BEFORE THE HEARING EXAMINER
FOR THE CITY OF SEATTLE

In the Matter of the Appeal of: **SEATTLE MOBILITY COALITION** From a Determination of Nonsignificance issued by the Seattle City Council	**Hearing Examiner file:** **W-18-013** **SEATTLE MOBILITY COALITION'S MOTION FOR RECONSIDERATION**

I. INTRODUCTION

Pursuant to Hearing Examiner Rule ("HER") 3.20, Appellant Seattle Mobility Coalition ("Appellant") files this Motion for Reconsideration of the Examiner's September 20, 2019 Findings and Decision ("Decision") in this matter. Appellant respectfully requests that the Examiner reconsider the portions of the Decision discussing: (1) the actions the City of Seattle ("City") must complete on remand, under the heading "Decision"; and (2) judicial review, under the heading "Concerning Further Review." First, when a determination of nonsignificance ("DNS") is remanded due to lack of information reasonably sufficient to evaluate the environmental impact of a proposal, the State Environmental Policy Act ("SEPA") requires that the agency issue a new threshold determination following consideration of sufficient information. While this requirement is implied in the Decision, it is not express. Appellant

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requests that the Examiner revise the Decision to specifically require the issuance of a new threshold determination. Second, the City's SEPA decision relating to a Comprehensive Plan amendment may be appealed to the Growth Management Hearings Board ("Growth Board") concurrently with any appeal of the decision on the underlying amendment. A SEPA appeal may not be filed with the Growth Board before the decision on the amendment is made; so-called "orphan" SEPA appeals are not allowed. Appellant requests that the Examiner revise the Decision to recognize this appeal pathway in the section of the Decision addressing further review. Appellant requests reconsideration of the Decision on these grounds.[1]

II. ARGUMENT

A. The Examiner should grant reconsideration because the parties did not have the opportunity to brief issues regarding the remedy provided or appeal path.

Hearing Examiner Rule of Practice and Procedure ("HER") 3.20 provides that reconsideration may be granted in the case of an irregularity in the proceedings preventing a fair hearing. Here, the Decision properly remands the DNS to the City and directs it to make determinations on the questions in Section B of the SEPA Checklist consistent with the available range of remedies in the HER. HER 3.18(c)(4), (5). However, the Decision is "irregular" in the sense that it also directs the City to do "any additional review it deems necessary" without explanation as to what this may be (i.e., without specifically directing issuance of a new threshold determination), which is outside the scope of the remedies described in HER 3.18. *See* HER 3.18(c)(4), (5) (decision may "affirm, modify, reverse or remand" and may "direct[] parties to take actions consistent with the decision"). The Decision also does not mention review by the

[1] Appellant believes it demonstrated the City improperly piecemealed the proposal to adopt impact fees ("Proposal") and that the Proposal will result in significant adverse impacts. Appellant expressly reserves its right to make these and any other claims on appeal and does not waive or abandon any claims.

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Growth Board, although this is the "subsequent procedural step[s] for appealing the Hearing Examiner's decision." *See* HER 3.18(c)(5). The potential for remand without specific direction and the question of the appeal pathway were not issues at hearing and so were not briefed by the parties. Fairness requires an opportunity for the parties to address these issues on reconsideration. *See Wallingford Community Council*, Hearing Examiner File No. W-17-006 - W-17-014, Order on Motion for Reconsideration (December 5, 2018), p. 1 (granting City's motion for reconsideration in light of the fact that "the postscript concerning appeals is not applicable for a non-project EIS appeal").

B. The City must issue a new threshold determination.

SEPA requires that the City must issue a new threshold determination following completion of Section B of the Checklist. The Examiner should reconsider the portion of the decision addressing the actions required on remand and clarify that a new threshold determination is required.

The Examiner correctly ruled that the City "improperly truncated the required analysis for this proposal"; that the fact that there was "no demonstration that [the City] considered, or made a determination with regard to, the questions in Section B is reversible error"; and that the "DNS was not based on 'information reasonably sufficient to evaluate the environmental impact' of the Ordinance." Decision, pp. 9-10. The Examiner also properly remanded the DNS to the City "for the purpose of revising the SEPA Checklist to include a determination(s) concerning the questions posed by Section B[.]" *Id*. at p. 11. However, the portion of the Decision remanding for "any additional review it [the City] deems necessary to complete the threshold determination in accordance with SEPA procedural requirements" is insufficiently specific. *Id*. The Examiner has found "reversible error" and remanded the DNS for preparation of additional

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information regarding the impacts of the Proposal (the information required by Section B of the Checklist). SEPA requires that after the City prepares this information and makes a determination regarding impacts on the elements of the environment discussed in Section B, it must then issue a threshold determination that complies with SEPA. This requirement is inherent in the environmental review process under SEPA. Under SEPA, the agency is required to use the environmental checklist to assist in making threshold determinations for proposals. WAC 197-11-315(1); SMC 25.05.315.A. In making a threshold determination, the responsible official must review the environmental checklist, independently evaluate the responses of the applicant, and "determine if the proposal is likely to have a probable significant adverse environmental impact, based on the proposed action, the information in the checklist . . . and any additional information[.]" WAC 197-11-33(1); SMC 25.05.330.A. A threshold determination is documented in a DNS or Determination of Significance ("DS"). WAC 197-11-310(5); SMC 25.05.310.D. Allowing an agency to make a threshold determination and then later prepare and review an adequate environmental checklist would turn the SEPA process on its head.

This is especially true where, as here, the City did not previously evaluate or make any determination regarding the impacts on the elements of the environment identified in Section B of the Checklist. As the Examiner recognized, the Checklist contains *no* explanation or analysis of potential impacts on the elements of the environment discussed in Section B. The City simply conducted "no consideration" whatsoever of the substantive issues discussed in that section. Decision, p. 10. The City took this approach because it "concluded that because the proposal was of a nonproject nature, it was not required to complete Section B of the environmental checklist." *Id.* at 9. Therefore, the City failed to "[d]etermine if the proposal is likely to have a probable significant adverse environmental impact, based on . . . the information in the

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checklist," as required by WAC 197-11-330(1)(b), and to "make its threshold determination based upon information reasonably sufficient to evaluate the environmental impact of a proposal," as required by WAC 197-11-335.

In other words, not only were the Checklist and the DNS insufficiently comprehensive, the City failed to make an actual threshold determination in relation to the elements of the environment discussed in Section B. As the Washington Supreme Court long ago cautioned, when a record "fails to show sufficient deliberation and consideration and contains little other than the conclusion that an EIS is unnecessary . . . [it] strongly refutes the contention that a threshold determination was made" in the first place. *Bellevue v. King Cty. Boundary Review Bd.*, 90 Wn.2d 856, 867-68, 586 P.2d 470, 477 (1978). That is exactly what occurred (or, more accurately, did not occur) here. Indeed, the Examiner's ruling correctly diagnoses the problem with the City's action by instructing the City on remand not just to revise its explanations but to "complete the threshold determination." Decision, p. 11.

The remedy for failure to base a threshold determination on adequate information is, as the Examiner directed, for the City to answer the questions in Section B. What the Examiner did not expressly direct, but what follows necessarily from the Decision's conclusions, is that the City must then issue a new threshold determination based on its findings. This is why, when an agency has not engaged in any "actual consideration of potential environmental significance," a reviewing court "*must vacate*" not only the threshold determination but the entire underlying action due to "serious noncompliance with SEPA's mandate." *Lassila v. Wenatchee*, 89 Wn.2d 804, 817, 576 P.2d 54, 61 (1978) (emphasis added). Although the "underlying action" is not at issue in this administrative appeal, the Examiner has nonetheless correctly identified the City's

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failure to consider or make a determination regarding relevant environmental questions as a "reversible" error. Decision, p. 10.

Having issued what incorrectly purports to be a final threshold determination, the City does not get to take a second bite at the apple by conducting additional analysis in support of the remanded DNS without issuing a new DNS. This would simply be a paper exercise of generating additional information to support a preordained conclusion. Instead, the City's task is to make a threshold determination as to impacts on the elements of the environment discussed in Section B, based on environmental analysis, for the first time.

Put another way: if the City's analysis indicates that the Proposal will have probable significant adverse impacts, it must withdraw the DNS and issue a DS, which would be a "new threshold determination." WAC 197-11-600(3)(b). In the same way, issuance of a DNS based on consideration of Section B of the Checklist would be a new threshold determination because it would be the first threshold determination that is based on actual environmental analysis of impacts to elements of the environment identified in Section B. Because such a decision has not yet been made by the City, it would be as distinct in character from the current DNS as a DS would be from a DNS that had actually considered environmental impacts. The City's forthcoming determination about environmental impacts thus cannot logically be said to constitute a "revision" or "completion" of a previous decision the City made about another matter entirely – the scope of review procedurally required for non-project actions. The City's task on remand therefore must be to make a new threshold determination.

Past Examiner decisions are consistent with this approach. In *Friends of Cheasty*, for example, the Examiner reversed a DNS because the Department of Parks and Recreation (which was both the applicant and lead agency) "did not consider all environmental factors in a manner

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sufficient to amount to prima facie compliance with the procedural requirements of SEPA," rendering it impossible to "determine whether or not the proposal's likely adverse impacts . . . would be significant." Hearing Examiner File W-15-008 and W-15-009, Findings and Decision (January 26, 2016), at 11-12. After the initial DNS was reversed by the Examiner, the Department revised the proposal and issued a new DNS. This second DNS was appealed in a separate Hearing Examiner proceeding. Some issues were dismissed on the basis of *res judicata*, since they were addressed in the prior appeal. Hearing Examiner File No. W-18-010 and W-18-011, Order on Motion for Partial Dismissal (August 29, 2019). Subsequently, the appellant voluntarily dismissed the remainder of its appeal. *Id*., Order of Dismissal, September 12, 2019.

In this case as well, a new threshold determination must be issued based on the new information prepared by the City. This is consistent with SEPA's policy and requirements for full disclosure. If, for example, the City ultimately concludes that there are no significant adverse impacts to areas of the environment discussed in Section B of the Checklist and issues a new DNS, then public notice is required. An agency must give public notice of a DNS for a Growth Management Act ("GMA") action, such as the one at issue here. WAC 197-11-340(2). The agency must send the DNS and the checklist to agencies with jurisdiction, the Department of Ecology, the tribes, and agencies whose public services would be impacted. *Id*. Any person, agency or tribe may provide comment. *Id*. The agency must reconsider the DNS based on timely comments and may retain, modify or withdraw the DNS. *Id*. The Appellant and any other party with standing must be afforded the opportunity to review and appeal the new DNS. *See* RCW 43.21C.075(3)(a); SMC 25.05.680.A. Allowing only a closed-door review of the City's responses to Section B by the Appellant and the Examiner would circumvent this legally required public process.

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C. The Decision may be appealed to the Growth Board concurrent with an appeal of the decision on the Comprehensive Plan amendments.

Under GMA and SEPA, the City's final SEPA decision relating to the Comprehensive Plan amendment may only be appealed to the Growth Board concurrent with the City's decision on the Comprehensive Plan amendment. The portion of the Examiner's decision concerning further review should so provide.

At the September 25, 2019, conference with the parties, the Examiner raised the question of whether the Superior Court's decision granting dismissal in *Save Madison Valley v. City of Seattle*, King County Superior Court Cause No. 19-2-10001-0 SEA affects the appealability of the Examiner's decision in this case. The answer is that *Save Madison Valley* is irrelevant here. In *Save Madison Valley*, the Deputy Examiner considered a challenge to a Master Use Permit ("MUP") including design review and SEPA components and an associated code interpretation. The Deputy Examiner dismissed the code interpretation appeal, upheld the design review decision, and rejected most of the appellant's challenges to the DNS, but remanded the DNS to the Seattle Department of Construction and Inspections ("SDCI") for additional analysis on two elements of the environment. The citizen group appellant appealed the Deputy Examiner's decision to Superior Court under the Land Use Petition Act ("LUPA"). The citizen group then proceeded to seek dismissal of its own case. The group argued that the Deputy Examiner's decision was not final but was "interlocutory" because the DNS was remanded to SDCI. The King County Superior Court (Judge Ruhl) granted the motion to dismiss on July 9, 2019.[2]

[2] *Save Madison Valley* is inapposite; however, Appellant will briefly address the issue raised in that case. Appellant is aware of differing King County Superior Court decisions on this issue. In the Examiner's decision *In the Matter of the Appeal of Livable Phinney*, Hearing Examiner File No. MUP 17-009, the Examiner reviewed a MUP with a design review and SEPA component and an associated code interpretation. The Examiner upheld the design review decision and DNS but remanded the code interpretation to SDCI. The applicant appealed the Examiner's decision to Superior Court under LUPA in

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Save Madison Valley has no bearing on the instant case for two reasons. First, this is not an appeal of a project permit (a MUP). Instead, this is an appeal of a DNS for a Comprehensive Plan amendment. As the Examiner knows, GMA actions such as Comprehensive Plan amendments and their associated SEPA review are subject to appeal to the Growth Board under GMA. RCW 36.70A.280(1)(a). Such actions are not "project permits" subject to review under LUPA. RCW 36.70C.020(2). Thus, case law interpreting LUPA has no relevance here.

Second, and most importantly, this case does not involve a decision on a government action and its associated environmental review together. Instead, this appeal involves only the adequacy of the DNS. In *Save Madison Valley*, the Deputy Examiner ruled on both the design review approval for a project and its associated environmental review. Here, because the underlying action is a Comprehensive Plan amendment over which the Examiner lacks jurisdiction, the Examiner decision relates to the DNS alone. The decision on the Comprehensive Plan amendment remains to be made by the City Council in the future. Under well-established Growth Board authority interpreting SEPA, the City's SEPA decision can only be appealed to the Growth Board at the same time as an appeal of the underlying Comprehensive Plan amendment decision. "Orphan" SEPA appeals are not permitted. RCW 43.21C.075; *Total*

Phinney Flats LLC v. City of Seattle, King County Superior Court Cause No. 17-2-21302-1 SEA. The City moved for dismissal, making the same arguments that the citizen group later made in *Save Madison Valley*, namely that the Examiner decision was not final due to the remand. The Superior Court (Judge Moore) denied the motion on October 13, 2017. In addition, in *Escala Owners' Association*, Hearing Examiner File No. MUP-17-035, the Examiner reviewed a design review decision, DS and SEPA Addendum. The Examiner upheld the design review decision but remanded the DS for further consideration of one area of the environment. The applicant appealed to Superior Court under LUPA in *1921-27 Fifth Avenue Holdings LLC v. City of Seattle*, King County Superior Court Cause No. 18-2-16223-8 SEA. The City moved for dismissal on the same ground as in *Phinney Flats*. The Superior Court (Judge North) granted the motion on September 14, 2018. Appellant believes that *Phinney Flats* was correctly decided and *1921-27 Fifth Avenue Holdings* and *Save Madison Valley* were incorrectly decided. Eventually, this question may be addressed in a published Court of Appeals case, but until that time, the question of whether an Examiner decision that involves a remand is a final decision for purposes of LUPA remains an unresolved legal issue with differing Superior Court decisions in different cases.

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Outdoor Corp. v. City of Seattle, CPSGMHB Case No. 13-3-008, Order of Dismissal (September 23, 2013); *see also Wallingford Community Council*, *supra*, Hearing Examiner File No. W-17-006 - W-17-014, City of Seattle's Motion for Reconsideration Re: Statement of Appeal Period (November 28, 2018) and Order on Motion for Reconsideration (December 5, 2018).

In the hearing in this matter, the Examiner mentioned that the Superior Court in *Save Madison Valley* was concerned about the potential for duplicative appeals. This concern does not apply here. There can be only one appeal of the City's SEPA action to the Growth Board, filed after the City takes action on the Comprehensive Plan amendment. RCW 43.21C.075. There would also be no potential for duplicative administrative appeals. When the City issues its new DNS on remand, any party with standing may appeal. However, as in *Friends of Cheasty*, issues already reviewed and decided in this appeal would be barred by *res judicata* from being relitigated. *Friends of Cheasty, supra*, Hearing Examiner File W-18-010 and W-18-011, Order on Motion for Partial Dismissal (August 29, 2019).

While Appellant does not believe it is the Examiner's responsibility to give legal advice to parties, HER 3.18(c)(5) requires that the Decision include a postscript with "[i]nformation regarding any subsequent procedural steps for appealing the Hearing Examiner's decision." For the reasons discussed above, to avoid confusion, this postscript should discuss Growth Board review concurrent with any appeal of the underlying GMA action.

III. CONCLUSION

For these reasons, Appellant respectfully requests modification of the Decision to require issuance of a new DNS and to indicate that an appeal may be filed to the Growth Board concurrent with an appeal on the City's proposed Comprehensive Plan amendments.

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Dated this 30th day of September, 2019.

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