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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**

RESPONDENT VELMEIR MADISON
COMPANY LLC’S REPLY
MEMORANDUM IN SUPPORT OF
MOTION TO ESTABLISH HER 2.23
REMAND PROCEDURES

I. LEGAL ARGUMENT

Appellant, Save Madison Valley’s (“SMV’s”) Response Memorandum mischaracterizes HER 2.23 and proposes a process that violates SEPA’s prohibition against multiple administrative appeal processes on a single permit application.

A. SMV Has Taken Inconsistent Positions.

In Superior Court, SMV took the position that “Save Madison Valley sought dismissal of its LUPA petition on the grounds that the Hearing Examiner’s decision wasn’t final.” SMV Motion for Reconsideration, p. 6, Mullaney Reply Decl. Ex. 1. SMV also claimed that Examiner’s statement at the end of her Decision that the Decision was final for purposes of LUPA was “boilerplate” and a “generic notice” that could not and should not be relied upon. SMV Reply on Motion for Reconsideration, pp. 3-4, Mullaney Reply Decl. Ex. 2.

1 In his July 9, 2019 Order, (First Mullaney Decl. Ex. 1) King County Superior Court
2 Judge John Ruhl determined that because of the remanded issues, the Examiner’s Decision was
3 interlocutory and not a final decision.¹

4 SMV cannot have it both ways: either the Examiner’s Decision was final and divested
5 the Examiner of jurisdiction or it was interlocutory and did not divest the Examiner of
6 jurisdiction. Because Judge Ruhl determined that the Examiner’s Decision was interlocutory, the
7 Examiner retains jurisdiction and HER 2.23 applies.

8 **B. HER 2.23 Applies to Remanded Decisions.**

9 In order to make the SEPA process more efficient, the Legislature has amended SEPA
10 several times to impose increasingly strict limitations on administrative appeals of SEPA
11 compliance. Richard L. Settle, *The Washington Environmental Policy Act*, § 19.01, p. 19-1. “Of
12 all the new project review requirements, the most important, applying to all local governments in
13 the state, is the hearing limitation.” *Id.* at § 19.01[1] p. 19-5. The single hearing limitation is
14 “strict and unqualified.” *Id.*

15 SMV incorrectly argues that HER 2.23 only applies to remands that occur in the midst of
16 ongoing proceedings (Response, pp. 3-4). HER 2.23 is not written in the conjunctive. HER 2.23
17 (a-c) apply to three different remand situations: HER 2.23(a) applies to a remand prior to the
18 Examiner making a recommendation; HER 2.23(b) applies to a remand prior to the Examiner
19 making a decision. HER 2.23(c) applies when the Examiner makes a decision that includes a
20 remand request for additional information and analysis, which is what occurred in this case:

21 If the Hearing Examiner remands a matter for additional information, analysis, or
22 other material, the Hearing Examiner shall retain jurisdiction in order to review
23 the adequacy of the information, analysis, or other material submitted in response
24 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.

25 _____
26 ¹ A copy of Judge Ruhl’s July 9, 2019 Order is attached as Ex. 1 to the Declaration of Patrick J. Mullaney filed with
the Motion to Establish Remand Procedures.

1 HER 2.23(c).

2 HER 2.23(e) provides that “[a]fter receiving information, analysis or other material in
3 response to a remand, and any rebuttal, the Examiner may reopen the hearing.” If SMV were
4 correct that HER 2.23 only applied before the Examiner made a decision, HER 2.23(e) would be
5 unnecessary.

6 HER 2.24 also supports the conclusion that HER 2.23 applies even after the Examiner
7 has made a decision by providing that an Examiner’s decision terminates jurisdiction *unless* the
8 Examiner’s decision includes a remand. HER 2.24 provides:

9 (a) The jurisdiction of the Hearing Examiner is terminated on the date a decision
10 or recommendation is issued unless the Hearing Examiner expressly retains
11 jurisdiction, *or the law or these Rules provide otherwise (see e.g., HER 2.23 and*
12 *3.20).*

12 HER 2.24 (emphasis added).

13 Thus, the Hearing Examiner’s Rules expressly contemplate the Examiner’s retention of
14 jurisdiction when a case is remanded, and HER 2.23 allows the Examiner to establish what
15 information should be submitted, the date for the submission, and whether the hearing should be
16 reopened following the Examiner’s review of the information submitted.

17 The process established by HER 2.23 is consistent with Washington law that prohibits
18 multiple administrative SEPA proceedings on a single permit application.

19 **C. A Particular SEPA Process Can Not Be Required on Remand.**

20 SMV’s claims that the Examiner’s remand restarts the SEPA process and requires
21 issuance of a new threshold determination and a second appeal process. SMV Response, p. 2.
22 SMV’s position conflicts with State law (RCW 36.70B.050 and RCW 43.21C.075) and with
23 the holding in *In re King Cty. Hearing Exam’r*, 135 Wash. App. 312, 320-21, 144 P.3d 345,
24 349 (2006).

25 In *In re King Cty. Hearing Exam’r*, the King County Examiner sought to require that
26 the King County Department of Natural Resources prepare a supplemental EIS related to

1 earthquake faults at the proposed site for the Brightwater wastewater treatment facility. Citing
2 a provision of King County regulations that is functionally identical to SMC 23.76.022.C.10,
3 the King County Examiner contended that his order requiring an SEIS was in the nature of
4 remand and therefore justified.

5 The court rejected this argument, concluded that the request was beyond the
6 Examiner's authority because "the statutory scheme vests in the lead agency the authority to
7 determine how to handle newly acquired information" *In re King Cty. Hearing Exam'r*,
8 135 Wash. App. at 321.

9 The same rationale applies here, it is up to SDCI to determine what, if any, additional
10 SEPA process is dictated by the new information presented on remand, and the remand does
11 not vest SMV with a right to an entirely new administrative SEPA appeal process. Here, SDCI
12 has indicated that it supports Velmeir's request for the Examiner to review the material
13 submitted on remand.

14 **D. SMV's Proposed New DNS Process Violates State Law.**

15 State law limits SEPA appeals and provides that if an agency has a procedure for appeals
16 of environmental determinations, such procedure "[s]hall allow no more than one agency
17 appeal proceeding on each procedural determination (the adequacy of a determination of
18 significance/nonsignificance ...)". RCW 43.21C.075 (emphasis added); *see also* 24 Wash.
19 *Prac., Environmental Law And Practice* § 17.52 (2d ed.) (If an agency chooses to provide for
20 SEPA administrative appeals, the appeal procedure may provide for no more than one agency
21 appeal of procedural determinations, i.e., the threshold determination or the adequacy of a final
22 EIS); *see also Wells v. Whatcom County Water District No. 10*, 105 Wn. App 143, 151, 19 P.3d
23 453 (2001) (appellant could not undertake two appeals of FEIS adequacy).

24 The prohibition against multiple SEPA proceedings is explained in WAC 197-11-680.
25 First, administrative SEPA appeals are subject to the restrictions in RCW 36.70B.050 and
26 36.70B.060 that local governments provide no more than one open record hearing and one closed

1 record appeal per consolidated permit decision. WAC 197-11-680(2). Second, regarding SEPA,
2 an agency “shall provide for only one administrative appeal of a threshold determination or the
3 adequacy of an EIS; *successive administrative appeals on these issues within the same agency*
4 *are not allowed*”. WAC 197-11-680(3)(a)(iv) (emphasis added); *see also* RCW 36.70B.050
5 (local government review of project permit applications must combine procedural and
6 substantive review and provide for no more than one open record hearing; RCW 36.70B.060(6)
7 (“if a local government elects to provide an appeal of its threshold determinations or project
8 permit decisions, the local government shall provide for no more than one consolidated open
9 record hearing on such appeal.”).

10 Application of HER 2.23 addresses these statutory prohibitions on successive
11 administrative appeals of the stormwater and shadow issues raised in the Examiner’s Decision
12 and results in a fair and efficient termination of the administrative process that comports with
13 State law.

14 **E. Velmeir’s Request Is Supported by Other Provisions of the Seattle Code.**

15 In addition to HER 2.23, at least two provisions of Seattle Municipal Code are consistent
16 with Velmeir’s request that the Examiner establish a schedule for reviewing the additional
17 information following remand. For example, in the context of Type III decisions,
18 SMC 23.76.005.D.2.b.1 provides that that “[t]he Hearing Examiner shall set a reasonable
19 period for the remand after consideration of the nature and complexity of the issues, and, if
20 practicable, after consultation with the parties about the reasonableness of the
21 remand period.” Emphasis added. SMC 23.76.005.D.2.c.3.1 establishes the same procedure
22 for Type IV remands.


23 **II. CONCLUSION**

24 SMV’s main objective is delay. There is no basis in State law to support SMV’s claim for
25 a new DNS process on the remanded issues. An appeal of SDCI’s SEPA decision on these
26 issues has already occurred. Assuming her Decision was final, the Examiner remanded for

1 additional information without retaining jurisdiction. The Superior Court has ruled that the
2 Examiner's decision was not final; rather, it was interlocutory. Therefore, the Examiner retains
3 jurisdiction and future proceedings following remand are governed by HER 2.23(c-e). For these
4 reasons, Velmeir respectfully requests that the Examiner grant this Motion and establish a
5 schedule for addressing the remanded issues.

6
7 DATED: July 29, 2019.

8 STOEL RIVES LLP

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12 Attorney for Respondent Velmeir Madison Co. LLC
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CERTIFICATE OF SERVICE

I, Sharman D. Loomis, certify and declare:

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

On July 29, 2019, I electronically filed a copy of *Velmeir Madison Company, LLC's Reply Memorandum in Support of Motion to Establish HER 2.23 Remand Procedures* with the Seattle Hearing Examiner using its e-filing system.

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

- | | |
|--|--|
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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 29, 2019 at Seattle, Washington.

STOEL RIVES, LLP



Sharman D. Loomis, Practice Assistant