BEFORE THE HEARING EXAMINER
CITY OF SEATTLE

In the Matter of the Appeal of:	Hearing Examiner File:
SEATTLE MOBILITY COALITION,	**W-18-013**
Appellants.	CITY'S RESPONSE TO APPELLANT'S MOTION FOR RECONSIDERATION
From a Determination of Non-Significance issued by the Seattle City Council.	

I. INTRODUCTION

Appellant filed a motion for reconsideration of the Examiner's September 20, 2019 Findings and Decision ("Decision"). To grant reconsideration, the Appellant must demonstrate there was an irregularity in the proceeding that prevented Appellant from having a fair hearing. Hearing Examiner Rule 3.20(a)(1). Appellant seeks reconsideration on: (1) the "Decision" portion of the Decision, and (2) the postscript ("Concerning Further Review"). Appellant's motion should be denied. Appellant has failed to establish it is entitled to reconsideration under HER 3.20(a)(1).

Rather, Appellant seeks another bite at the apple, attempting to contort its main argument (that the DNS should be reversed and remanded) into a claim that the Examiner's Decision remanding the DNS to City Council staff to complete Part B of the SEPA checklist is somehow a procedural

Peter S. Holmes
Seattle City Attorney
701 5th Avenue, Suite 2050
Seattle, WA 98104-7097
(206) 684-8200

irregularity where Appellant was prevented from having a fair hearing. Appellant also seeks reconsideration based on the decision's post-script because it fails to state appeal procedures if and when the Council adopts any Comprehensive Plan amendments on Transportation Impact fees. Yet, the post-script provides reference to relevant code and statute for SEPA. Even if the post-script contains errors or omissions, it is not a procedural irregularity that prevented Appellant from having a fair hearing. The post-script has nothing to do with the hearing or procedures under which the hearing occurred. Appellant fails to carry its burden to establish any procedural irregularity which prevented Appellant from having a fair hearing.

II. FACTS

Appellant appealed the DNS on November 15, 2018. After discovery, motions and opposing counsel's travel plans, the hearing occurred on June 10, 12 and 18, 2019. The parties filed closing briefs on July 19, 2019, and cross-closing briefs on July 26, 2019. On August 28, 2019, the Examiner requested additional briefing on four discrete questions, which the parties filed on September 6 and cross-briefs on September 11. The Hearing Examiner issued his Decision on September 20, 2019.

III. ISSUE STATEMENT

HER 3.20(a)(1) requires any party moving for reconsideration to establish evidence of an irregularity in the proceeding where the moving party was prevented from having a fair hearing. Here, the Appellant has failed to establish evidence of any irregularity in the proceeding where the Appellant was preventing from having a fair hearing. Should the Appellant's motion for reconsideration be denied?

IV. EVIDENCE RELIED ON

This response is based upon the pleadings and papers filed in this matter.

Peter S. Holmes
Seattle City Attorney
701 5th Avenue, Suite 2050
Seattle, WA 98104-7097
(206) 684-8200

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23

V. AUTHORITY

A. Appellant failed to identify any irregularity in the proceeding where Appellant was prevented from having a fair hearing

Hearing Examiner Rule (HER) 3.20(a)(1) sets four circumstances where the Examiner may grant a motion for reconsideration. In its motion, Appellant relies on HER 3.20(a)(1), which provides

> 3.20 (a) The Hearing Examiner may grant a party's motion for reconsideration of a Hearing Examiner decision if one or more of the following is shown:
>
> (1) Irregularity in the proceedings by which the moving party was prevented from having a fair hearing;

The HE Rules do not define or describe what it means by use of the term "irregularity." Black's Law Dictionary defines an "irregularity" as:

> Violation or nonobservance of established rules and practices. The want of adherence to some prescribed rule or mode of proceeding; consisting either in omitting to do something that is necessary for the due and orderly conducting of a suit or doing it in an unseasonable time or improper manner. 1 Tidd, Pr. 512. And *see McCain v. Des Moines*, 174 U. S. 168, 19 Sup. Ct. 644, 43 L. Ed. 936; *Emeric v. Al- varado*, 64 Cal. 529, 2 Pac. 418; *Hall v. Munger*, 5 Lans. (N. Y.) 113; *Corn Exch. Bank v. Blye*, 119 N. Y. 414. 23 N. E. S05; *Salter v. Hilgen*, 40 Wis. 365; *Turrill v. Walker*, 4 Mich. 1S3. "Irregularity" is the technical term for every defect in practical proceedings, or the mode of conducting an action or defense, as distinguishable from defects In pleadings. 3 *Chit. Gen. Pr*. 509.

Washington Court Rule (CR) 60(b)(1) contains similar language to HER 3.20(a)(1) and provides in part that "the court may relieve a party or the party's legal representative from a final judgment, order, or proceeding for… [an] irregularity in obtaining a judgment or order." Case law interpreting this term in CR 60(b)(1) is instructive as to how this tribunal should interpret and apply HER 3.20(a)(1).[1] The Court of Appeals concluded that an irregularity occurs when there is a failure to adhere to some prescribed rule or mode of proceeding, such as when a procedural matter that is necessary for the orderly conduct of trial is omitted or done at an unseasonable time

[1] HER 1.03(c) makes clear that the Hearing Examiner may look to the Superior Court Civil Rules for guidance.

Peter S. Holmes
Seattle City Attorney
701 5th Avenue, Suite 2050
Seattle, WA 98104-7097
(206) 684-8200

1 or in an improper manner. *Mosbrucker v. Greenfield Implement, Inc.*, 54 Wn. App. 647, 652, 774
2 P.2d 1267, 1270 (1989). This case law interpretation of "irregularity" is consistent with the
3 definition in Black's Law Dictionary.

4 In order for the Examiner to grant reconsideration under HER 3.20(a)(1), the Appellant
5 must identify a lack of adherence to a proscribed rule or mode of proceeding that prevented the
6 Appellant from having a fair hearing. However, rather than identify an irregularity where
7 Appellant was prevented from having a fair hearing, Appellant takes this opportunity to re-argue
8 its claim that the DNS should have been reversed and remanded, not simply remanded for further
9 work. *See* II.B of Appellant's Motion, p. 3:11-7:27. Appellant's disagreement with the Examiner's
10 ultimate conclusion does not constitute an irregularity in the proceedings that prevented Appellant
11 from having a fair hearing.

12 Next, Appellant's claim that the "Decision is 'irregular'" in that "it directs the City to do
13 'any additional review it deems necessary' without explanation as to what this may be", which
14 Appellant claims is "outside the scope of remedies described in HER 3.18". First, this is untrue.
15 The Decision remanded the DNS to the City "for the purposes of revising the SEPA Checklist to
16 include a determination(s) concerning the questions posed by Section B, and any additional review
17 it deems necessary to complete the threshold determination in accordance with SEPA procedural
18 requirements." Decision. Second, the Examiner's Rules authorize a remand of a Department's
19 SEPA determination on appeal. HER 3.18 (c)(4) provides:

20 > Hearing Examiner's Decision, Contents: Decision.
>
21 > The Hearing Examiner's decision as to the outcome of the appeal (affirm, modify,
> reverse, or remand) based upon a consideration of the whole record and, unless
22 > otherwise provided by applicable law, supported by substantial evidence in the
> record.

23

Peter S. Holmes
Seattle City Attorney
701 5th Avenue, Suite 2050
Seattle, WA 98104-7097
(206) 684-8200

Emphasis added.

Further, HER 3.18(b) sets forth the scope of the Examiner's Decision, providing "in accordance with applicable law, the Hearing Examiner's decision may affirm, reverse, modify, or remand the Department's decision or other action that is the subject of the appeal." Remand is authorized. And remand is a separate and distinct remedy from reversal. Each are called out in HER 3.18(b) and (c). The Examiner's Decision to remand, without reversing the City Council's DNS, is clearly authorized by the Hearing Examiner Rules. A remand is mentioned twice in HER 3.18. Appellant has failed to establish the Decision, which requires a remand without a reversal of the DNS constitutes a procedural "irregularity" that prevented Appellant from having a fair hearing.

And while Appellant spends almost five pages on its argument that "The City must issue a new threshold determination",[2] this entire section simply re-argues the issues already briefed by the parties. Further, Appellant's claim that the "potential for remand without specific direction" were not addressed at hearing and so were not briefed by the parties. Not true. Appellant always sought a reversal of the DNS and remand to the Director and argued for that throughout this proceeding. *See* Notice of Appeal, p. 10:9-13, Appellant's post-hearing brief (Subsection B. The City's failure to analyze environmental impacts requires remand, p. 24:5-26:19); Appellant's

[2] Appellant's Motion p. 3:10-p. 7:27.

Peter S. Holmes
Seattle City Attorney
701 5th Avenue, Suite 2050
Seattle, WA 98104-7097
(206) 684-8200

Supplemental Post-Hearing Brief at p. 6:17,[3] p. 6:20-22,[4] and p. 9:8-22.[5] And, even if not briefed, failure of the Examiner to offer a third round of closing briefs more than three months after hearing in no way constitutes some procedural irregularity by which Appellant was prevented from having a fair hearing.

Appellant next argues that its Motion should be granted because the post-script "does not mention review by the Growth Board, although this is the 'subsequent procedural step(s) for appealing the Hearing Examiner's decision.' *See* HER 3.18 (5)". Motion at p:2:24-3:2; *see* also II.C. of Motion at pp.8:1-10:21. The post-script of the Decision provides:

Concerning Further Review

> NOTE: It is the responsibly of the person seeking to appeal a Hearing Examiner decision to consult Code sections and other appropriate sources, to determine applicable rights and responsibilities.
>
> The Decision of the Hearing Examiner in this case is the final SEPA decision for the City of Seattle. Judicial review under SEPA shall be of the decision on the underlying governmental action together with its accompanying environmental

---

[3] In discussing the Juanita Bay decision, state:

> For both reasons, the court "remand[ed] this case to the City for its determination of whether it is necessary to prepare an Environmental Impact Statement before making a decision on the question of whether or not to issue [the] grading permit," noting that if the City could "affirmatively demonstrate prima facie compliance with the procedural requirements of SEPA, *then* the burden will fall upon the appellant . . . to prove the City's decision was invalid." *Id.* at 73-74 (emphasis added).

[4] After discussing Norway Hill Pres. & Prot. Ass'n v. King County Council, stating:

> Accordingly, the Court remanded the subdivision approval at issue for "consideration of environmental values based on full information *before* a decision is made." *Id.* at 279 (emphasis in original).

And like in *Norway Hill Pres. & Prot. Ass'n v. King County Council*, the Seattle City Council has not made any type of decision on the proposed Comp. Plan amendments.

[5] Appellant argues for reversal but cites to Settle and cases that require remand only.

> Recent decisions have continued to recognize that "lack of a credible threshold process precludes judicial review of the threshold determination until the lead agency has proceeded properly on remand." Settle, § 13.01[4].
>
> In *Conserv. Nw. v. Okanogan Cty.*, No. 33194-6-III, 2016 Wn. App. LEXIS 1410, at *90 (Ct. App. June 16, 2016), the Court determined that a county's decision to open its roads to all-terrain vehicles was accompanied by a checklist that was "almost devoid of specific information," containing only "repetitive, superficial, conclusory statements regarding the potential environmental impacts" of the action.2 Echoing the *Bellevue* decision, the court declined to require an EIS – in other words, to hold specifically that there had been a showing of significant adverse impacts – and instead remanded for preparation of a "checklist that includes a complete disclosure and review of information relevant to the environmental impact to the areas surrounding roads opened by the ordinance." *Id.* at 97.

Peter S. Holmes
Seattle City Attorney
701 5th Avenue, Suite 2050
Seattle, WA 98104-7097
(206) 684-8200

> determination. Consult applicable local and state law, including SMC Chapter 25.05 and RCW 43.21C.076, for further information about the appeal process.

As the first quoted paragraph makes clear, it is ultimately any appealing party's responsibility to research the appropriate process and timing for an appeal, and the Examiner's guidance on this is not binding. Moreover, as in many other types of cases, the second quoted paragraph provides appropriate guidance for judicial appeals of Examiner decisions. Appellant has failed to establish that this lack of information explicitly noting an appeal to the Growth Board constitutes an irregularity in the proceeding by which the moving party was prevented from having a fair hearing. In fact, Appellant admits that it "does not believe it is the Examiner's responsibility to give legal advice to parties". Appellant's Motion, p. 10:16-18.

Moreover, while the post-script does not identify an appeal to the Washington Growth Management Hearings Board as being a "subsequent procedural step for appealing the Hearing Examiner's Decision", the post-script provides the subsequent procedural steps:

> The Decision of the Hearing Examiner in this case is the final SEPA decision for the City of Seattle. Judicial review under SEPA shall be of the decision on the underlying governmental action together with its accompanying environmental determination. Consult applicable local and state law, including SMC Chapter 25.05 and RCW 43.21C.076,[6] for further information about the appeal process.

Failure to identify a subsequent appeal the Growth Board after Council action on the proposed legislation, if that occurs, does not constitute a "procedural irregularity by which Appellant was prevented from having a fair hearing" as required for reconsideration.

However, during the August 28, 2019 post-hearing conference, the Examiner independently raised concern about the post-script. Respondent City Council has no objection to the Examiner

---

[6] RCW 43.21C.076 does not exist. Rather, the citation should be to RCW 43.21C.075 entitled "Appeals". The City does not object to the Examiner modifying the post-script to make clear the statutory reference should be to RCW 43.21C.07<u>5</u>, not RCW 43.21C.07<u>6</u>.

Peter S. Holmes
Seattle City Attorney
701 5th Avenue, Suite 2050
Seattle, WA 98104-7097
(206) 684-8200

modifying the post-script to, at a minimum, correct the reference from RCW 43.21C.076, to RCW 43.21C.075 and, since agreed to by both parties, add a reference to the post-script referring to RCW 36.70A.280 or, a notation that "prior to filing a judicial appeal of the DNS, a party must first file an appeal to the Washington Growth Management Hearings Board consistent with RCW 36.70A.280."

The Respondent City Council and Appellant understand that, pursuant to RCW 43.21C.075, an appeal of the DNS must be combined with the underlying action, which, here, would be Council adoption of the proposed Comprehensive Plan legislation. *See* Decision ("Concerning Further Review" and Appellant's Motion at p. 8:2-5. And the parties also agree that because the Growth Board has jurisdiction over Comprehensive Plan amendments and associated SEPA determinations, any appeal of an adopted Comprehensive Plan amendment and associated SEPA determination, must first go to the Growth Board before filing a judicial appeal. RCW 36.70A.280(1)(a), cited by Appellant in its Motion at p. 9:3-5.

Finally, the Respondent City Council agrees with Appellant's statement that the *Save Madison Valley* order is irrelevant. Motion at p. 8:11-12. It is irrelevant because Save Madison Valley involved a project-level action, not a non-project action and the statutory mechanisms for appeal are different. Further, Appellant makes a variety of other arguments which are wholly irrelevant to the question before the Examiner. While Respondent City Council disagrees with these arguments, it will not respond to them here.[7]

[7] Including Appellant's claims: (1) made in footnote 2 of its Motion at p. 8-9, and (2) that the Examiner mentioned the Save Madison Valley court was concerned about the potential for duplicative appeals and Appellant's claim to address such issue at p. 10:5-15.

Peter S. Holmes
Seattle City Attorney
701 5th Avenue, Suite 2050
Seattle, WA 98104-7097
(206) 684-8200

B. CONCLUSION

For all of these reasons, the Hearing Examiner should deny Appellant's Motion for Reconsideration where Appellant fails to provide evidence of any procedural irregularity that prevented Appellant from having a fair hearing.

DATED this 7th day of October 2019.

PETER S. HOLMES
Seattle City Attorney

By: *s/ Elizabeth E. Anderson*, WSBA #34036
Assistant City Attorney
Seattle City Attorney's Office
701 Fifth Ave., Suite 2050
Seattle, WA 98104-7097
Ph: (206) 684-8200
Fax: (206) 684-8284
liza.anderson@seattle.gov
Attorneys for Respondent
Seattle City Council

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23

CERTIFICATE OF SERVICE

I certify that on this date, I electronically filed a copy of Respondent City's Response to Appellant's Motion for Reconsideration with the Seattle Hearing Examiner using its e-filing system.

I also certify that on this date, a copy of the same document was sent to the following party listed below in the manner indicated:

Courtney Kaylor
McCullough Hill Leary PS [X] Email
701 – 5th Ave., Ste 6600
Seattle, WA 98104
Phone: (206) 812-3388
Email: courtney@mhseattle.com
Lauren Verbanik, Paralegal
Email: lverbanik@mhseattle.com
Attorney for Appellant
Seattle Mobility

DATED this 7th day of October 2019.

s/Alicia Reise
Alicia Reise, Legal Assistant

Peter S. Holmes
Seattle City Attorney
701 5th Avenue, Suite 2050
Seattle, WA 98104-7097
(206) 684-8200