BEFORE THE HEARING EXAMINER
CITY OF SEATTLE

In the Matter of the Appeal of	Hearing Examiner File:
SEATTLE MOBILITY COALITION	**W-18-013**
from a Determination of Non-Significance issued by the Seattle City Council	**ORDER ON MOTION FOR RECONSIDERATION**

This matter was decided by order of the Hearing Examiner on September 20, 2019 ("Decision"). The Appellant submitted a Motion for Reconsideration ("Motion"), and the City submitted a Response in Opposition to the Motion.

The Hearing Examiner Rules of Practice and Procedure ("HER") provide the following:

> Clerical mistakes in decisions, recommendations, orders, or other parts of the record, and errors arising from oversight or omission, may be corrected by order on the Hearing Examiner's initiative, or in response to the motion of a party.

HER 2.25

> (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;
> > (2) Newly discovered evidence of a material nature which could not, with reasonable diligence, have been produced at hearing;
> > (3) Error in the computation of the amount of damages or other monetary element of the decision;
> > (4) Clear mistake as to a material fact.

HER 3.20.

The Motion requests reconsideration of the Decision on two basis: 1) the Decision should be modified to require the City to issue a new threshold determination; and, 2) the postscript to the Decision should be modified to accurately reflect the appeal process for this matter.

The Decision should be amended to indicate that a new threshold decision is required by the City. The Appellant is correct that, as in this case, where a DNS is returned for lack of adequate information to support the original DNS, a new threshold determination must be issued.

The Decision concluded:

> In this case, the Checklist was identified by the City as central to the City's threshold determination. Aside from the Ordinance, the Checklist was the only information identified by the City as part of its consideration of the potential environmental impacts. No additional information was requested about the potential impacts of the Ordinance. Where Section B of the Checklist is left blank[1], and the DNS does not show a determination as to the questions therein its contents [sic], the DNS was not based on "information reasonably sufficient to evaluate the environmental impact" of the Ordinance, the record does not support a finding of prima facie compliance by the City, and the DNS should be remanded.

Consistent with this conclusion, the Decision states the DNS is remanded to the City:

> for the purpose of revising the SEPA Checklist to include a determination(s) concerning the questions posed by Section B, and any additional review it deems necessary to complete the threshold determination in accordance with SEPA procedural requirements.

As the Decision implies, a new threshold determination must be made by the City.[2] For a new threshold determination, the Hearing Examiner cannot direct the outcome of the threshold determination, or materials considered by the City in that process, except as may be required by law. To be consistent with the Decision, the City must ensure that the error in the environmental checklist (lack of determination(s) concerning the questions posed in Section B) is corrected.

The Hearing Examiner indicated his intent at the post-hearing conference to modify the postscript to the decision based on the outcome of the post-hearing conference and Motion. Accordingly, the postscript will be modified (though the Hearing Examiner declines to include some of the specific modifications suggested by the Appellant).

At the hearing the Hearing Examiner requested the party representatives to consider the court's decision in Hearing Examiner Case Number MUP-18-020 (DR, W) and S-18-011, *Save Madison Valley v. City of Seattle and Velmeir Madison Co. LLC* ("Save Madison Valley"). Both parties indicated that they believe Save Madison Valley has no bearing on this case, because that case concerned an appeal of a project action and an associated DNS, and this case concerns a DNS for a non-project action. Both parties (likely due to minimal direction) missed the issue presented by the case as identified by input from the Deputy Hearing Examiner at the post-hearing conference. Save Madison Valley concerned a remand of a DNS. The court considered the remand an

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[1] Except a reference to the exemption and analysis in a different section of the Checklist.

[2] This outcome is appropriate under RCW 43.21C.075.3(a), where an appeal of the new threshold determination is likely. RCW 43.21C.075.3(a) provides that agency appeal procedures "Shall allow no more than one agency appeal proceeding on each procedural determination (the adequacy of a determination of significance/nonsignificance or of a final environmental impact statement)"

interlocutory decision, and the remand was not considered by the court to be the final decision of the City "because it did not settle the entire controversy between the parties." See Attachment A pgs. 4-6. The type of project associated with the DNS was irrelevant to the court's determination, that a remanded DNS was an interlocutory decision. Such an outcome does not seem to be tenable, where a DNS is returned to the lead agency for the purpose of issuing a new threshold determination - a threshold determination over which the Hearing Examiner has no jurisdiction.

The appropriateness of a "remand" is further complicated by HER 2.23 which provides:

> **2.23 REMAND**
>
> (a) Prior to issuing a recommendation, if the Hearing Examiner determines that information, analysis, or other material necessary to the Examiner's recommendation has not been provided, the Examiner may remand the matter for the addition of the requisite information, analysis, or other material.
> (b) Prior to issuing a decision on an appeal or a preliminary subdivision application, if the Hearing Examiner determines that information, analysis, or other material needed to satisfy the provisions of relevant law has not been provided, the Examiner may remand the matter for the addition of the requisite information, analysis, or other material.
> (c) If the Hearing Examiner remands a matter for additional information, analysis, or other material, the Hearing Examiner shall retain jurisdiction in order to review the adequacy of the information, analysis, or other material submitted in response 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.
> (d) A copy of the information, analysis, or other material filed with the Hearing Examiner in response to a remand shall also be served on all parties to the proceeding. If the size or condition of the required materials makes copying impractical, notifying the other parties of the filing is sufficient. The parties shall have an opportunity to review and file rebuttal to the information, analysis, or other material filed in response to a remand.
> (e) After receiving information, analysis or other material in response to a remand, and any rebuttal, the Examiner may reopen the hearing.

Under HER 2.23, the Hearing Examiner retains jurisdiction in the case of a remand. As with the outcome in Save Madison Valley, this does not seem appropriate where a DNS is returned to the lead agency to issue a new threshold determination. Arguably, HER 2.23 should not be considered to apply in this case as it controls only in cases "prior to issuing a decision on an appeal," and in this case a decision has been issued, but it may create confusion concerning the appropriate terminology in the case of a DNS that is returned to the lead agency for additional action.

Given the potential confusion caused by the Save Madison Valley ruling and HER 2.23, and given the context of the Motion, the Hearing Examiner will amend the Decision to "reverse" the DNS, instead of identifying it as a "remand." With this amendment, the deadlines and process for remand

identified at the post-hearing no longer apply, and the City will simply be required to proceed with issuing a new threshold determination.

The Appellant's Motion is **GRANTED**. The Hearing Examiner will issue an amended Decision as a result of the decision on the Motion, and will also provide a red-line copy to allow the parties to track the alterations made to the original.

Entered this 24th day of October, 2019.

Ryan Vancil, Hearing Examiner

Attachment A

SUPERIOR COURT OF WASHINGTON
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 ORDER GRANTING PETITIONER'S MOTION FOR RECONSIDERATION AND DISMISSING LUPA PETITION (Clerk's Action Required)

This matter has come before the court for consideration of Petitioner Save Madison Valley's Motion for Reconsideration (Dkt. 32). The Petitioner requests the court to vacate the court's Order of Dismissal Without Prejudice (Dkt. 30) and issue a new order of dismissal, but upon different grounds.

The Court has considered the pleadings and other documents filed by the parties, and in particular the following items:

Pleading	**Dkt. No.**
Save Madison Valley's Motion to Dismiss	18
Velmeir Madison Co., LLC's Response in Opposition to Motion to Dismiss	22
Declaration of Patrick Mullaney in Opposition to Motion to Dismiss	23

Pleading	Dkt. No.
Petitioner's Reply in Support of Motion to Dismiss	27
Order of Dismissal Without Prejudice	30
Save Madison Valley's Motion for Reconsideration	32
City's Response to Petitioner's Motion for Reconsideration	38
Velmeir's Response to Save Madison Valley's Motion for Reconsideration	40
Save Madison Valley's Reply in Support of Motion for Reconsideration	42
Declaration of Claudia M. Newman in Support of Reply in Support of Motion for Reconsideration	43

Procedural Background

The Petitioner, Save Madison Valley ("**Petitioner**"), opposes a construction proposal ("**Proposal**") that is being pursued by Respondent Velmeir Madison Co. ("**Velmeir**").

On July 23, 2018, the Director of the Seattle Department of Construction and Inspections ("**SDCI**") issued a Determination of Non-Significance ("**Determination**"), in which it approved Velmeir's Proposal. Land Use Petition at ¶ 4.11 (Dkt. 1).

On August 6, 2018, the Petitioner appealed from the SDCI's Determination to the City of Seattle Hearing Examiner. *Id.* at ¶ 4.12.

On February 26, 2019, a City of Seattle Deputy Hearing Examiner ("**Hearing Examiner**") issued a 45-page "Findings and Decision" ("**Decision**") reversing the SDCI's Determination. Findings and Decision of the Hearing Examiner for the City of Seattle, Exhibit A to Land Use Petition (Dkt. 1).

In her Decision, the Hearing Examiner reversed the SDCI's Determination, in part, and ruled in the Petitioner's favor, in part. *See* Decision, Conclusion Nos. 22 and 26 (Dkt. 1). The

Hearing Examiner's Decision states that it is "the final decision for the City of Seattle." *Id.* at 44. But the Decision also states that the matter is remanded to the SDCI for further review and action "consistent with Conclusions 15-27 and 39-43," with respect to certain issues. *Ibid.*

On April 10, 2019, the Petitioner filed its Land Use Petition ("**Petition**") in this court, pursuant to the Land Use Petition Act, Chap. 36.70C RCW ("**LUPA**").

On May 23, 2019, the Petitioner filed a Motion to Dismiss its own Petition ("**Motion**"). Dkt. 18. The Petitioner argued that its Petition "challenges an interlocutory administrative decision that is not ripe for judicial review and should be dismissed without prejudice." Motion at 1 (Dkt. 18). The Petitioner argued that it had filed the Petition even though it did not believe the Hearing Examiner's Decision was a final, appealable order. The Petitioner explained:

> While [Petitioner] does not believe that there was a final land use decision that could be challenged under LUPA, [the Petitioner] filed its petition to preserve its rights to appeal the Examiner's conclusions on [issues other than the drainage and shadow issues] under LUPA.

Motion at 3-4 (Dkt. 18).

Respondent Velmeir opposed the Petitioner's Motion on multiple grounds, including the ground that "it is clear that Seattle's Hearing Examiner intentionally made a final land use decision that was subject to appeal under [LUPA]." Velmeir's Response in Opposition to Motion to Dismiss at 1 (Dkt. 22). The City of Seattle did not respond to the Motion.

On June 4, 2019, the court granted the Petitioner's Motion, and filed and served an Order of Dismissal Without Prejudice (Dkt. 30), based upon CR 41(a)(1)(B), which allows a plaintiff to dismiss its own claims for any reason "at any time before plaintiff rests at the conclusion of plaintiff's opening case." The court stated that CR 41(a)(1)(B) made it unnecessary to address the issue of whether the court lacked subject matter jurisdiction.

Petitioner's Motion for Reconsideration

On June 13, 2019, the Petitioner filed its Motion for Reconsideration. Dkt. 32. The Petitioner requests the court to withdraw its Order of Dismissal; and urges the court to replace it with an order of dismissal, without prejudice, that states specifically that the court lacks subject matter jurisdiction. *Id.* at 2. The Petitioner states that it filed its Motion to Dismiss "for the very purpose of having the Court establish, as a matter of law, whether the Petition was premature ... [that is,] that the Hearing Examiner's decision wasn't final." *Id.* at 5-6. The Petitioner argues that if the current Order of Dismissal is allowed to stand, the Petitioner will be

> in the same position that it would have been if it hadn't filed the Petition at all ... If a future court concludes that the 21-day clock for a LUPA appeal ... started running on March 22, 2019, then [the Petitioner] will be permanently barred from challenging any of the conclusions in the Hearing Examiner's decision because it "voluntarily" dismissed its LUPA Petition.

Id. at 6.

The City of Seattle joins in the Petitioner's Motion for Reconsideration. Dkt. 38.

Velmeir apparently agrees that it is appropriate to vacate the Order of Dismissal, but argues that the court should stay the case rather than dismiss it on jurisdictional grounds. Velmeir's Response at 1, 3-4, Dkt. 40. Velmeir concurs with the Petitioner's argument that "the practical effect of a CR 41 voluntary dismissal would be to preclude further review of [the Petitioner's] Petition." *Id.* at 1. But Velmeir continues to argue that Hearing Examiner's Decision is a final decision that is ripe for review, and that the court therefore does have subject-matter jurisdiction over the issues raised in the Petition (*Id.* at 2; see also Dkt. 22 at 1). Velmeir argues that the court therefore should vacate the Order of Dismissal and "retain jurisdiction over this case, but ... stay the proceedings pending the outcome of the City's remand process." *Id.* at 3-4. Velmeir argues that this approach "minimizes further delay and ensures that by the time the court hears the merits of the case, any jurisdictional uncertainties [will] have been conclusively resolved." *Ibid.*

Attachment A

Discussion

The initial question is whether the CR 41 Order of Dismissal Without Prejudice should be vacated. All three parties appear to agree that it should (although for different reasons). Based upon the parties' apparent lack of disagreement on this issue, the court will vacate the Order of Dismissal.

Once the Order of Dismissal is vacated, the second question is whether the superior court has subject-matter jurisdiction pursuant to LUPA to adjudicate the Petitioner's appeal, when the Hearing Examiner's Decision not only states that it is a "final decision," but also remands the matter to SDCI for further review and action in compliance with the Hearing Examiner's Decision. In essence, the Petitioner's Motion seeks a declaratory ruling on this issue.

The court agrees with the Petitioner and the City that the Hearing Examiner's remand of the matter to SDCI makes the Decision an interlocutory decision, and not a final decision, for purposes of a LUPA appeal, despite the fact that the Decision states that it is a final decision. The reason is that the Decision did not settle entire the controversy between the parties.

In a case that is factually similar to this case, the Supreme Court held that the superior court lacked authority to conduct a LUPA review of a county board of commissioners' decision. *Stientjes Family Trust v. Thurston County,* 152 Wn.App. 616, 217 P.3d 379 (2009). The Supreme Court explained:

> The finality requirement was not satisfied herein. Although the BOCC [Board of County Commissioners] is the highest level of authority in the county to make land use decisions and had the authority to hear [the Petitioner's] appeal from the hearing examiner's decision, its decision was not final for purposes of review under LUPA. In reversing the hearing examiner's ruling and ***remanding the cause*** for consideration of whether DSD had properly applied the CAO to Stientjes' site plan, ***the BOCC … did not settle the controversy between the parties[.] [T]he BOCC's decision was akin to a court order denying a dispositive pretrial motion from which an appeal may not be taken. The decision was, by definition, interlocutory, rather than final.*** [Emphasis added]

Stientjes Family Trust v. Thurston County, 152 Wn.App. at 623-624, 217 P.3d 379.

Like the Board of County Commissioners in the *Stientjes* case, the Hearing Examiner remanded Velmeir's Proposal for further administrative action by the administrative agency. Her Decision was, by definition, interlocutory, rather than final, because it did not settle the entire controversy between the parties. *Id.* at 618, 217 P.3d 379.

In sum, this court lacks authority to conduct a LUPA review of the interlocutory Decision. A necessary corollary is that the court lacks authority to stay the action while Velmeir's Proposal wends its way through its second administrative process at the SDCI, and possibly through another appeal to the Hearing Examiner. The Petition therefore will be dismissed, without prejudice.

Order

For the reasons stated above, the court rules as follows:

(1) The Order of Dismissal Without Prejudice (Dkt. 30) is vacated.

(2) The court grants Petitioner Save Madison Valley's Motion to Dismiss (Dkt. 18).

(3) The court dismisses the Petitioner's Land Use Petition (Dkt.1), without prejudice, on grounds that the court lacks authority to conduct a LUPA review at this time.

Date: July 9, 2019.

s/ John R. Ruhl
John R. Ruhl, Judge

King County Superior Court
Judicial Electronic Signature Page

Case Number:	19-2-10001-0
Case Title:	SAVE MADISON VALLEY vs SEATTLE CITY OF ET AL
Document Title:	ORDER GRTG P'S MFR + DSMSG PETITION
Signed by:	John Ruhl
Date:	7/9/2019 11:01:45 AM

John R Ruhl

Judge/Commissioner: John Ruhl

This document is signed in accordance with the provisions in GR 30.

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Attachment A

BEFORE THE HEARING EXAMINER
CITY OF SEATTLE

CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on this date I sent true and correct copies of the attached **Order on Motion for Reconsideration with Attachment** to each person listed below, or on the attached mailing list, in the matter of **SEATTLE MOBILITY COALITION**, Hearing Examiner Files: **W-18-013**, in the manner indicated.

Party	Method of Service
Appellant Legal Counsel for W-18-013 Courtney Kaylor courtney@mhseattle.com Lauren Verbanik lverbanik@mhseattle.com	☐ U.S. First Class Mail, postage prepaid ☐ Inter-office Mail ☒ E-mail ☐ Fax ☐ Hand Delivery ☐ Legal Messenger
Department Legal Counsel Liza Anderson liza.anderson@seattle.gov Alicia Reise alicia.reise@seattle.gov	☐ U.S. First Class Mail, postage prepaid ☐ Inter-office Mail ☒ E-mail ☐ Fax ☐ Hand Delivery ☐ Legal Messenger
Department Ketil Freeman City Council Central Staff ketil.freeman@seattle.gov	☐ U.S. First Class Mail, postage prepaid ☐ Inter-office Mail ☒ E-mail ☐ Fax ☐ Hand Delivery ☐ Legal Messenger

Dated: October 24, 2019

Galen Edlund-Cho
Executive Assistant