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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
REPLY IN SUPPORT OF ITS MOTION
FOR RECONSIDERATION**

In its Motion for Reconsideration (“Motion”), Appellant Seattle Mobility Coalition argued that the Examiner should (1) require a new threshold determination on remand and (2) amend the postscript to the September 20, 2019 Findings and Decision (“Decision”) to clarify that any appeal must be to the Growth Management Hearings Board and must be concurrent with any appeal of the underlying action. In its Response to the Motion (“Response”), the City of Seattle (“City”) does not dispute the substantive basis for the first point and agrees fully with the second point. The City argues, however, that Hearing Examiner Rule of Practice and Procedure (“HER”) 3.20(a)(1) does not provide a basis for relief, and it asserts that the Motion seeks “reversal” of the Decision. These arguments are incorrect.

1 **A. The Examiner’s description of the remedy created an irregularity in the**
2 **proceedings.**

3 As explained in the Motion, reconsideration is merited under HER 3.20(a)(1)
4 (“Irregularity in the proceedings by which the moving party was prevented from having a fair
5 hearing”) because the Decision’s lack of a specific requirement for a new threshold
6 determination was not “consistent with the [D]ecision” as required by HER 3.18(d). The City
7 incorrectly characterizes the argument in the Motion as “disagreement with the Examiner’s
8 ultimate conclusion.” Response, p. 4. Appellant’s Motion, however, does not disagree¹ with the
9 Examiner’s “ultimate conclusion”: that the City has not “considered, or made a determination
10 with regard to, the questions in Section B” and has therefore failed to demonstrate *prima facie*
11 compliance with the SEPA requirement to base a DNS on adequate information. Decision, pp.
12 10-11. The City also incorrectly characterizes Appellant’s argument as challenging the Hearing
13 Examiner’s authority to remand a DNS. But Appellant has disputed neither that authority nor the
14 Examiner’s decision to remand the DNS in this case. See Motion, p. 2 (“Here, the Decision
15 properly remands the DNS to the City . . .”).
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18 Instead, the Motion seeks reconsideration not because the Decision was incorrect on the
19 merits but because the scope of relief was unclear and, if read not to require a new threshold
20 determination, inconsistent with the holding. The City argues that the Motion cannot succeed
21 because it does not “identify a lack of adherence to a proscribed rule” or omission of a “matter
22 that is necessary for the orderly conduct of trial.” Response, pp. 3-4. This argument is
23 unavailing, first, because the Motion does assert lack of adherence to a rule: HER 3.18(c) and
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27 ¹ As stated in footnote 1 in the Motion, Appellant reserves its right to dispute any aspect of the proceedings,
28 including any portion of the Decision, on appeal.

1 (d).² The Motion is based on the inconsistency between the Decision’s holding (the DNS was
2 not based on consideration of environmental factors) and remedy (which could be read to allow
3 the City to retroactively justify its unsupported determination rather than making a new
4 determination from the required information). This type of inconsistency constitutes an
5 irregularity that denied Appellant a fair hearing, as required by HER 3.20(a)(1).
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7 Even if the Decision had not failed to adhere to a specific rule, the City’s suggestion that
8 the Motion “must” establish a “procedural” irregularity is incorrect. The City bases this
9 suggestion on *Mosbrucker v. Greenfield Implement, Inc.*, 54 Wn. App. 647, 652, 774 P.2d 1267,
10 1270 (1989), which interprets Washington Superior Court Rule (“CR”) 60(b)(1). But that rule,
11 which concerns motions for relief from judgment, is not directly applicable to the Motion because
12 it is not seeking relief from judgment (which is an extraordinary remedy that goes to the heart of
13 a case, generally requiring a determination that a decision is invalid because of some extrinsic
14 factor unrelated to the merits). *See, e.g., Bjurstrom v. Campbell*, 27 Wn. App. 449, 451, 618
15 P.2d 533, 534 (1980). The Motion, again, does not challenge the Examiner’s decision on the
16 merits. Instead, Appellant has moved for reconsideration. CR 59(a)(1), the Court Rule that
17 governs motions for reconsideration, also provides that “irregularity” is a basis for granting a
18 motion. Case law interpreting “irregularity” under CR 59(a)(1) is thus a better source for
19 persuasive authority regarding the meaning of this term than cases concerning CR 60(b)(1). And
20 in the context of this rule, the Court of Appeals has recognized that an irregularity is created, and
21 relief justified, when there is an inconsistency between two aspects of a jury’s verdict. In
22 *Espinoza v. Am. Commerce Ins. Co.*, 184 Wn. App. 176, 196, 336 P.3d 115, 125 (2014), the
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27 ² Due to a typographical error, the Motion at page 2 cites to HER 3.18(c) only, but its consistency argument is
28 clearly based on the quoted language from HER 3.18(d).

1 Court rejected the argument that CR 59(a)(1) could not justify relief based on an inconsistency
2 between a liability determination and a damages award “since any irregularity occurred after the
3 jury found [the defendant liable].” The Court determined that this argument took an improperly
4 “limited view” of the term “fair trial” and “impos[ed] a hypertechnical meaning to the term.” *Id.*
5 Like the CR 59(a)(1) motion in *Espinoza*, Appellant’s Motion concerns two aspects of the
6 Decision resolving this case – a decision on the merits and a remedial order – that are
7 inconsistent with one another. Unlike in *Espinoza*, Appellant does not argue that a new hearing
8 is required, as the inconsistency here can be resolved by amending the scope of remand to reflect
9 what necessarily follows from the Decision’s discussion of the merits. The City’s argument that
10 a remedial order cannot create this type of inconsistency, like the defendant’s argument in
11 *Espinoza*, is unavailing.

14 The City also asserts that the proper scope of remand has already been resolved by the
15 Examiner’s denial of Appellant’s argument that the DNS should be reversed. That is not the
16 case. At the hearing, Appellant argued that the City’s proposal will create significant adverse
17 impacts requiring preparation of an Environmental Impact Statement, and thus that the DNS
18 should be “reversed,” meaning replaced with a DS and remanded for preparation of an EIS. *See,*
19 *e.g., Queen Anne Community Council, W-16-004, Findings and Decision (finding of significant*
20 *adverse impacts requires reversal and remand for preparation of EIS).* In the Motion, however,
21 Appellant does not challenge the Examiner’s conclusion regarding significant adverse impacts
22 and thus does not seek “reversal” of the City’s threshold determination. Nor, again, does the
23 Motion object to the Examiner’s decision to remand the DNS so the City can complete the
24 checklist. Instead, the Motion explains why remanding this matter without requiring issuance of
25 a new threshold determination to document the City’s first substantive consideration of
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1 environmental factors is inconsistent with the Decision’s rationale, as well as with SEPA’s
2 procedural requirements. The Motion asks the Examiner to alter the scope of the remedy, not to
3 change the decision on the merits. And as explained in the Motion, this issue has not previously
4 been discussed by either party – as it could not have been before the Decision was issued.

5 Notably, the City provides no authority whatsoever that contradicts Appellant’s argument that a
6 new threshold determination is required here, when the DNS failed to demonstrate *prima facie*
7 SEPA compliance.
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9 **B. The postscript must be amended.**

10 The City agrees with Appellant that any further appeal of the DNS must be consolidated
11 with the underlying action and brought before the Growth Management Hearings Board prior to
12 any judicial appeal. Response, pp. 7-8. Accordingly, Appellant requests that the postscript of
13 the Decision be amended to reflect these requirements.
14

15 **CONCLUSION**

16 For these reasons, Appellant respectfully requests modification of the Decision to require
17 issuance of a new threshold determination and to indicate that an appeal may be filed to the
18 Growth Board concurrent with an appeal on the City’s proposed Comprehensive Plan
19 amendments.
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22 Dated this 10th day of October, 2019.

23
24 MCCULLOUGH HILL LEARY, PS

25 s/Courtney A. Kaylor
26 Courtney Kaylor, WSBA #27519
27 Attorneys for Appellant
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