no basis or support in law.

Save Madison Valley is particularly troubled by SDCI's Response to Applicant Motion to Establish Remand Procedures that was filed with the Examiner on July 22, 2019. In that response, SCDI demonstrates an eager willingness to abdicate its responsibilities as the SEPA lead agency in favor of Velmeir's desire to press forward quickly with an ad-hoc process that serves its own interests while undermining public input and involvement.

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F. Litigation Before the Examiner May Not Even Be Necessary if SDCI is Required to Do Its Job

Velmeir wants to commence litigation over the shadow and drainage issues before we even know whether it's necessary. On May 10, 2019, counsel for Save Madison Valley submitted a letter to Bill Mills, the land use planner and supervisor at SDCI to touch base regarding the process and future assessment of the drainage and shadow impacts discussed in the Examiner's decision. Newman Dec., Ex. 4. In that letter, Save Madison Valley's counsel requested that SDCI inform them when the developer submits new or revised drainage reports so that the stormwater expert could review and comment to assist the City in its revised threshold determination. *Id*. With respect to shadow impacts, counsel for Save Madison Valley reached out to Bill Mills for the purpose of moving forward with the Examiner's direction towards the City to work with representatives of the Mad P P-Patch to address and review the probable adverse shadow impacts to the Mad P P-Patch. *Id.*

The Examiner should require SDCI to do its job as the responsible official under SEPA and allow the members of the public, the applicant, and SDCI to work proactively toward ensuring a proper review of the remanded issues. That sort of cooperation and interaction working with SDCI is the type of process that SEPA envisions and requires occur with public involvement with the responsible official. It would be inappropriate to force this conversation into litigation with the Examiner acting as the responsible official in a trial setting instead of going through the appropriate process set forth in SEPA. If SDCI does its job in a manner that is consistent with SEPA, then no appeal would be filed and the Examiner's involvement would be unnecessary.

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G. SEPA's Prohibition on More Than One Agency Appeal Proceeding Does Not Apply in this Case.

Velmeir argues that RCW 43.21C.075(3)(a) prohibits an appeal of the new threshold determination that will be issued by SDCI in this matter. That argument is based on a misreading of that provision. The SEPA prohibition on more than one agency appeal proceeding does not apply in this case.

RCW 43.21C.075(3)(a) provides that "if an agency has a procedure for appeals of agency environmental determinations made under this chapter, such procedure: (a) shall allow no more than one agency appeal proceeding on each procedural determination (the adequacy of a determination of significance or of a final environmental impact statement)").

This provision forbids local jurisdictions from requiring two or more administrative appeals of the very same SEPA decision. In Washington, local jurisdictions often subject land use decisions to a two-tier administrative process before those decisions can be appealed to court – first in an open record appeal (often before an Examiner) and then before the City Council or County Commissioners. *See, e.g.*, RCW 36.70B.060(6) (allowing two-tier appeal process for project permit decisions). This is the type of successive appeal process that SEPA prohibits. Like every other jurisdiction in Washington, Seattle does not provide a two-tier appeal process for SEPA threshold determinations. A threshold determination can be only administratively appealed once under the Seattle Municipal Code and any second appeal must go straight to Superior Court without a second, intermediary administrative appeal to the City Council.

The official interpretation of the Washington Department of Ecology, the agency that wrote the SEPA rules, articulates the spirit and letter of the provision. The quote below from Ecology's online SEPA Handbook, shows how Ecology interprets the "one appeal" limitation:

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> A DS, DNS, or EIS are each subject to a single administrative appeal proceeding. Successive reviews within the same agency are not allowed. For example, ***a hearing examiner's decision on the appeal of a DS cannot be further reviewed by the local legislative body***. Further consideration is limited to review by a court as part of a judicial appeal.

SEPA Online Handbook, Washington State Department of Ecology, § 11.1 (emphasis added). As indicated in the quote above, SEPA threshold determinations may not be subjected to a multi-tier administrative appeal process. That is what it means to bar more than one appeal of the same procedural determination.

In the February decision, the Hearing Examiner reversed the City's first DNS and remanded the matter back to SDCI for review of the drainage and shadow impacts of the Velmeir proposal. At this point in time, we don't know whether SDCI will conclude that the drainage and shadow impacts are significant or not. Whatever that decision is, it will constitute a new SEPA environmental determination that is subject to a new appeal to the Hearing Examiner.

III. CONCLUSION

Save Madison Valley requests that the Examiner deny Velmeir's Motion to Establish HER 3.23 Remand Procedures on the grounds presented above.

Dated this 24th day of July, 2019.

Respectfully submitted,

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