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** SECOND 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 *Save Madison Valley's Motion for Reconsideration*, filed in King County Superior Court No. 19-2-10001-0 on June 13, 2019.

4. Attached as Exhibit 2 is a true and correct copy of *Petitioner's Reply in Support of Motion to Dismiss*, filed in King County Superior Court No. 19-2-10001-0 on May 30, 2019.

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DATED: July 29, 2019.

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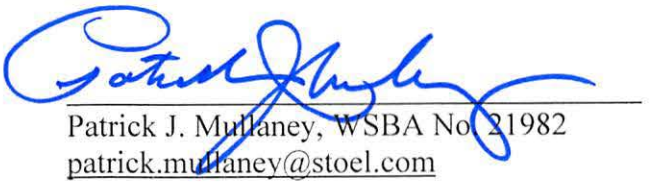

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CERTIFICATE OF SERVICE

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 ***Second Declaration of Patrick J. Mullaney 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, WA.

STOEL RIVES, LLP

Sharman D. Loomis, Practice Assistant

EXHIBIT 1

The Honorable John Ruhl
Hearing Date: June 21, 2019
Without Oral Argument

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND 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 SAVE MADISON VALLEY'S MOTION FOR RECONSIDERATION

I. RELIEF REQUESTED

Petitioner Save Madison Valley moves for reconsideration of this Court's Order of Dismissal Without Prejudice dated June 4, 2019.

Save Madison Valley was aware of the option for voluntary dismissal under CR 41 and did not request dismissal on that basis for a reason. The only way that Save Madison Valley can preserve its right to appeal the Hearing Examiner decision in the future is by obtaining a formal Court order at this time that states, as a matter of law, that the Court does not have subject matter jurisdiction to consider an appeal of the Hearing Examiner decision at this time. Save Madison Valley's right to appeal the Hearing Examiner decision in the future is not protected if Save Madison Valley voluntarily

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dismisses its own Petition. Save Madison Valley requests that the Court withdraw its Order of Dismissal, reinstate this matter, and resolve the issue on subject matter jurisdiction as requested by Petitioner's Motion to Dismiss.

II. STATEMENT OF FACTS

This matter involves a development proposal by Respondent Velmeir Madison Co. at 2925 East Madison Street in Seattle in the Madison Valley neighborhood. Land Use Petition (Apr. 10, 2019) at 4. After holding a hearing on the appeal of the City of Seattle planning department's approval of the development proposal, the City of Seattle Hearing Examiner issued the land use decision that is on appeal in this Land Use Petition. *Id*., Ex A (Findings and Decisions of the Hearing Examiner in File No. MUP-18-020 and S-18-01 (Feb. 26, 2019).

In her decision, the Hearing Examiner reversed and remanded the planning department's Decision to issue a Determination of Non-Significance. Hearing Examiner Findings and Conclusions at 44. The Hearing Examiner upheld Save Madison Valley's appeal on two key issues that had been presented on appeal and denied all of the other challenges brought on appeal by Save Madison Valley. The project approvals are now on hold until the additional environmental review ordered by the Examiner is completed.

The Land Use Petition Act (LUPA), ch. 36.70C RCW, provides jurisdiction for superior court review of final land use decisions made by counties and cities. RCW 36.70C.030. Save Madison Valley filed a Land Use Petition pursuant to LUPA petition on April 10, 2019 in which it challenged the Hearing Examiner's decision to deny issues presented in the appeal other than the drainage and shadow issues. While Save Madison Valley did not believe that the Hearing Examiner's decision was a final land use decision and, therefore, did not believe that the Court had subject matter jurisdiction,

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Save Madison Valley filed its Land Use Petition to preserve its rights to appeal the Examiner's conclusions on issues that were not remanded to the planning department.

Save Madison Valley filed a motion to dismiss with this Court on May 23, 2019 requesting that the Court dismiss the Land Use Petition on the grounds that the Court did not have subject matter jurisdiction over the issues presented in the Petition. *Id*. Save Madison Valley did not request voluntary dismissal pursuant to CR 41. Respondent Velmeir Madison Company LLC (Velmeir) opposed the Motion, arguing that the Court did have subject matter jurisdiction over the Land Use Petition. Velmeir's Response in Opposition to Motion to Dismiss (May 29, 2019).

A hearing on the motion was scheduled for June 6, 2019 at 4:00 pm to allow for oral argument on the motion. Before the hearing was held and without hearing oral argument on the motion, the Court dismissed the Petitioner's Land Use Petition without prejudice on the grounds of voluntary dismissal pursuant to CR 41(a)(1)(B). Order of Dismissal Without Prejudice (June 4, 2019). The issue of subject matter jurisdiction was not resolved by the Court.

This motion for reconsideration followed.

III. STATEMENT OF ISSUE

Was substantial justice done when the Court dismissed Petitioner's Land Use Petition on the grounds of voluntary dismissal pursuant to CR 41(a)(1)(B) when Petitioner did not request voluntary dismissal and when Petitioner's motion instead requested dismissal for lack of subject matter jurisdiction?

IV. EVIDENCE RELIED UPON

This Motion relies on the pleadings that have been filed by the parties in this matter.

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V. ARGUMENT

On the motion of the party aggrieved, an order may be vacated and reconsideration granted for any one of the following causes (among others not relevant here) materially affecting the substantial rights of such parties:

> … (3) Accident or surprise which ordinary prudence could not have guarded against**;**
>
> …
> (7) That there is no evidence or reasonable inference from the evidence to justify the verdict or the decision, or that it is contrary to law;
>
> …
> (9) That substantial justice has not been done.

CR 59.

The Order of Dismissal came as a surprise to Save Madison Valley because it was issued two days before oral argument on the motion was scheduled to occur and because Save Madison Valley's Motion to Dismiss did not volunteer to dismissal of its own Petition based on CR 41. Petitioner was aware of the option to seek voluntary dismissal of its Land Use Petition pursuant to CR 41(a)(1)(b) and did not seek voluntary dismissal for a reason. The dismissal of Save Madison Valley's Petition at this time on the grounds that it was "voluntary" puts Save Madison Valley in a very difficult position in light of case law interpreting and applying the Land Use Petition Act (LUPA), ch. 36.70C. Substantial justice was not done because the Court dismissed the Petition in a manner that subverts the very justice that Save Madison Valley was attempting to seek and protect when it filed its Petition in the first place.

As background, it's important to recognize that the statutory deadlines under LUPA are jurisdictional and unforgiving. A land use petition is barred, and the Court may not grant review, unless the petition is filed with the Court and served on the parties within 21 days of the issuance of

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the land use decision. RCW 36.70C.040(3). LUPA's statute of limitations begins to run on the date a land use decision is issued. RCW 36.70C.040(2)-(4). A land use decision becomes unreviewable by the courts if not appealed to superior court within LUPA's specified timeline. *Habitat Watch v. Skagit County*, 155 Wn.2d 397, 406-4-7, 120 P.3d 56 (2005); *Chelan County v. Nykreim*, 146 Wash.2d 904, 52 P.3d 1 (2002); *Samuel's Furniture, Inc. v. Department of Ecology*, 147 Wash.2d 440, 54 P.3d 1194, 63 P.3d 764 (2002). And the Land Use Petition Act (LUPA) provides "the exclusive means of judicial review of land use decisions." RCW 36.70C.030(1).

In her Decision, the Hearing Examiner ruled in favor of Save Madison Valley on some issues, but against Save Madison Valley on other issues. *See* Motion to Dismiss. We have a legal question presented by this: when does the 21 day clock for a LUPA appeal start running for SMV to challenge those conclusions that were decided against Save Madison Valley? Did the clock start ticking on March 22, 2019[1], after the Hearing Examiner decision was issued or will the clock start ticking at some future date after the remanded issues have been resolved?

Recognizing the very strict nature of the 21 day deadline, Save Madison Valley filed and served its current LUPA Petition within 21 days of the issuance of the Hearing Examiner's decision. Save Madison Valley believed that the LUPA Petition was premature, but filed it anyway to preserve its right to challenge the conclusions that were made against Save Madison Valley in case a court disagreed with Save Madison Valley's position on subject matter jurisdiction.

After filing the LUPA Petition, Save Madison Valley filed its Motion to Dismiss for the very purpose of having the Court establish, as a matter of law, whether the Petition was premature. Save

[1] While the Hearing Examiner's decision was issued on February 26, 2019, the City of Seattle SDCI filed a motion for reconsideration of the Hearing Examiner's Decision. That motion was denied by the Examiner on March 22, 2019. According to RCW 36.70C.020.2, a 21 day clock for a LUPA Appeal dose not start until rulings on any motions for reconsideration are issued.

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Madison Valley sought dismissal of its LUPA petition on the grounds that the Hearing Examiner's decision wasn't final. *Samuel's Furniture, Inc. v. State, Dept. of Ecology*, 147 Wn.2d 440, 452, 54 P.3d 1194 (2002); *Stientjes Family Trust v. Thurston County*, 152 Wn. App. 616, 625, 217 P.3d 379 (2009).

Now that the Court has ruled that the Petitioner voluntarily dismissed its appeal, Save Madison Valley is in the same position that it would have been if it hadn't filed the Petition at all. With a "voluntary" dismissal, Petitioner essentially has not appealed the Hearing Examiner decision within 21 days of March 22, 2019. If a future court concludes that the 21-day clock for a LUPA Appeal of those issues started running on March 22, 2019, then Save Madison Valley will be permanently barred from challenging any of the conclusions in the Hearing Examiner's decision because it "voluntarily" dismissed it's LUPA Petition.

Respondent Velmeir has made it clear that Velmeir disagrees with Save Madison Valley on this issue of finality. *See* Velmeir Response in Opposition to Motion to Dismiss. When a future Land Use Petition is filed by Save Madison Valley within 21 days of resolution of the remanded issues, Velmeir will file a motion to dismiss any and all allegations that challenge conclusions in the Hearing Examiner's decision that were not in favor of Save Madison Valley (i.e. not the remanded issues) on the grounds that SMV was required to file an appeal of those conclusions within 21 days March 22, 2019.

Obviously Save Madison Valley disagrees with Velmeir's position on that, but the only way that Save Madison Valley can preserve its right to challenge the Examiner's conclusions that were made against Save Madison Valley in the Hearing Examiner decision is if there is a formal court order that establishes, as a matter of law, that the Land Use Petition that was filed within 21 days of March 22, 2019 was premature and the court did not have subject matter jurisdiction over the issues presented

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at this time. If this Court allows the June 4, 2019 Order of Dismissal Without Prejudice to stand, a future challenge to the Hearing Examiner's decision could be dismissed for lack of subject matter jurisdiction.

If this Court's dismissal on CR 41 grounds against the wishes of Save Madison Valley stands, Save Madison Valley would very reluctantly have to appeal the dismissal to the Court of Appeals in order to seek a decision on subject matter jurisdiction. Justice is not served by a voluntary dismissal against the wishes of the Petitioner. Save Madison Valley requests that the Court reconsider its decision on its Motion to Dismiss.

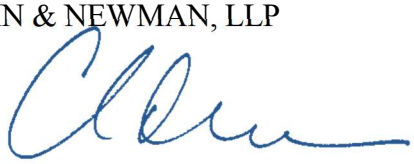
VI. CONCLUSION

Save Madison Valley respectfully requests that this Court vacate its Order of Dismissal Without Prejudice and instead dismiss Save Madison Valley's Land Use Petition without prejudice on the grounds that the Court does not have subject matter jurisdiction.

Dated this 13th day of June, 2019.

Respectfully submitted,

BRICKLIN & NEWMAN, LLP



By: _____
Claudia M. Newman, WSBA No. 24928
Attorneys for Save Madison Valley

I certify that this memorandum contains 1,770 words in compliance with the Local Civil Rules.

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EXHIBIT 2

The Honorable John Ruhl
Hearing Date: May 31, 2019 at 3:00 p.m.

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND 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 PETITIONER'S REPLY IN SUPPORT OF MOTION TO DISMISS

I. INTRODUCTION

The City of Seattle, through its Department of Construction and Inspections ("SDCI"), still retains jurisdiction over and continues to be charged with evaluating Velmeir's land use application for a large, multi-use building in the City's Madison Valley neighborhood. As such, the City could still require significant changes to the project. Or the proposal could be denied.

Yet, under RCW 36.70A.020, only a "final" determination on Velmeir's land use application, which leaves nothing open to further dispute and sets at rest all causes of action between the parties, can be appealed under LUPA. Because the City has yet to issue such a final determination, this Court

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lacks subject-matter jurisdiction over the present LUPA petition. In time, the issues in this appeal may be ripe for judicial review. But that time is not now. The appeal should be dismissed.

II. ARGUMENT

A. The Hearing Examiner's Decision Was Not a Final Land Use Decision Under LUPA.

Without providing any legal authority, Velmeir suggests that the Hearing Examiner's decision is final because "only" two issues were remanded for further administrative review — as if the number mattered. Velmeir Response at 2. This argument fails for multiple reasons.

First, Velmeir ignores the law. Whether one issue was remanded, or two, or three, or fourteen, a land use decision is not "final" unless "'[n]o additional issues remain.'" *Stientjes Family Trust v. Thurston County*, 152 Wn. App. 616, 625, 217 P.3d 379 (2009) (quoting *Samuel's Furniture, Inc. v. State, Dept. of Ecology*, 147 Wn.2d 440, 453, 54 P.3d 1194 (2002)). In turn, "no" means no. If *any* issues remain to be decided on a land use permit application, the Court "lack[s] authority" to hear a LUPA appeal. *Id.*

Here, issues clearly do remain concerning the proposal's shadow and drainage impacts, which were remanded to the City's administrative arm for further review. Thus, the Hearing Examiner's decision was not the City's "final" determination on Velmeir's application and the present LUPA petition must be dismissed. *See* Mot. at 5-6.

Furthermore, Velmeir's view of finality — devoid of supporting case law — simply does not make sense. Because the Examiner remanded Velmeir's permit application for further review, the project could still undergo significant changes before the City approves the project as a whole. The project could be denied. Or it could stall out, burdened with onerous mitigation measures necessary to address drainage and shadow impacts. Ultimately, Velmeir is asking for an advisory opinion on a final

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approval that may never materialize, or one that may look very different from what was challenged before the Hearing Examiner.

Worse, Velmeir's view of finality could lead to multiple, piecemeal advisory opinions. It is not inconceivable that even after additional review, other issues will be remanded, leading to potentially multiple judicial appeals of multiple, non-final decisions as the proposal winds its way through the City's permit review process. Such an approach is inconsistent with principles of judicial economy and binding case law. The Court lacks subject-matter jurisdiction and should reject Velmeir's invitation to wade into the realm of advisory opinions.

B. Save Madison Valley Is Not Precluded from Raising the Issue of Subject-Matter Jurisdiction.

Next, Velmeir points out that the Examiner's decision contains a notice indicating that it is "the final decision of the City of Seattle." From this, Velmeir argues that we are barred from raising the issue because we did not challenge the "form" of the Examiner's decision — as if she could expand the Court's subject-matter jurisdiction by fiat. Velmeir at 2. As above, this argument has no basis in law or fact.

First, the referenced statement in the Examiner's decision is a generic notice below the Examiner's signature, not above her signature with the rest of her findings and conclusions. This indicates that the statement is not a binding legal conclusion, but a boilerplate statement (likely authored by a different city employee) providing notice to the public about potential appeal rights.

In turn, the statement quoted by Velmeir is prefaced by the following disclaimer:

> NOTE: It is the responsibility of the person seeking to appeal a Hearing Examiner decision to consult code sections and other appropriate sources, to determine applicable rights and responsibilities.

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Hearing Examiner Decision at 44. Obviously, this disclaimer alerts the public that while the text following it is meant to be general guidance on the law, it cannot and should not be relied upon. Recipients of the Decision are ultimately responsible for interpreting the law themselves and determining when an appeal is available and appropriate. The law controls, not the statement following the disclaimer.

More importantly, the Seattle Hearing Examiner does not have authority to determine whether her decision constitutes a final land use decision under LUPA — a state statute that defines the Court's jurisdiction, not the Examiner's. Our Supreme Court has held that municipalities lack authority to proscribe procedures, rules, and remedies that must be followed by the superior courts. *See City of Spokane v. J-R Distributors, Inc*., 90 Wn.2d 722, 728, 585 P.2d 784 (1978). Likewise, city officials like the Hearing Examiner obviously lack authority to enlarge the court's subject-matter jurisdiction over matters that are expressly precluded by statute. This is especially true under LUPA, where the Court sits in an appellate capacity "and has only the jurisdiction conferred by law." *Durland v. San Juan County*, 182 Wn.2d 55, 64, 340 P.3d 191 (2014). Here, not only is it apparent that the Examiner did not *intend* to render a binding conclusion about the jurisdictional status of her decision under LUPA (as evidenced by the disclaimer), she would lack the authority to do so even if she had that intention.

Finally, subject-matter jurisdiction refers to the court's authority to hear and decide a claim. *Bour v. Johnson*, 80 Wn. App 643, 647, 910 P.2d 548 (1996). Without it, any judgment entered is void. *In re Marriage of Furrow*, 115 Wn. App 661, 667, 63 P.3d 821 (2003). For these reasons, a challenge to the Court's subject-matter jurisdiction may be asserted at any time and is never deemed waived. *See, e.g., In re Marriage of McDermott,* 175 Wn. App. 467, 479, 307 P.3d 717 (2013) ("Because the absence of subject-matter jurisdiction is a defense that can never be waived,

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judgments entered by courts acting without subject-matter jurisdiction must be vacated even if neither party initially objected to the court's exercise of subject-matter jurisdiction and even if the controversy was settled years prior"). Indeed, the Court itself "is under a duty to notice and apply all pertinent statutes" that may affect its subject-matter jurisdiction. *Hunter v. Dep't of Labor & Indus.*, 19 Wn. App. 473, 476, 576 P.2d 69, 71 (1978). Here, the pertinent statute — LUPA — makes clear that the Court lacks jurisdiction over the present appeal, regardless of what was or was not said in the Petition.

Nor are we asking for a "do-over," as Velmeir puts it. The simple fact is that Save Madison Valley exercised caution by filing the current appeal in light of what can be rather unforgiving and unpredictable interpretations of LUPA requirements in Superior Court. But judicial review is still premature. If a future LUPA appeal becomes necessary once the land use decision is final, that petition would address the same issues presented in this appeal (assuming the project has not changed) combined with any additional issues that arise once the decision is final (after drainage and shadow impacts have been fully addressed). We are not asking for a "do-over," but for judicial review at the appropriate time when the Court has actual jurisdiction over a concrete decision authorizing a concrete proposal. If Velmeir feels prejudiced by that, its remedy lies with the Legislature.

C. Prejudice Is Not Relevant to Subject-Matter Jurisdiction.

Velmeir contends that Save Madison Valley is not prejudiced by being required to prosecute its case at this time. We take issue with that assessment, since the project could still change radically before a final decision is issued, forcing Save Madison Valley to expend significant resources litigating for a potentially advisory opinion.

But prejudice (or the lack of it) is completely irrelevant. As discussed above, subject-matter jurisdiction refers to the court's authority to hear and decide the case before it. Therefore, "[w]hen a

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court lacks subject-matter jurisdiction in a case, dismissal is the only permissible action the court may take." *Young v. Clark*, 149 Wn.2d 130, 133, 65 P.3d 1192 (2003) (citing *Deschenes v. King County*, 83 Wn.2d 714, 716, 521 P.2d 1181 (1974)). Prejudice has nothing to do with it.

D. Save Madison Valley's Motion to Dismiss Was Timely.

Last, Velmeir argues that Save Madison Valley's motion was untimely, citing the six-court-day motion deadline at LCR 7(b)(4)(A). In doing so, Velmeir completely ignores the case scheduling order in this case. Like all other LUPA case scheduling orders issued in King County Superior Court, that order established an eight-day filing deadline for all jurisdictional motions:

> Motions on jurisdictional and procedural issues shall comply with Civil Rule 7 and King County Local Rule 7, *except that the minimum notice of hearing requirement shall be 8 days*.

Order Setting Land Use Case Schedule at 2 (April 10, 2019) (emphasis added).

Addressing this exact language, the Court of Appeals (Division I) recently held that the clear import of the Court's standard land use case scheduling order is to establish a uniform, eight-day briefing schedule for *all* jurisdictional motions. *See Thompson v. City of Mercer Island*, 193 Wn. App. 653, 658–59 (2016) ("Such motions under the case schedule order require only eight days' notice. [Respondents] complied with the superior court's case schedule order because they filed their motions to dismiss based on lack of standing exactly eight days before the scheduled hearing").

Moreover, because the briefing schedule established in the case scheduling order (a) is more than seven days, and (b) refers to "days" not "court days," the sentence in CR 6(b) about not counting intervening holidays does not apply. Like the respondents in *Thompson*, Save Madison Valley timely filed its Motion to Dismiss on May 23, 2019, exactly eight days before the scheduled hearing on May 31st.

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In short, Save Madison Valley did not "fail[] to account for Memorial Day." Instead, Velmeir failed to account for the case scheduling order. The motion is timely.

III. CONCLUSION

Save Madison Valley respectfully requests that this Court dismiss its LUPA Petition for lack of subject-matter jurisdiction. The issues presented in this appeal can and should be presented in a LUPA petition after the remand process has concluded, and after the City has issued a final land use decision.

Dated this 30th day of May, 2019.

Respectfully submitted,

BRICKLIN & NEWMAN, LLP

By: _____

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We certify that this memorandum contains 1,750 words, in compliance with the Local Civil Rules.

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